THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

JULY 3, 2012 and JULY 1, 2013

IN THE

Nebraska Court of Appeals

NEBRASKA APPELLATE REPORTS

VOLUME XX

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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PEGGY POLACEK . . . . . Reporter
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†No. A-12-588: **Fish v. Fish**. Affirmed. Pirtle, Sievers, and Riedmann, Judges.

†No. A-12-592: **State v. Schmale**. Affirmed. Riedmann, Sievers, and Pirtle, Judges.

†Nos. A-12-593 through A-12-596: **In re Interest of Alisondra V. et al**. Affirmed. Pirtle, Irwin, and Moore, Judges.

No. A-12-611: **In re Estate of Sheen**. Affirmed. Sievers, Pirtle, and Riedmann, Judges.

†Nos. A-12-619, A-12-620: **Brizendine v. Brudnay**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-12-634: **Schoepf v. Schoepf**. Affirmed. Inbody, Chief Judge, and Sievers and Riedmann, Judges.

No. A-12-645: **Kreifels v. Kreifels**. Affirmed. Sievers, Pirtle, and Riedmann, Judges.

†No. A-12-648: **Security State Bank v. Bopp**. Reversed and remanded. Pirtle, Sievers, and Riedmann, Judges.

†No. A-12-655: **Loseke v. Loseke**. Affirmed. Pirtle, Sievers, and Riedmann, Judges.

†No. A-12-670: **Czapla v. Dennis**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-12-690: **Haase v. Haase**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

†No. A-12-704: **In re Interest of Timothy W. et al**. Reversed and remanded for further proceedings. Moore, Irwin, and Pirtle, Judges.

†No. A-12-707: **Chantler v. Chantler**. Affirmed in part, and in part reversed and remanded with directions. Riedmann, Sievers, and Pirtle, Judges.

No. A-12-739: **State v. Martinez**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-12-744: **Sweet v. Omaha Pub. Power Dist**. Affirmed in part, and in part remanded with directions. Inbody, Chief Judge, and Irwin and Moore, Judges.

†No. A-12-748: **In re Interest of Ashe G**. Affirmed. Riedmann, Sievers, and Pirtle, Judges.

†No. A-12-751: **Sharp v. Sharp**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-12-760: **Pelc v. Pelc**. Affirmed. Riedmann, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-12-762: **In re Interest of Adlai S**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-12-766: **Lesser v. Eagle Hills Homeowners' Assn**. Affirmed. Riedmann, Sievers, and Pirtle, Judges.

†No. A-12-770: **Hotz v. Nebraska Med. Ctr**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-12-779: **Schlichtman v. Jacob**. Affirmed. Pirtle, Sievers, and Riedmann, Judges.

No. A-12-783: **State v. Fiala**. Affirmed. Riedmann, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-12-797: **In re Interest of Lonzo E**. Affirmed. Inbody, Chief Judge, and Sievers and Riedmann, Judges.

No. A-12-798: **Stephens v. Hartman**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-12-806: **State v. Weidenbach**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

†No. A-12-847: **Forbes v. Lang**. Affirmed. Pirtle, Sievers, and Riedmann, Judges.

No. A-12-884: **Robinson v. Department of Corrections**. Vacated and dismissed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-12-901: **In re Interest of Mathew H**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-12-904: **Faltys v. United Transport**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-12-924: **Tophoj v. Reichert**. Affirmed in part, and in part remanded for further proceedings. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-12-934: **Williams v. Segebart**. Affirmed. Sievers, Pirtle, and Riedmann, Judges.

No. A-12-938: **Meyer v. Koenig**. Affirmed. Sievers, Pirtle, and Riedmann, Judges.

†No. A-12-953: **Allen v. Malnove Holding Co**. Affirmed. Pirtle, Sievers, and Riedmann, Judges.

†No. A-12-994: **In re Interest of Marieanna N**. Affirmed. Pirtle, Sievers, and Riedmann, Judges.

No. A-12-1003: **In re Interest of Isabella B**. Affirmed. Sievers, Pirtle, and Riedmann, Judges.

No. A-12-1053: **State v. Reichert**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-12-1135: **In re Interest of Creighton W**. Reversed and remanded with directions. Sievers, Pirtle, and Riedmann, Judges.

†No. A-12-1139: **Zapata v. Roberts**. Affirmed in part, and in part dismissed. Moore, Irwin, and Pirtle, Judges.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. A-02-138: **Fuchs Machinery v. Bridgeport Machines**. Appeal dismissed.

No. A-11-689: **State v. Hillard**. Reversed and remanded with directions. See, § 2-107(A)(3); *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008); *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

No. A-11-812: **State v. Helmstadter**. Affirmed. See, § 2-107(A)(1); *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

No. A-11-847: **Crowder v. Dietrich**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 27-103(1)(b) (Reissue 2008); *Huber v. Rohrig*, 280 Neb. 868, 791 N.W.2d 590 (2010).

No. A-11-924: **Montanez v. Swift & Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-938: **Rice v. Rice**. Summarily reversed and vacated.

No. A-11-955: **State v. Lerette**. Affirmed. See § 2-107(A)(1).

No. A-11-960: **Osborne v. Osborne**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-988: **Hansen v. Hansen**. Affirmed. See, § 2-107(A)(1); *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007); *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006); *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002); *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995).

No. A-11-989: **Kelly v. City of Tekamah**. Affirmed. See § 2-107(A)(1).

No. A-11-993: **State v. Clausen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Wilson*, 17 Neb. App. 846, 771 N.W.2d 228 (2009).

No. A-11-1006: **Larson v. Larson**. Reversed, sentence vacated, and cause remanded with directions.

No. A-11-1006: **Larson v. Larson**. Motion of appellee for rehearing sustained. Appeal reinstated.

No. A-11-1006: **Larson v. Larson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-1065: **Hingst v. Simmons**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, §§ 2-107(B)(2) and 6-1452(A)(4)(b); Neb. Rev. Stat. § 25-2731 (Reissue 2008).

No. A-11-1067: **State v. Murillo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

No. A-11-1108: **Rhodes v. Neth**. Reversed and remanded with directions. See *Penry v. Neth*, 20 Neb. App. 276, 823 N.W.2d 243 (2012).

No. A-11-1111: **Rural Media Group v. Siedlik**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-12-005: **In re Interest of Ethan S**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-12-006: **In re Interest of M'Kenzi S**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-12-007: **In re Interest of Johnny M**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-12-043: **In re Interest of Khrystal T**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-045: **JHK, Inc. v. Heineman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *Wilson v. Fieldgrove*, 280 Neb. 548, 787 N.W.2d 707 (2010).

No. A-12-047: **Fohner v. Mahsudov**. Affirmed. See, §§ 2-107(A)(1) and 2-109(D)(1)(e); *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007); *Deterding v. Deterding*, 18 Neb. App. 922, 797 N.W.2d 33 (2011).

No. A-12-050: **State v. Sanders**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-058: **State v. Murillo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Diaz*, 283 Neb. 414, 808 N.W.2d 891 (2012).

No. A-12-059: **State v. Ducharme**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Jim*, 278 Neb. 238, 768 N.W.2d 464 (2009).

No. A-12-060: **In re Interest of Octavious K**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *In re Interest of Theodore W.*, 4 Neb. App. 428, 545 N.W.2d 119 (1996).

No. A-12-062: **In re Estate of Filipcic**. Matter remanded for further proceedings.

No. A-12-079: **Meisner v. Heckman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-081: **State v. Bartlett**. Motion of appellee for summary affirmance sustained. See *State v. Banes*, 268 Neb. 805, 688 N.W.2d 594 (2004).

No. A-12-095: **Bush v. Pokorny**. Affirmed. See § 2-107(A)(1).

No. A-12-105: **Gomez v. Gomez**. Affirmed. See § 2-107(A)(1).

No. A-12-117: **State v. Sullivan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011); *State v. Svoboda*, 13 Neb. App. 266, 690 N.W.2d 821 (2005).

No. A-12-118: **Arias v. JBS USA**. Stipulation allowed; appeal dismissed.

No. A-12-136: **State v. Packer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005).

No. A-12-138: **Jefferson v. Nebraska Unicameral Legislature**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-142: **State v. Wilson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011); *State v. Lamb*, 280 Neb. 738, 789 N.W.2d 918 (2010); *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008).

No. A-12-148: **State v. Mahler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-12-149, A-12-152 through A-12-154: **State v. Joynes**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-12-160: **Russell v. Russell**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-164: **Chae v. Houston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *Schropp Indus. v. Washington Cty. Atty.'s Ofc.*, 281 Neb. 152, 794 N.W.2d 685 (2011).

No. A-12-169: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009).

No. A-12-182: **Bohling v. Diamant**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-188: **State v. Cross**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011).

Nos. A-12-197 through A-12-199: **State v. Cave**. By order of the court, appeals dismissed for failure to file briefs.

No. A-12-201: **State v. Young**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-12-219: **State v. Voter**. Affirmed. See § 2-107(A)(1).

No. A-12-224: **State v. Ramirez**. 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. Reyes*, 18 Neb. App. 897, 794 N.W.2d 886 (2011).

Nos. A-12-227 through A-12-229: **In re Interest of Osiris G.** Motions of appellant to dismiss appeal sustained; appeals dismissed.

No. A-12-230: **Sandel v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-231: **State v. Saucedo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-235: **Spiering v. Swedeburg Covenant Church**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Hastings State Bank v. Misle*, 282 Neb. 1, 804 N.W.2d 805 (2011); *Tolbert v. Jamison*, 281 Neb. 206, 794 N.W.2d 877 (2011); *Fuchser v. Jacobson*, 205 Neb. 786, 290 N.W.2d 449 (1980).

No. A-12-236: **State v. Spidell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Kinser*, 283 Neb. 560, 811 N.W.2d 227 (2012); *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

No. A-12-249: **State v. Door**. Motion of appellee for summary affirmance sustained; conviction and sentence affirmed.

No. A-12-250: **State v. Santana**. Motion of appellee for summary affirmance sustained.

No. A-12-254: **State on behalf of Darius R. v. Andrew R.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-255: **TDCS, LLC v. Prosperity Properties**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-261: **State v. Gibson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-270: **State v. Viltres**. Affirmed. See, § 2-107(A)(1); *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

No. A-12-272: **State v. Metzger**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-280: **State on behalf of Aubrey J. v. Jacob J**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-12-285: **Sanchez v. JBS Swift & Co**. Stipulation allowed; appeal dismissed with prejudice.

No. A-12-287: **State v. Perry**. Motion of appellee for summary dismissal for mootness sustained.

No. A-12-289: **Hernandez v. Wess**. Affirmed. See, § 2-107(A)(1); *City of Lincoln v. Hershberger*, 272 Neb. 839, 725 N.W.2d 787 (2007).

No. A-12-292: **State v. Harden**. 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. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009); *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007).

No. A-12-293: **Hohlen v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-295: **Floyd v. First Student**. Stipulation allowed; appeal dismissed.

No. A-12-297: **Holle v. Holle**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-298: **Wertman v. Bollinger**. Appeal dismissed. See, § 2-107(A)(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-12-303: **State v. Santos**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-308: **State v. Dillon**. Appellee's suggestion of remand granted; remanded with directions.

No. A-12-312: **State v. White**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-12-313, A-12-314: **State v. Monday**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-319: **State v. Ortega-Partida**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Diaz*, 283 Neb. 414, 809 N.W.2d 891 (2012).

No. A-12-320: **Tuttle v. Bunge Milling**. Motion of appellant for rehearing sustained on May 29, 2013. Original opinion withdrawn.

No. A-12-327: **Martinez v. Excel Corp**. Affirmed. See § 2-107(A)(1).

No. A-12-328: **State v. Mitchell**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-329: **State v. Charging Elk**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-12-330: **County of Lancaster v. Local 2468**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-334: **Nebraska Equal. Opp. Comm. v. Widtfeldt**. Appeal dismissed. See Neb. Rev. Stat. § 25-1315(1) (Reissue 2008). See, also, *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

No. A-12-337: **State v. Rhodes**. 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. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-338: **In re Interest of Olga M**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-341: **State v. Martin**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-12-346, A-12-347: **Reynolds v. Keith Cty. Bd. of Equal**. Affirmed. See § 2-107(A)(1). See, also, *Reynolds v. Keith Cty. Bd. of Equal.*, 18 Neb. App. 616, 790 N.W.2d 455 (2010).

No. A-12-350: **State v. Wilson**. 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. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-356: **Marcon Enters. v. Midtown Ristorante**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-358: **State v. Capalite**. Affirmed. See, § 2-107(A)(1); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-12-360: **Marcon Enters. v. Midtown Ristorante**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-362: **State v. Vogt**. Motion of appellant to dismiss appeal considered and sustained; appeal dismissed at cost of appellant.

No. A-12-364: **State v. Davis**. Stipulation allowed; appeal dismissed.

No. A-12-365: **State v. Kelly**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-366: **State v. Stoltenberg**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-12-367: **Aston v. Stava**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-368: **Immele v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-371: **In re Estate of Salvador**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-374: **In re Interest of Jaiden L**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-376: **Becker v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 60-498.01(7) (Reissue 2010).

No. A-12-379: **Tyler v. Benson**. Motion of appellees MUD and OPPD for summary affirmance sustained. Affirmed with regard to remaining appellees. See § 2-107(A)(1).

Nos. A-12-381, A-12-382: **State v. Smith**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-12-384: **State v. Barry**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003). See, also, *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001).

No. A-12-387: **Caton v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *Perryman v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 66, 568 N.W.2d 241 (1997); *Riley v. State*, 244 Neb. 250, 506 N.W.2d 45 (1993).

No. A-12-388: **Nebraska Economic Development Corp. v. Tabor**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-391: **White v. White**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-396: **State v. Howard**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Reissue 2008); *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005).

No. A-12-398: **State v. Hernandez**. Appeal dismissed as moot.

No. A-12-400: **Lautenschlager v. Saint Francis Med. Ctr**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-401: **State v. Ybarra**. Motion of appellee for summary affirmance sustained; judgment affirmed. See Neb. Rev. Stat. § 28-206 (Reissue 2008).

No. A-12-402: **Bergfield v. Whitney Irr. Dist. Bd. of Directors**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-406: **State v. Tubbs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-408: **Caniglia v. Caniglia**. Appeal dismissed. See, § 2-107(A)(2); *Bhuller v. Bhuller*, 17 Neb. App. 607, 767 N.W.2d 813 (2009).

No. A-12-412: **Raven v. Raven**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-413: **In re Interest of Makayla W. et al**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-414: **In re Interest of Talik S. et al**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Andrew H. et al.*, 5 Neb. App. 716, 564 N.W.2d 611 (1997).

No. A-12-416: **State v. Olson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-417: **State v. Tyler**. Appeal dismissed. See § 2-107(A)(2).

Nos. A-12-419 through A-12-421: **State v. Tran**. Motions of appellant to dismiss appeal sustained; appeals dismissed.

No. A-12-423: **In re Guardianship & Conservatorship of Elza B**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-12-426, A-12-427: **State v. Chuol**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-428: **Rohloff v. Columbus Middle School**. Summarily affirmed. See, § 2-107(A)(1); *Vega v. Iowa Beef Processors*, 270 Neb. 255, 699 N.W.2d 407 (2005).

No. A-12-430: **State v. Kremer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-431: **State v. Miller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-433: **State v. Nelson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-436: **In re Interest of Jo Beth H. & Jackay H**. Stipulation allowed; appeal dismissed.

No. A-12-437: **Fisher v. Fisher**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. A-12-439: **In re Interest of Jordan B. et al**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-440: **Cruz v. Coreslab Structures**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-441: **Smith v. Martin Marietta Aggregates**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-12-442: **State v. Jones**. 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-12-443: **State v. Jansky**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-445: **Hassebrook v. Sutherland**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-446: **State v. Fieldgrove**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-447: **State v. Fieldgrove**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-448: **State v. Henderson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-449: **Yates v. T & Q Properties**. Affirmed. See § 2-107(A)(1).

Nos. A-12-450, A-12-451: **State v. Janes**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-453: **State v. Miller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011); *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

No. A-12-456: **In re Interest of Elijah M**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009).

No. A-12-457: **State v. Adolph**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-12-458: **State v. Means**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-460: **State v. Holloway**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-12-462: **State v. Staehr**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-464: **Goodwin v. Ali**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995); *Goodwin v. Hobza*, 17 Neb. App. 353, 762 N.W.2d 623 (2009).

No. A-12-465: **State v. Hawk**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-469: **Rambo v. Poulos**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-12-471: **NRS Properties v. Resilent, LLC**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-472: **State v. Jay**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-476: **Drew v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-479: **State v. Mockensturm**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993).

No. A-12-480: **State v. Allsman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Black*, 195 Neb. 366, 238 N.W.2d 231 (1976).

No. A-12-483: **Mutual of Omaha Bank v. Boyle**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-12-485: **State v. Troncone**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-486: **State v. Purdie**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-2801 (Reissue 2008); *Anderson v. Gunter*, 235 Neb. 560, 456 N.W.2d 286 (1990); *Pruitt v. Parratt*, 197 Neb. 854, 251 N.W.2d 179 (1977).

No. A-12-487: **In re Interest of Nadeja H. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-492: **State v. Gonzales**. 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. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-495: **In re Interest of Jahiem W**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-496: **In re Interest of James W**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-497: **In re Interest of Jaquiesha W**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-500: **State v. Rodriguez-Rojas**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-506: **Wiekhorst v. Kirkham, Michael & Assocs**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-507: **Domina Law Group v. Mid America Fin. Invest**. Motion of appellee for summary dismissal sustained; appeal dismissed. See § 2-107(B)(1).

Nos. A-12-508 through A-12-510: **State v. Samuelson**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-12-511: **Thalken v. Callahan**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-513: **State v. Alley**. Appellee's suggestion of remand sustained; sentence vacated, and cause remanded with directions.

No. A-12-514: **In re Interest of Ka-Von C. & Qemond C**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-12-516: **Duerr v. Suburban Title & Escrow**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-519: **State v. Kelly**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-12-520: **DeJonge v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-522: **In re Interest of Lillee G**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-526: **State v. Wittman**. 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-12-528: **Stowe v. NP Dodge Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-12-529: **Cambara v. Martinez**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-12-530: **Waiselewski v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-532: **Kramer v. Wells Fargo Home Mortgage**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-534: **State v. Ferebee**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-4001.01(1) (Cum. Supp. 2010); *State v. Hamilton*, 277 Neb. 593, 763 N.W.2d 731 (2009); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004).

No. A-12-536: **Bargen v. Bargen**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-12-537: **Cornish v. Neth**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-12-538: **In re Interest of Giavonni P. & Estevan P**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-540: **State v. Starks**. 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-12-541: **United General Title Ins. Co. v. Malone**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-12-544: **State v. Marzolf**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-12-545: **State v. Meints**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Zimmerman*, 19 Neb. App. 451, 810 N.W.2d 167 (2012).

No. A-12-546: **State v. Lovette**. Affirmed. See, § 2-107(A)(1); *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011).

No. A-12-549: **Frantzen v. Frantzen**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-12-553, A-12-554: **State v. Martin**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011); *State v. Dethlefs*, 239 Neb. 943, 479 N.W.2d 780 (1992).

No. A-12-555: **State v. Rainey**. Appellee's suggestion of remand sustained.

No. A-12-559: **State v. Hofer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-12-560: **Muck v. Muck**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1329 and 25-1912(1) and (3) (Reissue 2008).

No. A-12-565: **State v. Williams**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-12-566: **State v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-568: **Tyler v. Conboy**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-12-569: **Brooks v. Pinnacle Bank**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-12-570: **State v. Eagleboy**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-12-571: **State v. Harpham**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-572: **State v. Harpham**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

Nos. A-12-573, A-12-575: **State v. Dawn**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-12-574: **State v. Robinson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-576: **State v. Reynozo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

Nos. A-12-577, A-12-578: **State v. Keith**. 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-12-584: **State v. Pilachowski**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-585: **Sloan v. Sloan**. By order of the court, appeal dismissed for appellant's failure to file brief in compliance with § 2-109.

No. A-12-590: **Wusk v. Donald**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-12-597: **In re Interest of Breana M**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-598: **State v. Torres**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-599: **In re Interest of Dylan B**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-601: **State v. Farnsworth**. 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-12-602: **State v. Martis**. 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-12-603: **In re Guardianship & Conservatorship of Kristopher M**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-604: **Credit Mgmt. Servs. v. Jacobson**. Appeal dismissed. See § 2-107(A)(2).

Nos. A-12-605, A-12-606, A-12-608, A-12-614: **State v. Wells**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-12-610: **In re Interest of Dylan B**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-612: **Dawley v. Weaver Repair**. Stipulation allowed; appeal dismissed.

No. A-12-613: **State v. Luetkenhaus**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-12-616: **George v. Britten**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *McMaster v. State of Minn.*, 30 F.3d 976 (8th Cir. 1994); *Moore v. Grammer*, 232 Neb. 795, 442 N.W.2d 861 (1989).

No. A-12-617: **State v. Hutchison**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-12-621: **State v. Thomas**. Affirmed in part, and in part restitution vacated and cause remanded for further proceedings. See, Neb. Rev. Stat. § 29-2281 (Reissue 2008); *State v. Mick*, 19 Neb. App. 521, 808 N.W.2d 663 (2012).

No. A-12-625: **State v. Perdue**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Gonzalez*, 283 Neb. 1, 807 N.W.2d 759 (2012); *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008); *State v. Wabashaw*, 274 Neb. 394, 740 N.W.2d 583 (2007); *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005).

No. A-12-628: **Gandara v. Kawa**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-630: **State v. Vlcek**. Stipulation allowed; appeal dismissed.

No. A-12-632: **State v. Vickers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-633: **Miller v. Miller**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Reissue 2008).

No. A-12-635: **Wells v. Britten**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *Jackson v. Olson*, 146 Neb. 885, 22 N.W.2d 124 (1946).

No. A-12-636: **State v. McHugh**. Stipulation allowed; appeal dismissed.

No. A-12-637: **State v. Nelson**. 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. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-638: **FirstComp Underwriters Group v. Lamp**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-12-639: **State v. Pigee**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-640: **State v. Williams-Thomas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-12-641: **State v. Kirkendall**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-12-642: **State v. Clayborne**. 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. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-643: **U-Save Pharmacy v. Bag 'N Save**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs and attorney fees.

No. A-12-644: **Leslie v. Leslie**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-646: **Miracle v. Tri Valley Health System**. Stipulation allowed; appeal dismissed.

No. A-12-647: **State v. Harden**. Stipulation allowed; appeal dismissed.

No. A-12-649: **State v. Landers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See, also, *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010).

No. A-12-652: **Gaytan v. Wal-Mart**. Appeal dismissed. See, § 2-107(A)(2); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-12-654: **State v. Marchan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-656: **State v. Hajek**. 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. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-659: **Travis M. v. Wendy W**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-661: **State v. Erhart**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-663: **Kudym v. Kudym**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-664: **Hansen v. Nebraska Parole Board**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *Schropp Indus. v. Washington Cty. Atty.'s Ofc.*, 281 Neb. 152, 794 N.W.2d 685 (2011).

No. A-12-669: **State v. Phillips**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-12-671: **State v. Donaldson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009); *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006); *State v. Lewchuk*, 232 Neb. 229, 440 N.W.2d 229 (1989).

No. A-12-674: **Tyler v. Lesley, Court Administrator**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-12-675, A-12-677: **State v. Escamilla**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-676: **State v. Erving**. Motion of appellee for summary affirmance sustained. See, *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011); *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998).

No. A-12-678: **State v. Keezer**. Appellee's suggestion of remand granted; matter remanded with directions.

No. A-12-679: **State v. Keezer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-12-680: **State v. Mata**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-682: **State v. Ortiz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-683: **State v. Kasper**. Appeal dismissed as moot. See § 2-107(D).

No. A-12-689: **In re Guardianship of Oliver M**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-694: **Evans v. Thatcher**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-12-695: **State v. McGuire**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-696: **State v. Baker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-697: **Gomez v. Kohl**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); 42 U.S.C. § 1997e(a) (2006).

No. A-12-698: **State v. Croghan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-701: **State v. Choul**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Pereira*, 284 Neb. 982, 824 N.W.2d 706 (2013).

No. A-12-705: **State v. Sorensen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-706: **State v. Castonguay**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Phelps*, 273 Neb. 36, 727 N.W.2d 224 (2007); *State v. Dean*, 270 Neb. 972, 708 N.W.2d 640 (2006); *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003).

No. A-12-708: **Bush v. Reinke**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-709: **Mihm v. Mihm**. Appeal dismissed. See, § 2-107(A)(2); *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990); *Johnson v. Johnson*, 15 Neb. App. 292, 726 N.W.2d 194 (2006); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

No. A-12-712: **State v. Hernandez**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-715: **State v. Montin**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-12-716: **State v. Wisinski**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011).

No. A-12-718: **Chaffin v. Chaffin**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-719: **State v. Schwager**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-721: **State v. Evans**. Stipulation allowed; appeal dismissed.

No. A-12-722: **Horner v. Horner**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-724: **State v. Rauch**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1902 and 25-1912 (Reissue 2008); *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010).

Nos. A-12-725, A-12-728: **State v. Gray**. 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. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-726: **Shadow Run Assn. v. Brodsky**. Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice at cost of appellant.

No. A-12-727: **State v. Bolden**. Stipulation allowed; appeal dismissed.

No. A-12-730: **McCullough v. McCullough**. Appeal dismissed. See, § 2-107(A)(2); *In re Adoption of Amea R.*, 282 Neb. 751, 807 N.W.2d 736 (2011); *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009).

No. A-12-731: **State v. Mendez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-732: **Schroer v. Village Pharmacy**. Affirmed. See § 2-107(A)(1).

No. A-12-733: **Flink v. Cleanest by Farr**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-734: **State v. Wickman**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-735: **State v. Graf**. 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. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-737: **State v. Butler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-12-741: **State v. Hinman**. 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).

No. A-12-743: **Hess v. State**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-746: **Barthel v. Liermann**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-747: **Binder v. Binder**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1912 and 25-2301.01 (Reissue 2008); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-12-752: **State v. Fay**. Sentence of imprisonment affirmed, order of restitution vacated, and cause remanded with directions. See, *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *State v. Mick*, 19 Neb. App. 521, 808 N.W.2d 663 (2012).

No. A-12-756: **State v. Nash**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-758: **Krajicek v. Lower Platte Weed Mgmt. Area**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008). See, also, *Federal Land Bank of Omaha v. Johnson*, 226 Neb. 877, 415 N.W.2d 478 (1987).

No. A-12-763: **In re Estate of Cover**. Stipulation allowed; appeal dismissed with prejudice.

No. A-12-764: **In re Interest of J.C**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-765: **State v. Cantando**. Stipulation allowed; appeal dismissed.

No. A-12-767: **Sloan v. Watson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-768: **State v. Overstreet**. Stipulation allowed; appeal dismissed.

No. A-12-772: **State v. Khalaf**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011); *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998).

No. A-12-773: **State v. Umana**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-12-774: **State v. Manary**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-12-775: **State v. Provencher**. 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. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-776: **State v. Hyde**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-2267 (Reissue 2008); *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011); *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008).

No. A-12-778: **Schuttler v. Strong**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-780: **Mammel v. Ehlers**. Appeal dismissed. See, § 2-107(A)(2); *StoreVisions v. Omaha Tribe of Neb.*, 281 Neb. 238, 795 N.W.2d 271 (2011).

No. A-12-781: **In re Interest of Adriana C**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-782: **In re Interest of Denise C**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-12-785 through A-12-787: **State v. Gallagher**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-788: **State v. Yar**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-789: **Pratt v. Houston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-2801 (Reissue 2008); *Rehbein v. Clarke*, 257 Neb. 406, 598 N.W.2d 39 (1999).

No. A-12-792: **State v. Kuku**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013); *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998); *State v. Wood*, 220 Neb. 388, 370 N.W.2d 133 (1985).

No. A-12-793: **Sprague v. Sprague**. Summarily remanded. See, *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922 (2009); *Jones v. Belgum*, 17 Neb. App. 750, 770 N.W.2d 667 (2009).

No. A-12-795: **Brake v. Brake**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-796: **Central Neb. Pub. Power & Irr. Dist. v. Hixson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008). See, e.g., *Pioneer Chem. Co. v. City of North Platte*, 12 Neb. App. 720, 685 N.W.2d 505 (2004).

No. A-12-799: **In re Interest of R.L.J**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-800: **State v. Gall**. 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. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-803: **State on behalf of Kyya D. v. Eric H**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-12-805: **State v. Mehner**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-807: **State v. Ornelas-Escorza**. Upon consideration of appellant's brief and appellee's suggestion of remand, order of district court reversed and cause remanded with instructions. See *State v. Mata*, 280 Neb. 849, 790 N.W.2d 716 (2010).

No. A-12-809: **In re Interest of Abigail B**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-815: **Happy Cab v. City Taxi**. Reversed and remanded for further proceedings.

Nos. A-12-816, A-12-817: **State v. Loontjer**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

Nos. A-12-818, A-12-819: **State v. Mitchell**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-12-820: **State v. Landaverde**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-12-824: **State v. Dieteman**. Stipulation allowed; appeal dismissed.

No. A-12-825: **State v. Foster**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-826: **In re Supervised Admin. of Kountze Heirloom Trust**. Appeal dismissed with prejudice; each party to bear own costs.

No. A-12-829: **State v. Oxarart**. 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. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-832: **Groeteke v. Sherman Cty. Bd. of Equal**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 77-5019(2) (Cum. Supp. 2012); *McLaughlin v. Jefferson Cty. Bd. of Equal.*, 5 Neb. App. 781, 567 N.W.2d 794 (1997).

No. A-12-836: **State v. Pedraza**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-841: **Wolff v. Nebraska Medical Cleaning Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-842: **Miller v. Miller**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-848: **Webster v. Wayne Civil Serv. Comm**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-12-851: **State v. Meyer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Pereira*, 284 Neb. 982, 824 N.W.2d 706 (2013).

No. A-12-854: **Iowa Mut. Ins. Co. v. Lange**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-856: **Brooks v. Leslie**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-858: **Montes v. Mulhall's Nursery**. Stipulation allowed; appeal dismissed.

No. A-12-862: **Crown Asset Mgmt. v. Young**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-863: **State v. Fountain**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Ramirez*, 284 Neb. 697, 823 N.W.2d 193 (2012); *State v. Derr*, 19 Neb. App. 326, 809 N.W.2d 520 (2011).

No. A-12-865: **State v. McDougald**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Thomas*, 278 Neb. 248, 769 N.W.2d 357 (2009); *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002).

No. A-12-868: **State v. Moen**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-12-869: **State v. Thornton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-870: **Barrett v. Winsor**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

Nos. A-12-871, A-12-872: **State v. Tramble**. Motions of appellee for summary affirmance sustained; judgments affirmed. See Neb. Rev. Stat. § 29-1106 (Reissue 2008).

No. A-12-873: **State v. Love**. 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. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-874: **State v. Peterson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000).

No. A-12-876: **State v. Marion**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-12-878: **In re Interest of Mariska K**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1902 (Reissue 2008); *In re Interest of Meridian H.*, 281 Neb. 465, 798 N.W.2d 96 (2011); *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000).

No. A-12-879: **In re Interest of Natalia K**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1902 (Reissue 2008); *In re Interest of Meridian H.*, 281 Neb. 465, 798 N.W.2d 96 (2011); *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000).

No. A-12-880: **In re Interest of Samara K**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1902 (Reissue 2008); *In re Interest of Meridian H.*, 281 Neb. 465, 798 N.W.2d 96 (2011); *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000).

No. A-12-881: **Johnson v. Paulsen, Inc**. Stipulation considered; appeal dismissed.

No. A-12-882: **State v. Bloom**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-885: **Robinson v. Department of Corrections**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-886: **Robinson v. Department of Corrections**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-887: **Robinson v. Department of Corrections**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-889: **State on behalf of Angelena R. v. Humberto R**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-890: **In re Interest of Elijah P**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1902 (Reissue 2008); *In re Interest of Meridian H.*, 281 Neb. 465, 798 N.W.2d 96 (2011); *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000).

No. A-12-891: **State v. McIntyre**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-894: **Grimm v. Echostar Satellite**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-898: **State v. Allen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-12-899: **State v. Spottedwood**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-900: **State v. Williams**. 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. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-905: **State v. Madut**. Stipulation allowed; appeal dismissed.

No. A-12-906: **State v. Bloom**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Hudson*, 279 Neb. 6, 775 N.W.2d 429 (2009).

No. A-12-907: **State v. Winters**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Lonnecker*, 237 Neb. 207, 465 N.W.2d 737 (1991).

No. A-12-910: **State v. Cobb**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-917: **State v. Rollie**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012); *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012).

No. A-12-918: **State v. Brock**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-12-919: **State v. Payne**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-923: **State v. Hernandez**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-925: **Thompson v. Fairbanks Internat**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-926: **State v. Davis**. Appeal dismissed. See, § 2-107(A)(2); *State v. Shelly*, 279 Neb. 728, 782 N.W.2d 12 (2010).

No. A-12-928: **Skiba v. Med-Care, Inc**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-930: **State v. Hendon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-12-936: **State v. Carpenter**. Stipulation allowed; appeal dismissed.

No. A-12-937: **State v. Carpenter**. Stipulation allowed; appeal dismissed.

No. A-12-939: **State v. Weaver**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-12-940: **State v. Cusatis**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-943: **State v. Papazian**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-944: **In re Interest of Estevan P. et al**. Reversed and remanded with directions. See, § 2-107(A)(3); *In re Interest of Zylena R. & Adrionna R.*, 284 Neb. 834, 825 N.W.2d 173 (2012).

No. A-12-948: **Sullivan v. Douglas County**. Appeal dismissed. See § 2-107(A)(2). See, also, *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-12-950: **State v. Marsh**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011).

No. A-12-952: **Robertson v. Longo**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-2733 (Reissue 2008); *First Nat. Bank of Unadilla v. Betts*, 275 Neb. 665, 748 N.W.2d 76 (2008).

No. A-12-954: **In re Interest of Desirae S**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999). See, also, *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

No. A-12-955: **Diocese of Nebraska v. Scheiblhofer**. Appeal dismissed. See, § 2-107(A)(2); *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

No. A-12-956: **Haworth v. Douglas County**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-12-958: **Harris v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-961: **State v. Nielsen**. 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).

No. A-12-964: **State v. Boutin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, Neb. Rev. Stat. § 29-1207(4) (Cum. Supp. 2010); *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009).

No. A-12-965: **State v. Lee**. Stipulation allowed; appeal dismissed.

No. A-12-969: **State v. Green**. Conviction and sentence affirmed. See § 2-107(A)(1).

No. A-12-970: **State v. Bannister**. 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. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-971: **Malone v. Omaha Bldg. Bd. of Review**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1329 (Reissue 2008).

Nos. A-12-972, A-12-973: **State v. Deleon**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-12-976: **In re Interest of Kristopher C**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-12-977, A-12-978: **State v. Lee**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-980: **In re Interest of Shaleesa N. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-981: **Cattle Nat. Bank & Trust Co. v. Anthony**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-984: **Union Pacific Streamliner Fed. Credit Union v. Breci**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-988: **Evans v. Thatcher**. Appeal dismissed. See, § 2-107(A)(2); *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005).

No. A-12-990: **State v. Rosas**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-991: **State v. Rosas**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-992: **Addleman v. Addleman**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-995: **Twin Rivers Feed & Seed v. Mel & Joy Price, Inc**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-12-997: **Jacobsen v. Jacobsen**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-998: **Rightnar v. Rightnar**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-1004: **In re Guardianship of Jean K**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-1013: **State v. Vaughn**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-12-1014: **Rambo v. Poulos**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-1015: **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-12-1016: **Donovan v. Donovan**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-1017: **Liermann v. Jensen**. Vacated and dismissed.

No. A-12-1018: **State v. Pedraza**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-12-1019: **State v. Jenkins**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-1032: **State v. Moss**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-12-1034: **Sea-Hubbert Farms v. Boston**. Appeal dismissed as moot.

Nos. A-12-1035, A-12-1036: **State v. Peirce**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003). See, also, *State v. Sepulveda*, 278 Neb. 972, 775 N.W.2d 40 (2009).

No. A-12-1039: **State v. Petersen**. 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-12-1040: **Hillard v. Bakewell**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-1041: **FirstTier Bank v. Enderson**. Appeal dismissed for lack of jurisdiction.

No. A-12-1048: **State v. Jarman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-12-1050: **State v. Hornbeck**. Summarily dismissed. See § 2-107(A)(2).

No. A-12-1051: **State v. Jealous of Him**. Summarily dismissed. See § 2-107(A)(2).

No. A-12-1054: **State v. Speake**. Stipulation allowed; appeal dismissed.

No. A-12-1059: **Encore Funding v. Helme**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-1060: **State v. Gonzalez-Hernandez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Reinpold*, 284 Neb. 950, 824 N.W.2d 713 (2013); *State v. Ramirez*, 284 Neb. 697, 823 N.W.2d 193 (2012).

No. A-12-1062: **State v. Zuck**. Motion of appellee for summary affirmance sustained. See *State v. Harris*, 274 Neb. 40, 735 N.W.2d 774 (2007).

No. A-12-1064: **Robey v. Department of Corr. Servs**. Appeal dismissed. See, § 2-107(A)(2); *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007).

No. A-12-1073: **State v. Scott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-1074: **State v. Kirstine**. 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. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-1079: **State v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-12-1082: **In re Interest of Ryan S**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-1108: **State v. White**. 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).

No. A-12-1111: **In re Interest of Chelsea M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-1112: **Penigar v. Pierson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-1114: **State v. Ransom**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-1115: **State v. Jones**. 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. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-1118: **Jones v. Houston**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008); *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003).

No. A-12-1119: **Loomis v. Holum**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-1120: **Ortega v. Barent**. Stipulation allowed; appeal dismissed.

No. A-12-1121: **State v. O'Neal**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009).

No. A-12-1122: **Wafer v. Stryker**. Stipulation allowed; appeal dismissed.

No. A-12-1124: **State v. Pappan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-1125: **State v. Forst**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-12-1127: **City of York v. Demuth**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-1128: **State v. Rosado**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-1130: **State v. Billups**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-12-1132: **Henderson v. Henderson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-1140: **Enterprise Rent-A-Car-Midwest v. Department of Revenue**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-12-1141: **Brooks v. Gibbs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-1143: **State v. Salinas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-1145: **Evans v. Thatcher**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-1146: **Brooks v. NAI FMA Realty**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-12-1148: **Evans v. EEOC**. Appeal dismissed. See, § 2-107(A)(2); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-12-1150: **State v. Brooks**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-1151: **State v. Wilson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-12-1156: **State v. Hoffman**. 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. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-1159: **State v. Gilchrist**. Motion of appellee for summary affirmance sustained. See § 2-107(B)(2).

No. A-12-1163: **Cincinnati Ins. Co. v. Travelers Indemnity Co**. Stipulation allowed; appeal dismissed.

No. A-12-1172: **Gray v. Department of Corr. Servs**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008); *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003).

No. A-12-1174: **Allison v. City of Omaha**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *Waite v. City of Omaha*, 263 Neb. 589, 641 N.W.2d 351 (2002).

No. A-12-1176: **State v. Davis**. Appeal dismissed. See § 2-107(A)(2).

No. A-12-1177: **Piper v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-1182: **Hubl v. Reichenberg**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State on behalf of A.E. v. Buckhalter*, 273 Neb. 443, 730 N.W.2d 340 (2007); *Tejral v. Tejral*, 220 Neb. 264, 369 N.W.2d 359 (1985).

No. A-12-1184: **State v. Williams**. 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. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-1187: **State v. Keen**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-1188: **State v. Young**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Ramirez*, 284 Neb. 697, 823 N.W.2d 193 (2012).

No. A-12-1191: **State v. Schriner**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-1193: **Gardner v. Gardner**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-12-1194: **State v. Beard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-1195: **Frederick v. City of Falls City**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-12-1196: **State v. Feldhacker**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-1198: **Leon v. State**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-1201: **Schon v. Schon**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-1202: **Vazquez v. Vazquez**. Stipulation allowed; appeal dismissed.

No. A-12-1204: **State v. Gilchrist**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-12-1205: **Petersen v. City of Blair**. Appeal dismissed. See, § 2-107(A)(2); *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007).

No. A-12-1206: **Petersen v. City of Blair**. Appeal dismissed. See, § 2-107(A)(2); *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007).

No. A-12-1210: **In re Interest of Amber B**. Stipulation allowed; appeal dismissed.

No. A-12-1211: **In re Estate of Schmidt**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-1212: **State v. Harris**. By order of the court, appeal dismissed for failure to file briefs.

No. A-12-1213: **State v. Sebesta**. Affirmed. See § 2-107(A)(1).

No. A-12-1214: **Clark v. Aksamit**. Appeal dismissed. See §§ 2-109(D) and 2-111(A).

No. A-12-1215: **State v. Baker**. 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. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-1216: **Campbell v. Britten**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-1218: **State v. Clark**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *City of Gordon v. Montana Feeders, Corp.*, 273 Neb. 402, 730 N.W.2d 387 (2007).

No. A-12-1223: **State v. Bolling**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Ramirez*, 284 Neb. 697, 823 N.W.2d 193 (2012).

No. A-12-1225: **State v. Rangel**. Stipulation allowed; appeal dismissed.

No. A-12-1226: **In re Trust of Batt**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2729(1) (Reissue 2008).

No. A-12-1226: **In re Trust of Batt**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-13-001: **Ayers v. Anton Kristijanto, Inc**. Stipulation allowed; appeal dismissed.

No. A-13-005: **State v. Benish**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-13-006: **State v. Benish**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-13-007: **State v. Vogel**. 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. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-13-008: **State v. Glazebrook**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Fedalina G.*, 272 Neb. 314, 721 N.W.2d 638 (2006).

No. A-13-012: **State v. Gilmore**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009).

No. A-13-014: **State v. Bartunek**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-016: **Grady v. Geiger**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Fedalina G.*, 272 Neb. 314, 721 N.W.2d 638 (2006).

No. A-13-020: **State v. Morehead**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-13-021: **State v. Hoos**. 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-13-024: **State v. Cecetka**. Stipulation allowed; appeal dismissed.

No. A-13-027: **State v. Tatum**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

Nos. A-13-031, A-13-032: **State v. Price**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-13-033: **In re Guardianship of Carl U**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-13-037: **Corona v. Corral**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-041: **State v. Sullivan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Golka*, 281 Neb. 360, 796 N.W.2d 198 (2011).

No. A-13-044: **State v. Volcek**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) and (3) (Reissue 2008).

No. A-13-047: **Lentz v. Morris**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-13-049: **State v. Hamilton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Ramirez*, 284 Neb. 697, 823 N.W.2d 193 (2012).

No. A-13-050: **Dorwart v. Nebraskaland Days**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-13-069: **State v. Painter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-13-070: **State v. Hernandez**. Sentence affirmed, restitution vacated, and cause remanded. See Neb. Rev. Stat. § 29-2281 (Reissue 2008).

No. A-13-079: **FoGe Investments v. First Nat. Bank of Wahoo**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-082: **State v. Allsman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-13-085: **Taylor v. Salway**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-086: **State v. Red Kettle**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-087: **State v. Farnsworth**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-088: **State v. Garcia**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-090: **Parking Mgmt. & Consultants v. City of Omaha**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-092: **State v. Turrentine-Sims**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-13-094: **Paper Tiger Shredding v. Nautica Capital**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-13-096: **State v. Hilts**. Appeal dismissed. See, § 2-107(A)(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-13-097: **State v. Schmidt**. 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-13-099: **In re Interest of Jerry H**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-113: **Neligh-Oakdale Teachers Assn. v. Antelope Cty. Sch. Dist**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-13-114: **Klawitter v. Midlands Foot Specialists**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-13-117: **State v. Castonguay**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008). See, also, *State v. Billups*, 10 Neb. App. 424, 632 N.W.2d 375 (2001).

No. A-13-119: **State v. Louis**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-120: **City of Omaha v. Morello**. Appeal dismissed. See, § 2-107(A)(2); *Johnson v. NM Farms Bartlett*, 226 Neb. 680, 414 N.W.2d 256 (1987). See, also, *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009).

No. A-13-124: **State v. Walters**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-13-127: **State v. Waters**. 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).

No. A-13-131: **In re Interest of Nevaeh W**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-13-132: **In re Interest of Benjamin K. & Anthony K**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-138: **Marcuzzo v. Bank of the West**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-13-145: **State v. Groves**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-13-146: **State v. Hanan**. Stipulation allowed; appeal dismissed.

No. A-13-148: **State v. Rodriguez**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-149: **State v. Rodriguez**. Stipulation allowed; appeal dismissed.

No. A-13-150: **State v. Shepard**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-13-151: **State v. Harden**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. A-13-152: **Ulrich v. Ulrich**. Stipulation allowed; appeal dismissed.

No. A-13-154: **State v. McCowin**. 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. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-13-157: **State v. Collins**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008). See, also, § 2-101(B)(4).

No. A-13-158: **Bowers v. Northport Irr. Dist**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

Nos. A-13-161, A-13-162: **State v. Howk**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-163: **Maben-Bittenbender v. Hunt**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Reissue 2008). See, also, *Beckman v. McAndrew*, 16 Neb. App. 217, 742 N.W.2d 778 (2007).

No. A-13-167: **Evans v. Thatcher**. Appeal dismissed. See § 2-107(A)(2). See, e.g., *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

No. A-13-172: **City of Omaha v. Morello**. Appeal dismissed. See, § 2-107(A)(2); *Johnson v. NM Farms Bartlett*, 226 Neb. 680, 414 N.W.2d 256 (1987). See, also, *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009).

No. A-13-173: **Owens v. Owens**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-174: **In re Name Change of Iromuanya**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-13-175: **Clark v. Clark**. Appeal dismissed. See, § 2-107(A)(2); *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009).

No. A-13-187: **State v. Red Kettle**. Appeal dismissed. See §§ 2-107(A)(2) and 2-101(B)(4). See, also, *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. A-13-190: **State on behalf of Joseph W. v. Anthony C**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-13-197: **Gray v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-198: **Botts v. Lancaster County**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-202: **State v. Pierce**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-204: **Styles v. PSI Group**. Stipulation allowed; appeal dismissed.

No. A-13-213: **Bealer v. State Farm Fire & Cas. Co**. Stipulation allowed; appeal dismissed.

No. A-13-215: **In re Interest of Catalino V**. 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-13-219: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-13-225: **State v. Yeager**. Stipulation allowed; appeal dismissed.

No. A-13-228: **City of Omaha v. Mobeco Indus**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008); *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998).

No. A-13-230: **City of Omaha v. Morello**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008); *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998).

No. A-13-233: **Standing Stone, LLC v. Kirkham, Michael**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008). See, also, *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-13-236: **State v. Beecher**. Stipulation allowed; appeal dismissed.

No. A-13-254: **State v. Gray**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Watkins*, 284 Neb. 742, 825 N.W.2d 403 (2012); *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009).

No. A-13-259: **State v. Wilson**. Appeal dismissed. See, §§ 2-107(A)(2) and 2-101(B)(4); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. A-13-261: **State v. Robbins**. Appeal dismissed. See, § 2-107(A)(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-13-270: **State v. Uong**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 29-825 and 29-826 (Reissue 2008); *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999).

No. A-13-283: **Boyd v. Cornhusker Motor Lines**. Stipulation allowed; appeal dismissed.

No. A-13-300: **State v. Johnson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-13-307: **In re Adoption of Lillyan C**. Stipulation allowed; appeal dismissed.

No. A-13-316: **State v. Fletcher**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-13-321: **United General Title Ins. Co. v. Malone**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008). See, also, *Abante, LLC v. Premier Fighter*, 19 Neb. App. 730, 814 N.W.2d 109 (2012).

No. A-13-332: **West Plains LLC v. Rosberg**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-13-334: **Rosberg v. West Plains Co**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-13-335: **State v. Rooks-Byrd**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-13-338: **Bacon v. Davis Erection Co**. Appeal dismissed. See, § 2-107(A)(2); *Hashman v. Neth*, 18 Neb. App. 951, 797 N.W.2d 275 (2011). See, also, *Miller v. M.F.S. York/Stormor*, 257 Neb. 100, 595 N.W.2d 878 (1999).

No. A-13-352: **State v. Allen**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-13-359: **Chavez v. Farmland Foods**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-377: **State v. Foltz**. Appeal dismissed. See, § 2-107(A)(2); *State v. Rieger*, 8 Neb. App. 20, 588 N.W.2d 206 (1999); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-13-387: **Burns v. Burns**. Remanded with directions. See *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922 (2009).

No. A-13-415: **Owens v. Owens**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-432: **Porter v. Vodec, Inc**. Stipulation allowed; appeal dismissed.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-10-376: **In re Interest of Kyjsha T. et al**. Petition of appellant for further review denied on July 11, 2012.

No. A-10-376: **In re Interest of Kyjsha T. et al**. Petition of appellee Lakisha T. for further review denied on July 11, 2012.

No. A-10-954: **Woodle v. Curlis**. Petition of appellant for further review denied on August 30, 2012.

No. A-10-1063: **Adams v. Logan Contractors Supply**. Petition of appellant for further review denied on June 27, 2012.

No. A-10-1212: **State v. Davis**. Petition of appellant for further review dismissed on July 11, 2012, as filed out of time. See § 2-102(F)(1).

No. A-10-1238: **Dowd Grain Co. v. County of Sarpy**, 19 Neb. App. 550 (2012). Petition of appellant for further review denied on August 30, 2012.

No. A-11-069: **In re Trust of O'Donnell**, 19 Neb. App. 696 (2012). Petition of appellant for further review denied on June 27, 2012.

No. S-11-083: **Sutton v. Killham**, 19 Neb. App. 842 (2012). Petition of appellant for further review sustained on July 11, 2012.

No. A-11-146: **State v. Kruger**. Petition of appellant for further review denied on July 11, 2012.

No. A-11-284: **State v. Johnson**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-360: **Horne v. Krejci**. Petition of appellant for further review denied on October 4, 2012.

No. A-11-364: **Haubold v. Nebraska Truck Center**. Petition of appellee for further review denied on January 3, 2013.

No. S-11-407: **State v. Mitchell**, 19 Neb. App. 801 (2012). Petition of appellant for further review sustained on August 31, 2012.

No. S-11-415: **State v. Pittman**, 20 Neb. App. 36 (2012). Petition of appellant for further review denied on October 31, 2012.

No. S-11-415: **State v. Pittman**, 20 Neb. App. 36 (2012). Petition of appellee for further review sustained on October 31, 2012.

No. A-11-420: **Nordhues v. Maulsby**, 19 Neb. App. 620 (2012). Petition of appellant for further review denied on June 27, 2012, as untimely filed.

No. S-11-424: **State v. Burbach**, 20 Neb. App. 157 (2012). Petition of appellant for further review sustained on October 17, 2012.

No. A-11-462: **Mann v. Rich**. Petition of appellee for further review denied on August 30, 2012.

No. A-11-495: **Smith v. Smith**. Petition of appellant for further review denied on February 27, 2013.

No. A-11-495: **Smith v. Smith**. Petition of appellant for further review denied on March 22, 2013, as untimely. See § 2-102(F)(1).

No. S-11-515: **State v. White**, 20 Neb. App. 116 (2012). Petition of appellee for further review sustained on February 21, 2013.

No. A-11-544: **Penry v. Neth**, 20 Neb. App. 276 (2012). Petition of appellee for further review denied on December 14, 2012, as untimely filed.

No. A-11-570: **State v. Huggins**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-590: **Keiser v. Hohenthaner**. Petitions of appellant for further review denied on August 30, 2012.

No. A-11-598: **Bel Fury Invest. Group v. Palisades Collection**, 19 Neb. App. 883 (2012). Petition of appellant for further review denied on August 30, 2012.

No. A-11-610: **Parks v. Marsden Bldg Maintenance**, 19 Neb. App. 762 (2012). Petition of appellant for further review denied on August 30, 2012.

No. A-11-630: **Atiqullah v. El-Touny**. Petition of appellant for further review denied on August 17, 2012, as untimely.

No. A-11-655: **Nelson v. Wardyn**, 19 Neb. App. 864 (2012). Petition of appellee for further review denied on July 11, 2012.

No. A-11-661: **Backen v. Backen**. Petition of appellee for further review denied on July 11, 2012.

No. S-11-668: **Jones v. Jones**. Petition of appellant for further review sustained on August 31, 2012, for purpose of discussing propriety of dismissal for lack of prosecution.

No. A-11-683: **Meints v. City of Beatrice**, 20 Neb. App. 129 (2012). Petition of appellant for further review denied on November 14, 2012.

No. A-11-701: **Professional Collection Serv. v. Stuthman**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-702: **State v. Godfrey**. Petition of appellant for further review denied on December 12, 2012.

No. A-11-717: **State v. Ramirez**. Petition of appellant for further review denied on August 30, 2012.

No. S-11-718: **State v. Bromm**, 20 Neb. App. 76 (2012). Petition of appellee for further review sustained on September 26, 2012.

No. A-11-718: **State v. Bromm**. Petition of appellant for further review denied on June 19, 2013.

No. A-11-737: **State v. Hashman**, 20 Neb. App. 1 (2012). Petition of appellant for further review denied on September 13, 2012.

No. S-11-744: **Simon v. Drake**. Petition of appellant for further review sustained on November 14, 2012.

No. A-11-747: **Friedman v. Friedman**, 20 Neb. App. 135 (2012). Petition of appellant for further review denied on October 1, 2012, as untimely filed.

No. A-11-767: **State v. Schuster**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-774: **State v. Riedel**. Petition of appellant for further review denied on September 19, 2012.

No. A-11-775: **State v. Halligan**, 20 Neb. App. 87 (2012). Petition of appellant for further review denied on September 24, 2012, as untimely filed.

No. A-11-776: **Keig v. Keig**, 20 Neb. App. 362 (2012). Petition of appellant for further review denied on April 10, 2013.

No. A-11-803: **Onuachi v. Meylan Enterprises**. Petition of appellee for further review denied on June 27, 2012.

No. A-11-804: **State v. Seeger**, 20 Neb. App. 225 (2012). Petition of appellant for further review denied on January 23, 2013.

No. A-11-848: **State v. Wiedel**. Petition of appellant for further review denied on July 11, 2012.

No. A-11-851: **In re Interest of Jontaia W**. Petition of appellant for further review denied on July 11, 2012.

No. A-11-852: **State v. Jones**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-856: **Tyler v. O'Reilly Auto. Stores**. Petition of appellant for further review denied on June 27, 2012.

No. A-11-866: **State v. Balvin**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-868: **In re Guardianship of Oltmer**. Petition of appellant for further review denied on September 26, 2012.

No. A-11-884: **In re Interest of Elijah D**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-886: **Haltom v. Haltom**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-890: **State v. Muhammad**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-898: **Dahlquist v. Dahlquist**. Petition of appellee for further review denied on August 30, 2012.

No. A-11-899: **Soderquist v. Soderquist**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-917: **State v. Brown**. Petition of appellant for further review denied on June 27, 2012.

No. S-11-921: **State v. Richardson**. Petition of appellant for further review sustained on November 21, 2012.

No. S-11-940: **State v. Landera**, 20 Neb. App. 24 (2012). Petition of appellee for further review sustained on September 26, 2012.

No. A-11-944: **State v. Davis**. Petition of appellant for further review denied on July 16, 2012, as filed out of time. See § 2-102(F)(1).

No. A-11-951: **State v. Moser**, 20 Neb. App. 209 (2012). Petition of appellee for further review denied on December 19, 2012.

No. S-11-953: **In re Interest of Shaquille H.**, 20 Neb. App. 141 (2012). Petition of appellant for further review sustained on October 31, 2012.

No. A-11-958: **State v. Worley**. Petition of appellant for further review denied on December 12, 2012.

No. A-11-975: **State v. Gonzalez**. Petition of appellant for further review denied on June 27, 2012.

No. A-11-976: **State v. Staberg**. Petition of appellant for further review denied on February 13, 2013.

No. A-11-979: **State v. Robertson**. Petition of appellant for further review denied on March 13, 2013.

No. A-11-981: **State v. Schmidt**. Petition of appellant for further review denied on May 15, 2013.

No. A-11-987: **In re Interest of Nyarout T. et al**. Petition of appellant for further review denied on November 28, 2012.

No. A-11-990: **State v. Simnick**. Petition of appellant for further review denied on April 17, 2013.

No. A-11-999: **State v. Dak**. Petition of appellant for further review denied on February 27, 2013.

No. A-11-1002: **Henry v. West American Ins. Co**. Petition of appellant for further review denied on December 19, 2012.

No. A-11-1041: **Pohlmann v. Pohlmann**, 20 Neb. App. 290 (2012). Petition of appellant for further review denied on January 23, 2013.

No. A-11-1044: **State v. Henderson**. Petition of appellant for further review denied on June 27, 2012.

No. A-11-1051: **State v. Torres**. Petition of appellant for further review denied on January 23, 2013.

No. A-11-1055: **Dennis v. Dennis**. Petition of appellant for further review denied on October 17, 2012.

No. A-11-1067: **State v. Murillo**. Petition of appellant for further review denied on August 30, 2012.

No. A-11-1068: **In re Interest of Marco J**. Petition of appellant for further review denied on November 14, 2012.

No. A-11-1068: **In re Interest of Marco J**. Petition of appellee for further review denied on November 14, 2012.

Nos. A-11-1084, A-11-1085: **State v. Griffin**, 20 Neb. App. 348 (2012). Petitions of appellant for further review denied on February 13, 2013.

Nos. A-11-1084, A-11-1085: **State v. Griffin**, 20 Neb. App. 348 (2012). Petitions of appellee for further review denied on February 13, 2013.

No. A-11-1087: **In re Interest of Lilybelle H. et al**. Petition of appellant for further review denied on October 31, 2012.

No. A-11-1106: **State v. Boswell**. Petition of appellant for further review denied on February 13, 2013.

No. S-11-1109: **Braunger Foods v. Sears**, 20 Neb. App. 428 (2012). Petition of appellant for further review sustained on February 21, 2013.

No. A-12-027: **State v. Cruz**. Petition of appellant for further review denied on July 11, 2012.

No. A-12-037: **Sea-Hubbert Farms v. Boston**. Petition of appellant for further review denied on June 27, 2012.

No. A-12-042: **State v. Hackett**. Petition of appellant for further review denied on December 12, 2012.

No. A-12-045: **JHK, Inc. v. Heineman**. Petition of appellant for further review denied on September 13, 2012.

No. A-12-046: **State v. Shadle**. Petition of appellant for further review denied on March 20, 2013.

No. A-12-053: **In re Interest of Robert R. & Kimberly R**. Petition of appellant for further review denied on October 31, 2012.

No. A-12-053: **In re Interest of Robert R. & Kimberly R**. Petition of appellee for further review denied on October 31, 2012.

No. A-12-058: **State v. Murillo**. Petition of appellant for further review denied on October 4, 2012.

No. A-12-067: **State v. Florea**, 20 Neb. App. 185 (2012). Petition of appellee for further review denied on November 14, 2012.

No. A-12-070: **Soleiman Brothers v. Concord Neighborhood Corp**. Petition of appellee for further review denied on November 21, 2012.

No. A-12-073: **State v. Gonzalez**. Petition of appellant for further review denied on November 28, 2012.

No. A-12-074: **State on behalf of Keegan M. v. Joshua M.**, 20 Neb. App. 411 (2012). Petition of appellant for further review denied on March 13, 2013.

No. A-12-096: **Graves v. Scottsbluff Urology Assocs**. Petition of appellant for further review denied on April 10, 2013.

No. A-12-100: **In re Estate of Stride**. Petition of appellant for further review denied on March 13, 2013.

No. S-12-112: **State v. Osborne**, 20 Neb. App. 553 (2013). Petition of appellant for further review sustained on April 10, 2013.

No. A-12-124: **Carper v. Carper**. Petition of appellant for further review denied on August 30, 2012.

No. A-12-124: **Carper v. Carper**. Petition of appellant for further review denied on March 15, 2013.

No. A-12-146: **State v. Groat**. Petition of appellant for further review denied on October 17, 2012.

Nos. A-12-149, A-12-152 through A-12-154: **State v. Joynes**. Petitions of appellant for further review denied on August 30, 2012.

No. A-12-157: **Jones v. Jones**. Petition of appellant for further review denied on October 17, 2012.

No. A-12-159: **Hubbart v. Hormel Foods**, 20 Neb. App. 309 (2012). Petition of appellant for further review denied on May 8, 2013.

No. A-12-164: **Chae v. Houston**. Petition of appellant for further review denied on December 12, 2012.

No. A-12-166: **Eich v. American General Life Ins. Co**. Petition of appellant for further review denied on January 3, 2013.

No. A-12-168: **State v. Harms**. Petition of appellant for further review denied on January 31, 2013.

No. A-12-183: **Traffansetdt v. Seal-Rite Insulation**. Petition of appellee for further review denied on February 13, 2013.

No. A-12-184: **Jurgens v. Irwin Indus. Tool Co.**, 20 Neb. App. 488 (2013). Petition of appellant for further review denied on May 15, 2013.

No. A-12-186: **Estate of Hansen v. Bergmeier**, 20 Neb. App. 458 (2013). Petition of appellant for further review denied on April 24, 2013.

No. A-12-192: **Muzzey v. Ragone**, 20 Neb. App. 669 (2013). Petition of appellees for further review denied on June 12, 2013.

No. A-12-204: **State v. Robertson**. Petition of appellant for further review denied on April 17, 2013.

No. A-12-205: **State v. Smothers**. Petition of appellant for further review denied on July 11, 2012.

No. A-12-213: **Comstock v. Comstock**. Petition of appellant for further review denied on January 16, 2013.

No. A-12-221: **State v. Chol**. Petition of appellant for further review denied on December 12, 2012.

No. A-12-232: **State v. Stephens**. Petition of appellant for further review denied on November 21, 2012.

No. S-12-241: **State v. Taylor**. Petition of appellant for further review sustained on June 19, 2013.

No. A-12-243: **Maciorowski v. Maciorowski**. Petition of appellant for further review overruled without prejudice on March 28, 2013, as premature.

No. A-12-243: **Maciorowski v. Maciorowski**. Petition of appellant for further review denied on April 10, 2013.

No. A-12-247: **State v. Stolp**. Petition of appellee for further review denied on January 23, 2013.

No. A-12-249: **State v. Door**. Petition of appellant for further review denied on March 13, 2013.

No. A-12-262: **James Neff Kramper Family Farm v. Garwood**. Petition of appellant for further review denied on March 13, 2013.

No. S-12-266: **Petersen v. City of Blair on behalf of Airport Auth**. Petition of appellant for further review sustained on August 31, 2012.

No. A-12-270: **State v. Viltres**. Petition of appellant for further review denied on September 19, 2012.

Nos. A-12-281 through A-12-284: **In re Interest of Angelina G. et al.**, 20 Neb. App. 646 (2013). Petitions of appellant for further review denied on June 5, 2013.

No. A-12-289: **Hernandez v. Wess**. Petition of appellant for further review denied on November 21, 2012.

No. A-12-290: **State v. Richardson**. Petition of appellant for further review denied on April 17, 2013.

No. A-12-292: **State v. Harden**. Petition of appellant for further review denied on September 13, 2012.

No. A-12-309: **Cheloha v. Cheloha**. Petition of appellant for further review denied on January 18, 2013, due to untimely filing.

No. A-12-316: **Anderson v. Lancaster County**. Petition of appellant for further review denied on January 16, 2013.

No. A-12-318: **State v. White**. Petition of appellant for further review denied on January 23, 2013.

Nos. S-12-346, S-12-347: **Reynolds v. Keith Cty. Bd. of Equal**. Petitions of appellant for further review sustained on March 13, 2013.

No. A-12-352: **Hultine v. Hultine**. Petition of appellant for further review denied on April 10, 2013.

No. A-12-354: **Harris v. Iowa Tanklines**, 20 Neb. App. 513 (2013). Petition of appellant for further review denied on April 24, 2013.

No. A-12-355: **Mulder v. Mulder**. Petition of appellant for further review denied on June 5, 2013.

No. A-12-387: **Caton v. Department of Corr. Servs**. Petition of appellant for further review denied on February 21, 2013.

No. A-12-392: **In re Interest of Rose H. et al**. Petition of appellee Christopher H. for further review denied on May 15, 2013.

No. A-12-393: **In re Interest of Timothy H**. Petition of appellee Christopher H. for further review denied on May 15, 2013.

No. A-12-412: **Raven v. Raven**. Petition of appellant for further review denied on August 30, 2012.

No. A-12-416: **State v. Olson**. Petition of appellant for further review denied on January 31, 2013.

No. A-12-418: **Pittman v. Rivera**. Petition of appellant for further review denied on August 30, 2012.

No. A-12-430: **State v. Kremer**. Petition of appellant for further review denied on December 19, 2012.

No. A-12-437: **Fisher v. Fisher**. Petition of appellant for further review denied on September 13, 2012.

No. A-12-449: **Yates v. T & Q Properties**. Petition of appellant for further review denied on May 8, 2013.

No. A-12-457: **State v. Adolph**. Petition of appellant for further review denied on February 13, 2013.

No. A-12-458: **State v. Means**. Petition of appellant for further review denied on December 19, 2012.

No. A-12-460: **State v. Holloway**. Petition of appellant for further review denied on November 14, 2012.

No. A-12-467: **State v. Cruz**. Petition of appellant for further review denied on March 27, 2013.

No. A-12-471: **NRS Properties v. Resilent, LLC**. Petition of appellant for further review denied on December 12, 2012.

No. S-12-486: **State v. Purdie**. Petition of appellant for further review sustained on August 31, 2012.

No. A-12-493: **Aguirre v. Union Pacific RR. Co.**, 20 Neb. App. 597 (2013). Petition of appellee for further review denied on May 8, 2013.

No. A-12-537: **Cornish v. Neth**. Petition of appellant for further review denied on December 12, 2012.

No. A-12-542: **State v. Cole**. Petition of appellant for further review denied on April 17, 2013.

No. A-12-544: **State v. Marzolf**. Petition of appellant for further review denied on January 16, 2013.

No. A-12-546: **State v. Lovette**. Petition of appellant for further review denied on April 17, 2013.

Nos. A-12-553, A-12-554: **State v. Martin**. Petitions of appellant for further review denied on February 13, 2013.

No. A-12-570: **State v. Eagleboy**. Petition of appellant for further review denied on October 16, 2012, as untimely. See § 2-102(F)(1).

No. A-12-584: **State v. Pilachowski**. Petition of appellant for further review denied on March 13, 2013.

No. A-12-586: **Gocek v. Gocek**. Petition of appellant for further review denied on June 5, 2013.

Nos. A-12-593 through A-12-596: **In re Interest of Alisondra V. et al**. Petitions of appellant for further review denied on May 23, 2013.

No. A-12-616: **George v. Britten**. Petition of appellant for further review denied on February 27, 2013.

No. A-12-634: **Schoepf v. Schoepf**. Petition of appellant for further review denied on March 13, 2013.

No. A-12-635: **Wells v. Britten**. Petition of appellant for further review denied on March 27, 2013.

No. A-12-639: **State v. Pigee**. Petition of appellant for further review denied on March 20, 2013.

No. S-12-642: **State v. Clayborne**. Petition of appellant for further review sustained on February 21, 2013.

No. A-12-654: **State v. Marchan**. Petition of appellant for further review denied on December 12, 2012.

No. A-12-664: **Hansen v. Nebraska Parole Board**. Petition of appellant for further review denied on November 14, 2012.

No. A-12-689: **In re Guardianship of Oliver M**. Petition of appellant for further review denied on December 12, 2012.

No. A-12-697: **Gomez v. Kohl**. Petition of appellant for further review denied on April 12, 2013, as untimely. See § 2-102(F)(1).

No. A-12-701: **State v. Choul**. Petition of appellant for further review denied on March 13, 2013.

No. A-12-706: **State v. Castonguay**. Petition of appellant for further review denied on April 10, 2013.

No. A-12-709: **Mihm v. Mihm**. Petition of appellant for further review denied on December 19, 2012.

No. A-12-712: **State v. Hernandez**. Petition of appellant for further review denied on October 31, 2012.

No. A-12-735: **State v. Graf**. Petition of appellant for further review denied on January 16, 2013.

No. A-12-737: **State v. Butler**. Petition of appellant for further review denied on January 16, 2013.

No. A-12-751: **Sharp v. Sharp**. Petitions of appellant for further review denied on June 19, 2013.

No. A-12-772: **State v. Khalaf**. Petition of appellant for further review denied on April 10, 2013.

No. A-12-792: **State v. Kuku**. Petition of appellant for further review denied on June 3, 2013, as filed out of time.

No. A-12-796: **Central Neb. Pub. Power & Irr. Dist. v. Hixson**. Petition of appellant for further review denied on March 27, 2013.

No. A-12-815: **Happy Cab v. City Taxi**. Petition of appellee for further review denied on March 27, 2013.

No. A-12-865: **State v. McDougald**. Petition of appellant for further review denied on April 10, 2013.

No. A-12-869: **State v. Thornton**. Petition of appellant for further review denied on April 10, 2013.

No. A-12-874: **State v. Peterson**. Petition of appellant for further review denied on April 10, 2013.

No. A-12-876: **State v. Marion**. Petition of appellant for further review denied on March 27, 2013.

No. A-12-901: **In re Interest of Mathew H**. Petition of appellant for further review denied on June 5, 2013.

No. A-12-917: **State v. Rollie**. Petition of appellant for further review denied on April 10, 2013.

No. A-12-952: **Robertson v. Longo**. Petition of appellant for further review denied on June 12, 2013.

No. A-12-961: **State v. Nielsen**. Petition of appellant for further review denied on April 17, 2013.

No. A-12-964: **State v. Boutin**. Petition of appellant for further review denied on June 5, 2013.

No. A-12-970: **State v. Bannister**. Petition of appellant for further review denied on April 10, 2013.

No. A-12-992: **Addleman v. Addleman**. Petition of appellant for further review denied on January 23, 2013.

No. A-12-1019: **State v. Jenkins**. Petition of appellant for further review denied on May 15, 2013.

No. A-12-1034: **Sea-Hubbert Farms v. Boston**. Petition of appellant for further review denied on March 14, 2013, as filed out of time. See § 2-102(F)(1).

No. A-12-1048: **State v. Jarman**. Petition of appellant for further review denied on May 15, 2013.

No. A-12-1114: **State v. Ransom**. Petition of appellant for further review denied on May 15, 2013.

No. A-12-1121: **State v. O'Neal**. Petition of appellant for further review denied on May 15, 2013.

No. A-12-1128: **State v. Rosado**. Petition of appellant for further review denied on May 8, 2013.

No. A-12-1130: **State v. Billups**. Petition of appellant for further review denied on May 23, 2013.

No. A-13-008: **State v. Glazebrook**. Petition of appellant for further review denied on June 19, 2013.

No. A-13-086: **State v. Red Kettle**. Petition of appellant for further review denied on June 17, 2013.

No. A-13-114: **Klawitter v. Midlands Foot Specialists**. Petition of appellant for further review denied on June 12, 2013.

No. A-13-117: **State v. Castonguay**. Petition of appellant for further review denied on June 12, 2013.

No. A-13-151: **State v. Harden**. Petition of appellant for further review denied on May 8, 2013.

No. A-13-167: **Evans v. Thatcher**. Petition of appellant for further review denied on June 13, 2013, as untimely.

No. A-13-187: **State v. Red Kettle**. Petition of appellant for further review denied on June 17, 2013, as incomplete and premature.

CASES DETERMINED

IN THE

NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA, APPELLEE, V. RON R. HASHMAN, APPELLANT.

815 N.W.2d 658

Filed July 3, 2012. No. A-11-737.

1. **Pretrial Procedure: Appeal and Error.** The trial court has broad discretion in granting discovery requests and errs only when it abuses its discretion.
2. **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.
3. **Due Process: Evidence.** Suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment.
4. ____: ____. There are three components of a true violation under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963): The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.
5. **Constitutional Law: Trial: Evidence.** Favorable evidence is material, and constitutional error results from its suppression by the State, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability of a different result is accordingly shown when the State's evidentiary suppression undermines confidence in the outcome of the trial.
6. **Constitutional Law: Due Process: Evidence.** Under certain circumstances, the Due Process Clause of the 14th Amendment to the U.S. Constitution may require that the State preserve potentially exculpatory evidence on behalf of a defendant.
7. **Due Process: Evidence: Police Officers and Sheriffs.** Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.
8. **Judgments: Due Process: Evidence: Appeal and Error.** A trial court's conclusion that the government did not act in bad faith in destroying potentially useful evidence, so as to deny the defendant due process, is reviewed for clear error.

9. **Evidence: Proof.** Because of its obvious importance, where material exculpatory evidence is destroyed, a showing of bad faith is not necessary.
10. ____: ____. Where evidence that is destroyed is only potentially useful, a showing of bad faith under *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988), is required.

Appeal from the District Court for Box Butte County: LEO DOBROVOLNY, Judge. Affirmed.

Bell Island, of Island & Huff, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

MOORE and PIRTLE, Judges, and CHEUVRONT, District Judge, Retired.

MOORE, Judge.

INTRODUCTION

Ron R. Hashman appeals his conviction in the district court for Box Butte County of driving under the influence (DUI), third offense, with a breath alcohol concentration of .15 or greater. On appeal, Hashman assigns error to the State's alleged failure to comply with a discovery order and Hashman also asserts that his due process rights were violated when the State failed to disclose the destruction of evidence prior to trial. Finding no abuse of discretion in the district court's determination of these claims, we affirm.

BACKGROUND

On March 28, 2009, Officer Jim Grumbles of the Alliance Police Department was on patrol, when he observed a pickup making a left turn. Because the pickup turned into the far outside lane, instead of turning into the inside lane and then merging over, Grumbles initiated a traffic stop of the pickup, which was being driven by Hashman. Upon making contact with Hashman, Grumbles noted that Hashman's eyes were watery and bloodshot, that he was somewhat slow in his reactions, and that he had the odor of an alcoholic beverage about his person. Hashman admitted to consuming alcohol. When Grumbles inquired about health issues, Hashman informed him that he was taking medication for high blood pressure and had

allergies and leukemia. Grumbles administered standardized field sobriety tests to Hashman. Grumbles observed six out of six indicators of impairment on the horizontal gaze nystagmus test. Grumbles observed three out of eight indicators on the nine-step walk-and-turn test and three out of four indicators on the one-leg stand maneuver. During the one-leg stand, Hashman informed Grumbles that he had equilibrium problems and had had several back surgeries, information that he failed to mention when Grumbles first inquired about medical issues. Grumbles then asked Hashman to recite the alphabet and also administered a preliminary breath test, which showed the presence of alcohol. Based on his observations of Hashman, his admission to consuming alcohol, and his performance on the field sobriety tests, Grumbles formed the opinion that Hashman was impaired and not safe to drive a motor vehicle. Grumbles arrested Hashman, read him the postarrest chemical test advisement, and transported him to a hospital for a blood draw after Hashman agreed to take a blood test.

On May 26, 2009, the State filed an information charging Hashman with DUI, over .15, third offense—a Class IIIA felony under Neb. Rev. Stat. § 60-6,197.03(6) (Cum. Supp. 2008). A jury trial was held on May 27 and 31, 2011.

Kimberly Galyen, a registered nurse at the hospital, drew blood from Hashman after his arrest. Galyen testified about the procedure she follows in blood draws. When she is notified that a police officer is coming in for a blood draw, Galyen obtains a legal blood draw kit and prepares a room. A police officer is present during the course of each legal blood draw. Either Galyen or the officer will break the seal on the kit, and Galyen signs the top of the kit to show that she was the one who drew the blood. Each kit contains a needle, a container for the needle, two vacutainer tubes, a Betadine swab, and seals for reclosing the kit. Galyen inspects the tubes to make sure they have anticoagulant in them, and she has never seen one that does not. After drawing the blood, Galyen fills out a blood draw certificate, documenting that she was the one who drew blood from a particular individual at a particular date and time. Once the blood is drawn, Galyen notes the individual's name and the date and time, and she places that information and her

initials on the tubes of blood. The officer then places the tubes in the kit and seals it. At trial, Galyen identified one exhibit as the tubes of Hashman's blood marked with Hashman's name; the date of March 28, 2009; the time of the blood draw; and Galyen's initials in her handwriting. The information on the blood tubes corresponded with the information documented by Galyen on the blood draw certificate she completed for Hashman's blood draw.

Grumbles testified that he inspected the blood kit at the hospital to make sure it had not expired, opened it, and provided the contents to Galyen. Grumbles was present when Galyen drew Hashman's blood and marked the tubes. Once the tubes were marked, Grumbles sealed the tubes and placed them inside a plastic bag, which he also sealed. He placed the sealed bag into the kit and sealed the kit. Grumbles also completed a blood collection report and test sheet. Grumbles kept the kit with him until he could place it in the evidence refrigerator, which he did on March 28, 2009.

Colleen Busch, a police officer and criminal investigator with the Alliance Police Department, testified about her duties with respect to handling blood kits and other evidence. Busch checks the log on the front of the secure refrigerator in her office area in the mornings to see if any new blood kits have been placed inside. If there are any new blood kits, she unlocks the refrigerator and secures them in a second refrigerator to which only she has access. Then, at the appropriate time, she packages the kits and sends them to the state crime laboratory by certified mail, return receipt requested. The blood kits are not returned to Busch. Busch retains possession of the receipts to show that the kits were mailed. She also documents, on the evidence card associated with each item, when it was shipped to the laboratory. The certified mail receipts and evidence property reports are marked with the relevant police report number. Hashman's blood kit was in a secured refrigerator unit from the time Grumbles logged it in on March 28, 2009, until Busch mailed it to the laboratory on March 31. Busch inspects each kit before she mails it to make sure it is properly sealed. She also places two extra pieces of tape on every blood kit before mailing it to ensure that it will not open. If

a kit was not properly sealed when she inspected it, Busch would contact the officer involved and work with that officer to repackage and properly submit the kit. According to Busch, she has never actually had to contact an officer to repackage a blood kit.

Jamie Mraz, a forensic scientist at the Nebraska Department of Health and Human Services laboratory, tested the blood drawn from Hashman. Mraz' duties include maintaining the chain of custody on samples and evidence that come into the laboratory and analyzing blood samples for alcohol content. Mraz has a Class A permit from the State of Nebraska, authorizing her to analyze blood samples using automated headspace gas chromatography. Gas chromatography is a technique for separating and testing for compounds, such as ethanol, in their gas forms. Mraz tested Hashman's blood on April 1, 2009, following the Nebraska Administrative Code's title 177 protocol that was in effect on that date. See 177 Neb. Admin. Code, ch. 1 (2009). Mraz identified the return receipt slip from the post office, showing that she signed for the blood kit containing Hashman's blood on April 1. Mraz also identified the container holding the blood tubes she received for Hashman.

Mraz testified that at the laboratory, the kits, or boxes, in which blood tubes are sent are stored separately from the tubes. Blood tubes are stored in a locked refrigerator in the laboratory when they are not being tested, and the kits are stored separately in a room attached to the laboratory. The laboratory holds the kits for 2 years, and then they are destroyed. According to Mraz, the laboratory receives between 2,500 and 2,800 blood kits each year. Mraz did not realize that Hashman's case was still ongoing at the end of the 2-year storage period, and the kit in which Hashman's blood was sent to the laboratory was destroyed prior to trial. Mraz testified that upon receiving the kit containing the tubes of Hashman's blood, she took the tubes from the kit and placed them in the secure refrigerator.

At this point in Mraz' testimony, Hashman's attorney asked that the jury be excused in order to raise his concerns about the destruction of the blood kit. Outside of the jury's presence,

Hashman's attorney questioned Mraz further. Mraz became aware of the kit's destruction in April 2011, when she received an order to have one of the tubes of Hashman's blood sent out for independent testing. Mraz still had the blood, so she was able to send it off for an independent test. The night before trial, Mraz told the county attorney about the destruction of the blood kit.

The following exchange then occurred between the district court and Hashman's attorney:

> [Hashman's attorney]: My motion, Your Honor, is I need some time remedy for the failure to disclose exculpatory evidence. This is a *Brady* [*v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963),] violation. Under *Kyles versus Whitley*[, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995),] it doesn't matter that she's not directly with the county attorney, she has a duty to disclose, they have a duty to provide. The county attorney knew yesterday at least; they didn't tell me this morning, hey, better let you know so we could ask for —
>
> THE COURT: Well, . . . what exculpatory evidence do you believe was hidden from you?
>
> [Hashman's attorney]: The box, the container, that it was destroyed and that they can no longer demonstrate that the blood was in that box, how that box was done, and the necessary chain of custody events.
>
> THE COURT: How is that exculpatory?
>
> [Hashman's attorney]: How is it exculpatory? It goes to the credibility of the process, Your Honor, and whether or not they can make their proof.

The court overruled Hashman's motion, and the prosecutor resumed questioning Mraz after the jury returned to the courtroom.

Mraz described the normal procedure she follows upon receiving a blood kit. Mraz obtains the blood kit from the post office and takes it to the laboratory, where she logs the kit in. Mraz did not specifically remember doing that with the blood kit in this case but testified that she follows the same procedure every time. Mraz did not recall whether the kit containing the tubes of Hashman's blood was sealed when

she received it, but she testified that she wrote on the tubes to indicate that they were sealed when she received them. When Mraz receives a blood kit, she examines the tubes for cracking, makes sure they are sealed, checks for signs of clotting, and compares any information written on the tubes to the blood alcohol test form that comes with the kit to make sure that it is consistent.

Mraz testified that she followed the laboratory's normal protocol and procedure upon receiving Hashman's blood in 2009, and she testified to her belief that the kit was intact, the tubes and the blood were in good condition, and the information on the tubes was consistent with the information on the kit. Mraz testified that after opening the kit with Hashman's blood and checking the contents, she would have assigned a laboratory number to the kit, written the number on the outside of the kit along with her initials as the person opening it, and written whether it was sealed and the date she opened it. Mraz then would have written the laboratory number and the date the kit was received on the blood alcohol test form and would have noted the laboratory number on any other sealed portions of the kit, along with the fact that she was the one who opened that portion of the kit. After she checked the blood tubes and marked them with the laboratory number, the fact that they were sealed, and her initials, Mraz placed one tube in a test tube rack and one tube on a "rocker" in preparation for testing Hashman's blood. After Mraz completed testing Hashman's blood, the tubes were kept in the secure refrigerator in the laboratory. Mraz testified that although there is certain information recorded on the kit, or box, that the blood comes in for testing, much of that information is documented in other places. She testified that the box itself does not have anything to do with the results of the blood test.

Mraz described in considerable detail the process of testing blood using automated headspace gas chromatography, which she used to test Hashman's blood. Once the gas chromatograph has completed the testing process, it produces a chromatogram, which is the recorded graphic printout of the measured amount of alcohol. Mraz checks the chromatogram to make sure that the standards and the quality control samples

used in the testing were within their ranges. If they are all correct, she then determines the blood alcohol content for the unknown sample being tested. Mraz writes the blood alcohol content on the blood alcohol test form that comes with the kit and sends copies to the arresting agency and the county attorney's office.

Mraz testified that after testing Hashman's blood, she received a result of the blood alcohol content. When the prosecutor asked Mraz what the result was, Hashman's attorney objected and asked to voir dire the witness. Based on this questioning, Mraz testified that the computer attached to the instrument used for blood testing prints off a chromatogram from every sample she analyzes, which printout is the result of the analysis performed by the machine. Mraz must then analyze the chromatogram to determine whether it shows a reportable amount. The blood alcohol content that is reported and documented on the blood alcohol test form reflects Mraz' interpretation of the chromatogram. Hashman's attorney then asked to conduct further voir dire outside of the jury's presence.

Once the jury was removed from the courtroom, Hashman's attorney questioned Mraz further about chromatograms in general and offered a sample chromatogram for demonstrative purposes. The following exchange then occurred:

> [Hashman's attorney]: . . . And my objection now is pursuant to 29-1912, the State is required to disclose the results of a test if they intend to use it at trial — only if they intend to use it. They have now indicated clearly they intend to use it, they have not disclosed the chromatogram which is the actual equivalent to the breath test strip in a breath test, Your Honor. And, therefore, I'd ask for a remedy, either a disallowance of the information or some other method in which to deal with it because that's not been disclosed to me, Your Honor.
>
> THE COURT: So what you are saying is something akin to [the sample chromatogram] in this case should have been disclosed to you?
>
> [Hashman's attorney]: Exactly. Something akin to [the sample chromatogram] should have been disclosed by the . . . State in this case for me to use to analyze because

> it's the actual results, it's the printout, it's — for lack of a better word, it's the breath test strip in a breath case. They print it out and then they transcribe it over to a different piece of paper, Your Honor.
>
> THE COURT: I'll consider [the sample chromatogram] for that purpose. But your — whatever your request for relief is, it's denied.

Hashman's attorney clarified that he was asking to "strike the evidence," and the court again denied the request. After the jury returned to the courtroom, the State offered exhibit 14, the blood alcohol test form on which Mraz documented Hashman's blood alcohol content of .219. The court overruled Hashman's objections on the bases of foundation and best evidence and received exhibit 14 into evidence.

On cross-examination, Hashman's attorney questioned Mraz further about the science of gas chromatography and problems that can occur in the process. Hashman's attorney also questioned Mraz about what she looks for when analyzing a chromatogram. Mraz had Hashman's chromatogram with her in court, and Hashman's attorney questioned her in great detail about what the chromatogram showed. The chromatogram was also received into evidence.

The jury found Hashman guilty of DUI, over .15, and on August 31, 2011, the district court found that Hashman had two prior DUI convictions, making his offense a third offense. The court sentenced him to 5 years of supervised probation, ordered him to pay a $1,000 fine, revoked his driver's license for 5 years, and ordered him to spend 60 days in jail. Hashman subsequently perfected the present appeal to this court.

ASSIGNMENTS OF ERROR

Hashman asserts that the district court erred in (1) failing to provide a remedy for the State's failure to comply with a discovery order and (2) finding that his due process rights were not violated when the State failed to disclose the destruction of evidence prior to trial.

STANDARD OF REVIEW

[1,2] The trial court has broad discretion in granting discovery requests and errs only when it abuses its discretion. *State*

v. Norman, 282 Neb. 990, 808 N.W.2d 48 (2012). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Parminter*, 283 Neb. 754, 811 N.W.2d 694 (2012).

ANALYSIS

Failure to Disclose Chromatogram.

Hashman asserts that the district court erred in failing to provide a remedy for the State's failure to comply with a discovery order. Specifically, he argues that the State did not comply with discovery because the chromatogram, the printout graph of the blood test result, was not provided in discovery. Neb. Rev. Stat. § 29-1912(1)(e) (Cum. Supp. 2010) provides that the State must disclose "[t]he results and reports of physical or mental examinations, and of scientific tests, or experiments made in connection with the particular case, or copies thereof."

The record shows that prior to trial, Hashman was provided with a copy of the Nebraska Department of Health and Human Services laboratory result, which is presumably the same document as exhibit 14, the test result form prepared by Mraz. Although the chromatogram shows a graphic printout of the test result and the controlled items tested, it must be interpreted by Mraz to determine its validity and the process is not complete until Mraz fills out the test form. Mraz brought the chromatogram with her to court, and Hashman's attorney questioned her in great detail about the information shown in the chromatogram. Hashman has not shown that the State failed to comply with the discovery statute. We find no abuse of discretion in the district court's denial of Hashman's request for a remedy for the State's failure to provide Hashman with the chromatogram prior to trial.

Destruction of Blood Kit.

Hashman asserts that the district court erred in finding that his due process rights were not violated when the State failed to disclose the destruction of evidence, specifically, the blood kit, prior to trial.

[3-5] In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the U.S. Supreme Court held that "suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." There are three components of a true *Brady* violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). The Nebraska Supreme Court has stated that favorable evidence is material, and constitutional error results from its suppression by the State, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *State v. McGee*, 282 Neb. 387, 803 N.W.2d 497 (2011). A reasonable probability of a different result is accordingly shown when the State's evidentiary suppression undermines confidence in the outcome of the trial. *Id.*

[6-10] Under certain circumstances, the Due Process Clause of the 14th Amendment to the U.S. Constitution may require that the State preserve potentially exculpatory evidence on behalf of a defendant. *State v. Nelson*, 282 Neb. 767, 807 N.W.2d 769 (2011). Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. *Id.* A trial court's conclusion that the government did not act in bad faith in destroying potentially useful evidence, so as to deny the defendant due process, is reviewed for clear error. *Id.* Because of its obvious importance, where material exculpatory evidence is destroyed, a showing of bad faith is not necessary. *Id.* Where evidence that is destroyed is only potentially useful, a showing of bad faith under *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988), is required. *State v. Nelson, supra.*

In this case, the blood kit box, or container, used to transport the vials of blood from the hospital, to the evidence vault, and finally to the laboratory was not material exculpatory evidence.

The blood kit box had no effect on the test performed on the blood or the results of the test. And while the box itself contains information regarding the chain of custody, much of this information is documented in other places, including on the blood vials. The State established an ample chain of custody for the blood drawn from Hashman through the testimony of Galyen, Grumbles, Busch, and Mraz. Hashman's attorney cross-examined each of these witnesses thoroughly regarding the collection, transport, and storage of Hashman's blood. Hashman has not shown a reasonable probability that, had the destruction of the blood kit box been disclosed to the defense prior to trial, the result of the proceeding would have been different. Nor has he shown that the State acted in bad faith in destroying the blood kit. The kits are stored separately from the blood vials, and the kits are routinely destroyed after a 2-year period. We conclude that there was no *Brady* violation. The district court did not err in finding that Hashman's due process rights were not violated. Hashman's assignment of error is without merit.

CONCLUSION

The district court did not abuse its discretion in denying Hashman's request for a discovery violation or in denying his *Brady* challenge.

AFFIRMED.

IN RE ESTATE OF SHIRLEY A. WEBB, DECEASED. ROGER WEBB AND MARK WEBB, APPELLEES, V. DANNY L. WEBB, PERSONAL REPRESENTATIVE OF THE ESTATE OF SHIRLEY A. WEBB, APPELLANT.

817 N.W.2d 304

Filed July 17, 2012. No. A-11-721.

1. **Decedents' Estates: Appeal and Error.** Absent an equity question, an appellate court reviews probate matters for error appearing on the record made by the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law,

is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

3. **Decedents' Estates: Appeal and Error.** The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
4. **Decedents' Estates.** A person interested in the estate may petition for removal of a personal representative for cause at any time.
5. ____. Cause for removal of a personal representative exists when removal would be in the best interests of the estate, or if it is shown that a personal representative or the person seeking his appointment intentionally misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office.
6. ____. That the named personal representative is interested in the estate and that his or her interest may become hostile to those of the other interested beneficiaries does not necessarily render the personal representative legally incompetent.
7. **Decedents' Estates: Courts.** If the individual interest of the personal representative comes into irreconcilable conflict with the interests of the estate, then the county court has the authority to act to protect the interests of all by restraining or removing the personal representative, or supervising the personal representative's administration of the estate.
8. **Decedents' Estates.** A personal representative is under a duty to settle and distribute the estate of the decedent as expeditiously and efficiently as is consistent with the best interests of the estate.
9. **Decedents' Estates: Time.** Within 3 months after appointment, a personal representative is required to prepare and file an inventory of property owned by the decedent at the time of death. The inventory is to list the decedent's property with reasonable detail and include a fair market value. The personal representative is required to send a copy of the inventory to interested persons who request it.

Appeal from the County Court for Red Willow County: ANNE PAINE, Judge. Affirmed.

Maurice A. Green, of Green Law Offices, P.C., for appellant.

Stanley C. Goodwin, of Goodwin Law Offices, for appellees.

MOORE and PIRTLE, Judges, and CHEUVRONT, District Judge, Retired.

MOORE, Judge.

INTRODUCTION

Danny L. Webb appeals from an order of the Red Willow County Court removing him as personal representative of the

estate of Shirley A. Webb and appointing a successor personal representative. We find that the county court's determination that it is in the best interests of the estate to remove Danny as personal representative is supported by competent evidence and is not clearly erroneous. We affirm.

BACKGROUND

Roger Webb, Mark Webb, and Danny are the surviving children of Shirley A. Webb, who died September 22, 2010. The decedent's will, executed June 30, 2009, directed all assets of her business, Webb's Water Truck Service, LLC, to Danny, including but not limited to "all tangible assets of the business, including furniture, fixtures, inventories, tools, machinery, equipment, motor vehicles and other property connected thereto and utilized by and associated with this proprietorship." The will recognized that Danny "continued to work for and directly assisted in the equity and value" of the business. The residuary estate was directed to be split between Roger, Mark, and Danny. Danny was nominated in the will to serve as personal representative. The validity of the will is not at issue on appeal.

On September 29, 2010, Danny filed a petition for informal probate of will and informal appointment of personal representative. On that date, Danny was informally appointed as personal representative of the estate and letters of appointment were filed. No objections to Danny's appointment were filed.

On June 8, 2011, Roger and Mark filed an application for removal of the personal representative and requested appointment of a successor personal representative. They alleged that (1) no inventory had been filed; (2) Danny informed them that he removed items from the decedent's home and claimed ownership of said items which Roger and Mark felt were part of the residual estate; (3) Danny intended to sell the decedent's home, which is part of the residual estate, to his son for the assessed valuation of the property which is substantially below market value; (4) Danny had or may have represented that certain items of personal property were gifts made to him by the decedent prior to her death, which items Roger and Mark

believe should be part of the residual estate; and (5) Danny had in other ways and instances mismanaged the estate to their detriment.

On July 26, 2011, a hearing was held on the removal application. On the same day, Danny filed an inventory of the estate. No other filings were made by Danny in the estate proceeding prior to this date. Danny acknowledged that he was late in filing the inventory due to difficulties coordinating with his attorney and Ron Smith, the accountant for the decedent and the business. Smith testified about his delay in providing Danny with a valuation of the business. Despite previous requests from Danny's attorney, Smith did not produce the valuation until June 1 due to the need to first complete the income tax returns and the financial statements.

Roger and Mark made efforts to obtain information from Danny about the status of the estate, which efforts were not successful. Roger testified that he contacted Danny "[a] couple of times" by telephone to inquire about the status of the estate between September 2010 and January 2011. Roger and Mark sent a letter to Danny's attorney requesting an inventory and accounting of the estate, a copy of the will, and a copy of the Nebraska statutes for dispersal of the estate. Roger testified that he did not receive a response, but that his own lawyer obtained a copy of the will. Roger did not attempt to contact Danny further after sending the letter. Mark testified that after sending the letter, he spoke with Danny again and told him that they needed to know exactly what was in the estate. Danny acknowledged that Roger and Mark had made some inquiries about the status of the estate proceeding prior to filing their application.

The inventory reveals that the largest asset owned by the decedent is the business, which Smith valued at $501,605. In addition, the inventory includes real estate valued at $65,884; "Stocks and Bonds" valued at $45,655; "Mortgages, Notes and Cash" valued at $51,488; and "Miscellaneous personal property, furniture, etc[.]" valued at $4,250. The record shows that the stocks have been evenly distributed between the brothers and that life insurance proceeds have also apparently been divided between the brothers.

To value the family home for the inventory, Danny used the assessed tax value of $65,884. Danny testified that he had discussed selling the house to his son for a purchase price of $66,000, but no transaction had been completed. Both Roger and Mark recommended to Danny that he get the house appraised, but Danny declined. According to Roger and Mark, Danny's response was to tell them that they could get an appraisal done themselves. Roger obtained an appraisal valuing the home at $88,000. Danny was aware that an appraisal had been done but did not ask for a copy of the report. Danny testified that he did not agree with the appraised value of the house and continued to believe that the assessed value was correct.

The evidence concerning the bank accounts listed under "Mortgages, Notes and Cash" on the inventory was less than clear. The list shows two checking accounts, three money market accounts, a "Christmas Club" account, and an IRA variable account. Apparently, there are personal accounts and business accounts, but there was no evidence to identify the different accounts listed on the inventory. The evidence suggests that the business was a limited liability company owned by the decedent and her husband and that during their lifetime, they used the business account to make some personal expenditures and used their personal accounts to make some business expenditures. After the decedent's husband died, she added Danny as a joint holder on her bank accounts. However, there was no evidence adduced to specify the form in which the accounts were held, i.e., whether there was a right of survivorship, a "pay on death" designation, or an agency designation. Danny testified that he was informed that he could use the accounts as he needed to in order to pay for business expenses, the decedent's utilities, and her funeral. Danny stated that the banks told him that the accounts belonged to him. At some point, Danny transferred the money that was in the decedent's accounts to an account in his name only. Danny also indicated that he had a power of attorney to make bank transfers from the decedent's accounts; however, he was unsure exactly how the bank transactions occurred. Danny claims that the money in the accounts at the time of the decedent's death belongs to him. Danny

acknowledged that he did not contribute his own money to the accounts, with the possible exception of the business account due to his work for the business. Danny also agreed that the accounts would more properly have been classified under the jointly owned property category on the inventory.

Evidence was adduced concerning miscellaneous personal property that has been removed from the decedent's house. Danny identified several items that were paid for by the business which he claims he now owns by virtue of the devise of the business to him. These items include a corner hutch which Danny gave to his son, together with a bed and a television which remain in the house. Receipts were received in evidence indicating the purchaser of these items was Webb's Water Truck Service.

Danny testified that he had authorized other family members to remove property, but as far as he was aware, nothing was taken that would affect the bottom line on the inventory. The brothers had an apparent agreement that each could remove items that he had given to their parents as gifts. Roger removed a grandfather clock, an antique churn, a quilt, a recipe box, and other personal items that he had given his parents. Mark removed three small ivory walrus carvings that he had given the decedent as a gift.

The decedent owned jewelry which was not separately listed on the inventory. Danny was not sure whether the value of the jewelry had been included in the personal property portion of the inventory. According to Mark, the decedent had received several "expensive" items of jewelry as gifts from their father, including earrings purchased shortly before he died in 2009. Mark testified that he saw the receipt for these earrings which indicated a price of approximately $4,000. Danny testified that he had not had the jewelry appraised; however, Mark testified that the decedent's jeweler told him that an inventory had been prepared and given to Danny. Danny testified that Roger and Mark had not asked him about the jewelry; however, Mark testified he asked Danny about the jewelry, to which Danny responded that the decedent had been hiding it and that he did not know the location. At the hearing, Danny testified that some of the jewelry was in his possession

and some was at the decedent's house. Danny testified that he intended to divide the jewelry equally "[w]henever things here get settled."

At the end of the presentation of evidence, the court made comments on the record. The court noted that the evidence and testimony explained the reason for the delay in filing the inventory and noted that inventories can be amended. The court found it concerning that inquiries were made by Roger and Mark to Danny as personal representative with regard to the status of the estate, the inventory, and the value of the house. The court found that the value of the real estate listed in the inventory was substantially less than that of the appraisal procured by Roger and Mark. Although Danny did not have a copy of the appraisal at the time he was preparing the inventory, he had been requested to get an appraisal and declined to do so. The court expressed concern regarding Danny's refusal to get an appraisal and telling Roger and Mark to do it themselves. The court also noted that Danny "testified both ways" in that he used his power of attorney to transfer assets to joint accounts and then later testified that he did not do that. The court noted the evidence that money in the decedent's accounts was used by Danny to pay bills for a business that he was going to inherit. The court was concerned that there had been commingling of assets between the decedent's personal and business accounts. It also noted that the decedent's jewelry was not listed on the inventory and that no valuation had been provided to Roger and Mark, even though there was testimony that Danny had obtained the information from the jeweler.

The court concluded that Danny should be removed as personal representative. Specifically, the court stated that the "conflict of interest by [Danny] is not necessarily dispositive of his ability to serve," but found it was in the best interests of the estate to remove him and appoint a successor.

On July 28, 2011, the court entered an order finding that the application for removal should be sustained and that there should be an appointment of a successor personal representative. The court did not make any additional findings of fact in its written order.

ASSIGNMENT OF ERROR

Danny assigns that the county court erred in finding that he should be removed as personal representative of the estate, because there was no wrongdoing or cause pursuant to Neb. Rev. Stat. § 30-2454(b) (Reissue 2008) and because the court made no such requisite findings in its order.

STANDARD OF REVIEW

[1-3] Absent an equity question, an appellate court reviews probate matters for error appearing on the record made by the county court. *In re Estate of Muncillo*, 280 Neb. 669, 789 N.W.2d 37 (2010). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*. The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. *Id*.

ANALYSIS

[4,5] A person interested in the estate may petition for removal of a personal representative for cause at any time. § 30-2454(a). Section 30-2454(b) provides:

> Cause for removal [of a personal representative] exists when removal would be in the best interests of the estate, or if it is shown that a personal representative or the person seeking his appointment intentionally misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office.

We first address Danny's argument that the court did not make the requisite findings to support removal in its order entered on July 28, 2011. The written order generally found that the application for removal of Danny as personal representative should be sustained and that there should be an appointment of a successor personal representative. We understand Danny's argument to be that it was necessary to make findings in the order consistent with § 30-2454(b); namely,

that it was in the best interests of the estate or that one or more of the enumerated causes listed therein existed. However, nothing in the statute requires that such findings be included in the order. We further note that Danny did not specifically request such findings. See Neb. Rev. Stat. § 25-1127 (Reissue 2008) (upon trial of questions of fact by court, it shall not be necessary for court to state its findings, except, generally, for plaintiff or defendant, unless either party requests it). Finally, the trial judge did in fact make oral findings at the close of evidence, culminating in the conclusion that it was in the best interests of the estate to remove the personal representative and appoint a successor. This argument is without merit.

We next address whether there was cause to remove Danny as personal representative. Roger and Mark alleged that (1) no inventory had been filed in the matter, (2) Danny removed items from the decedent's home and claimed ownership of items which Roger and Mark believed were part of the residual estate, (3) Danny intended to sell the decedent's home for the assessed value of the property which is less than market value, (4) Danny represented that certain items of value were gifts made to him by the decedent which Roger and Mark believed should be part of the residual estate, and (5) Danny had in other ways and instances mismanaged the estate to Roger and Mark's detriment. We note that nothing in the application for removal could be construed to allege that Danny disregarded an order of the court or that he had become incapable of discharging the duties of a personal representative, nor was evidence adduced to support such findings.

[6,7] Prior to a discussion of the evidence as it relates to the allegations in the application to remove Danny as personal representative, we note the county court's reference to the possible "conflict of interest" between Danny and the heirs of the estate, which conflict the county court found is "not necessarily dispositive of his ability to serve." It is common practice for a will to nominate a personal representative who is close to, or related to, the testator, and it is thus not uncommon for the nominated personal representative to have an interest in the estate, or in other property of the decedent. *In re Estate of Rosso*, 270 Neb. 323, 701 N.W.2d 355 (2005). That the named

personal representative is interested in the estate and that his or her interest may become hostile to those of the other interested beneficiaries does not necessarily render the personal representative legally incompetent. *Id*. If the individual interest of the personal representative comes into irreconcilable conflict with the interests of the estate, then the county court has the authority to act to protect the interests of all by restraining or removing the personal representative, or supervising the personal representative's administration of the estate. *Id*. See Neb. Rev. Stat. §§ 30-2440 through 30-2443 and § 30-2450 (Reissue 2008).

In this case, we agree that the potential conflict of interest between the personal representative and the other interested beneficiaries is in itself insufficient to warrant removal. However, as we discuss below, the conflict of interest, when considered with the other evidence, supports the county court's decision to remove Danny as personal representative.

[8,9] Neb. Rev. Stat. § 30-2464(a) (Reissue 2008) provides in part that a personal representative is under a duty to settle and distribute the estate of the decedent as expeditiously and efficiently as is consistent with the best interests of the estate. Neb. Rev. Stat. § 30-2467 (Reissue 2008) also requires a personal representative, within 3 months after appointment, to prepare and file an inventory of property owned by the decedent at the time of death. The inventory is to list the decedent's property with reasonable detail and include a fair market value. See *id*. The personal representative is required to send a copy of the inventory to interested persons who request it. See *id*.

In *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989), the Nebraska Supreme Court determined that a personal representative's inactivity was not in the best interests of the estate and provided cause for removal. In *In re Estate of Snover*, the interested parties filed a motion for accounting after which the court ordered the personal representative to comply with a specified time schedule or notify the court of any necessary adjustment in the schedule in a timely fashion. When the personal representative failed to comply with the progression order and failed to timely file the federal estate

tax return, the parties filed a motion to remove the personal representative. The county court overruled the motion, but the district court reversed, and remanded with directions to remove the personal representative. The Supreme Court affirmed the district court's decision, finding that where the county court had ordered a certain progression, such unexplained inactivity by the personal representative constituted grounds for removal. *Id*. Conversely, in *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992), the Nebraska Supreme Court affirmed the lower court's denial of the party's motion to remove the personal representative where there was no violation of any court order or evidence of neglect.

In this case, Danny did not file an inventory until approximately 10 months after his appointment and not until the day of the hearing on the application to remove him as personal representative. Clearly, Danny did not comply with the statutory requirements for filing the inventory, although he did not violate any court order. However, there was evidence presented as to the reason for the delay, at least with respect to valuation of the major asset of the estate. Nevertheless, Danny failed to keep the remaining heirs apprised of the status of the inventory and the estate proceedings, despite several requests for information.

In addition to failing to keep Roger and Mark informed, Danny also failed to obtain an appraisal of the house, despite requests from Roger and Mark to do so. Rather, Danny initially intended to sell the decedent's home to his son for the assessed valuation of the property. And Danny continues to maintain that the house should be valued at the assessed value as opposed to the appraised value, which is more than $20,000 higher than the assessed value. Danny has also failed to provide Roger and Mark with an inventory or valuation of the decedent's jewelry, which jewelry is not separately listed on the inventory.

The activity surrounding the decedent's bank accounts also creates concern in this case. Danny testified that the myriad accounts owned by the decedent at her death were held jointly with him, but they were not listed as jointly owned property on the inventory. Danny has treated the accounts as his own since

the decedent's death, transferring them into an account in his name only. We do not know from this record the specific manner in which the accounts were created or held. Neb. Rev. Stat. § 30-2719 (Reissue 2008) sets forth the various ways in which multiple-party accounts can be created, such as with a right of survivorship, a "pay on death" designation, or an agency designation. The statute further specifies the ownership rights upon the death of a party to the various types of accounts. Although Danny testified that he was told by the banks that the accounts belonged to him, such ownership has not been verified based on the record before us, especially since we do not know which accounts are personal and which are business. The court was concerned about the possible commingling of the personal and business accounts, which appears to be a legitimate concern, at least at this juncture.

Although of limited significance, Danny's position that the items of household furniture purchased by the business were his by virtue of his inheritance of the business appears misguided and contrary to the best interests of the estate. It seems clear that these items—the hutch, bed, and television—are not business assets but were simply purchased using a business account, which was not an unusual practice for the decedent and her husband.

Considering the totality of the circumstances in this case and recognizing our deferential standard of review, we conclude that the county court did not err in finding that it was in the best interests of the estate to remove Danny as personal representative and appoint a successor.

CONCLUSION

We conclude that the district court's decision to remove Danny as personal representative of the estate and appoint a successor was not clearly erroneous.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ANGEL R. LANDERA, APPELLANT.

816 N.W.2d 20

Filed July 17, 2012. No. A-11-940.

1. **Criminal Law: Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion.
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 made by the court below.
3. **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.
4. **Juvenile Courts: Jurisdiction: Waiver: Pleas: Appeal and Error.** Although a voluntary guilty or no contest plea generally waives all defenses to a charge, an appellant's voluntary plea following the denial of his or her motion to waive jurisdiction to the juvenile court does not preclude the appellant's challenge to such action on appeal.
5. **Criminal Law: Courts: Juvenile Courts: Jurisdiction: Words and Phrases.** The district court and the separate juvenile court have concurrent jurisdiction over felony prosecutions of a juvenile, defined as a person who is under the age of 18 at the time of the alleged criminal act.
6. **Criminal Law: Courts: Juvenile Courts: Jurisdiction: Waiver.** When a felony charge against a juvenile is filed in district court, the juvenile may file a motion requesting that court to waive its jurisdiction to the juvenile court for further proceedings under the Nebraska Juvenile Code.
7. **Criminal Law: Courts: Juvenile Courts: Jurisdiction.** Upon a juvenile defendant's motion in a felony case, the district court shall transfer a case to juvenile court unless a sound basis exists for retaining jurisdiction.
8. **Courts: Juvenile Courts: Jurisdiction: Proof.** The burden of proving a sound basis for retention of a juvenile case in the district court lies with the State.
9. **Courts: Juvenile Courts: Jurisdiction.** In order to retain juvenile proceedings in the district court, the court does not need to resolve every factor set forth in Neb. Rev. Stat. § 43-276 (Cum. Supp. 2010) against the juvenile; moreover, there are no weighted factors and no prescribed method by which more or less weight is assigned to each specific factor.
10. ____: ____: ____. Considering the factors set forth in Neb. Rev. Stat. § 43-276 (Cum. Supp. 2010) on a motion to transfer to juvenile court is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile.
11. **Plea Bargains: Prosecuting Attorneys: Sentences: Specific Performance: Appeal and Error.** Where the prosecutor has breached a plea agreement, the defendant is precluded from obtaining trial or appellate relief in the form of withdrawal of the plea unless the defendant moves to set aside the plea in the trial court; however, if the defendant objects at the trial level, despite failing to move to withdraw the plea, the defendant is nevertheless entitled at trial and on

appeal to consideration of relief in another form, such as specific performance of the plea agreement.

12. **Plea Bargains: Prosecuting Attorneys: Courts: Sentences.** Once the State has violated a plea agreement at sentencing by way of prosecutorial comments, the violation cannot be cured either by the prosecutor's offer to withdraw the comments or by the trial court's statement that it will not be influenced by the prosecutor's comments in imposing sentence.
13. **Sentences: Time.** A defendant cannot be sentenced to a minimum of more than 20 months' imprisonment for the conviction of a Class IV felony.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Sentences vacated, and cause remanded for resentencing.

Nathan J. Sohriakoff, Deputy Platte County Public Defender, for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

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

PIRTLE, Judge.

INTRODUCTION

Angel R. Landera pled guilty to 10 counts of possession of child pornography, all Class IV felonies, and was sentenced by the district court for Platte County to a term of 30 months' to 4 years' imprisonment on each count, to be served concurrently. We determine that the State violated the plea agreement it made with Landera, and therefore, we vacate Landera's sentences and remand the cause for resentencing before a different judge. As required by Neb. Ct. R. App. P. § 2-111(E)(5)(a) (rev. 2008), no oral argument is allowed for this appeal.

BACKGROUND

On October 29, 2010, Landera was charged by information in the district court for Platte County with two counts of distribution of child pornography and 20 counts of possession of child pornography. That same day, Landera filed a motion to transfer jurisdiction to the juvenile court. At the hearing on the motion, an investigator with the Columbus Police Department explained how the charges against Landera arose. She testified

that on February 11, she was contacted by an electronics store employee who was repairing a laptop computer that had been brought into the store. While working on the computer, the employee became concerned about the content of some of the computer's files and contacted law enforcement. The investigator viewed the files on the computer and observed them to be child pornography. She then contacted Landera, the owner of the computer. Landera admitted during an interview with the investigator that he had downloaded pornography and stored the files on his computer. He also admitted that he liked viewing child pornography at the same level as adult pornography and that he knew that possessing the child pornography was wrong. He stated that in viewing child pornography, he preferred prepubescent children.

Landera's computer was seized, and it was determined that the computer contained 195 still images and videos that met the criteria for child pornography. The images and videos were predominantly of prepubescent children between the ages of 4 and 12 who were involved in sexual abuse or penetration.

The evidence also showed that Landera was born in June 1992 and that he was only 6 months from his 19th birthday at the time of the hearing. He had graduated from high school and had been attending the University of Nebraska at Kearney, living in a college dormitory. At the time of the hearing, he was not attending college, because he had been placed on suspension and had withdrawn voluntarily. The suspension was due to the discovery of a large box of adult pornographic videotapes in his dormitory room.

A juvenile services officer with the Nebraska Department of Health and Human Services testified that in her opinion, a juvenile could not receive satisfactory treatment for a sex-related offense in 6 months. She testified that sex offender treatment programs are generally 6 to 12 months in length. She testified that treatment would hardly begin in the 6-month timeframe before Landera turned 19 and "age[d] out" of the juvenile court system, given the initial evaluations that take place and the time it takes to find placement for treatment.

Following the hearing, the district court denied Landera's motion to transfer.

On March 21, 2011, Landera pled guilty to 10 counts of possession of child pornography pursuant to a plea agreement with the State. Prior to the entry of Landera's pleas, Landera's counsel advised the district court of the terms of the plea agreement:

> [Landera] is going to plead [guilty] to Counts III, IV, VI, VII, XIII, XIV, XV, XVI, XVII and XX.
>
> . . . .
>
> . . . The State will dismiss the balance of the charges and agree to recommend probation provided [Landera] obtain[s] a psychiatric evaluation and a sex offender evaluation from a reputable individual and follow[s] through with all recommendations.

The State and Landera both agreed with the recitation of the plea agreement. Landera also indicated to the district court that there were no terms or conditions of the plea agreement other than what had been recited into the record by his counsel. After finding that an adequate factual basis had been established, the district court accepted Landera's pleas and found him guilty on all 10 counts.

On June 15, 2011, the district court continued the sentencing hearing set for that day because it was of the opinion that imprisonment might be appropriate, but wanted more detailed information than had been provided in the presentence investigation report. The court ordered Landera committed to the Nebraska Department of Correctional Services for a 90-day evaluation.

After the evaluation was completed, a sentencing hearing was held. The State informed the court that it was recommending that Landera be sentenced to a term of probation with a period of incarceration imposed as a condition of that probation. The State explained that it had initially intended to recommend a sentence of extensive probation with challenging treatment, but that after reading Landera's 90-day evaluation, it felt compelled to recommend that a period of incarceration be imposed as a condition of the probation. While the State was explaining the sentencing recommendation to the court, Landera's counsel made an objection. The following is the exchange that took place:

[Prosecutor]: I think . . . Landera presents an interesting question for the Court. Prior to reviewing the evaluation from [the Diagnostic and Evaluation Center], the State was prepared to recommend probation, extensive probation, with challenging treatment. . . .

In reviewing the presentence [report], again, for today's sentencing, along with the [Diagnostic and Evaluation Center's] evaluation, I'm struck and I can't recommend probation —

[Defense counsel]: Your Honor, I object. The State entered into a plea agreement with the State — with [Landera]. I'll read the agreement verbatim. The State will dismiss the balance of the charges and agree to recommend probation provided [Landera] obtain[s] a psychiatric evaluation, not merely a psychological evaluation and a sexual offender evaluation from a re[pu]table provider and follow[s] through with all recommendations. All of those elements were satisfied. The State is bound to recommend probation.

[Prosecutor]: I'm aware of the plea agreement and I will explain that.

THE COURT: But you'll follow it, right?

[Prosecutor]: I have always stood by my plea agreements.

THE COURT: Okay. I understand.

[Prosecutor]: There are conditions, however, as a matter that can be adjudged — that can be sentenced according to probation that I had not intended to ask the Court to impose. . . .

. . . .

I'm well aware of the plea agreement and, as I said, I had fully intended to ask the Court to place him on probation with treatment. I believe that there must be a term of incarceration as a condition of probation and I believe that that term should be upfront.

. . . .

I don't understand how [Landera] would be able to function without continuing treatment programs that he has made, again, one step toward. But I also believe that

there should be a punishment element and that should be made clear to [Landera]. I'd submit on that fact.

THE COURT: [Defense counsel]?

[Defense counsel]: I'm a little taken aback as the Court, I'm sure, might understand. I entered into today, [Landera] entered into today's sentencing expecting a recommendation of probation, an unqualified recommendation of probation from the [prosecutor]. We got, only after my objection, an extremely qualified recommendation of probation. I'm very surprised by this.

Landera's counsel made further arguments regarding sentencing and concluded by asking the court to honor the plea agreement that the State and Landera signed and asking the court to order probation.

The district court sentenced Landera to concurrent prison sentences of 30 months' to 4 years' imprisonment on each of the 10 counts of possession of child pornography.

ASSIGNMENTS OF ERROR

Landera assigns that the trial court erred in (1) denying his motion to transfer to juvenile court, (2) failing to grant his motion for specific performance of the plea agreement by the State, (3) imposing minimum sentences that exceed the minimum sentences authorized by statute, and (4) imposing excessive sentences.

STANDARD OF REVIEW

[1] A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion. *State v. Parks*, 282 Neb. 454, 803 N.W.2d 761 (2011).

[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 made by the court below. *State v. Fenin*, 17 Neb. App. 348, 760 N.W.2d 358 (2009).

[3] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *Id.*

ANALYSIS

Motion to Transfer to Juvenile Court.

[4] Landera first assigns that the trial court erred in denying his motion to transfer the matter to juvenile court. Although a voluntary guilty or no contest plea generally waives all defenses to a charge, an appellant's voluntary plea following the denial of his or her motion to waive jurisdiction to the juvenile court does not preclude the appellant's challenge to such action on appeal. See *State v. Ice*, 244 Neb. 875, 509 N.W.2d 407 (1994).

[5-8] The district court and the separate juvenile court have concurrent jurisdiction over felony prosecutions of a juvenile, defined as a person who is under the age of 18 at the time of the alleged criminal act. *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009). When a felony charge against a juvenile is filed in district court, the juvenile may file a motion requesting that court to waive its jurisdiction to the juvenile court for further proceedings under the Nebraska Juvenile Code. *State v. Goodwin, supra*. The district court "'shall'" transfer the case unless a sound basis exists for retaining jurisdiction. *Id.* at 951, 774 N.W.2d at 740. The burden of proving a sound basis for retention lies with the State. *Id.*

At the time the district court considered Landera's motion, it was statutorily required to consider the following factors for each offense: (1) the type of treatment Landera would most likely be amenable to; (2) whether there is evidence that the alleged offense included violence or was committed in an aggressive and premeditated manner; (3) the motivation for the commission of the offense; (4) Landera's age and the ages and circumstances of any others involved in the offense; (5) Landera's previous history, including whether he had been convicted of any previous offenses or adjudicated in juvenile court, and, if so, whether such offenses were crimes against the person or relating to property, and other previous history of antisocial behavior, if any, including any patterns of physical violence; (6) Landera's sophistication and maturity as determined by consideration of his home, his school activities, his emotional attitude and desire to be treated as an adult, his pattern of living, and whether he has had previous contact with

law enforcement agencies and courts and the nature thereof; (7) whether there are facilities particularly available to the juvenile court for Landera's treatment and rehabilitation; (8) whether Landera's best interests and the security of the public may require that he continue in secure detention or under supervision for a period extending beyond his minority and, if so, the available alternatives best suited to this purpose; (9) whether the victim agrees to participate in mediation; (10) whether there is a juvenile pretrial diversion program established pursuant to Neb. Rev. Stat. §§ 43-260.02 to 43-260.07 (Reissue 2008); (11) whether Landera has been convicted of or has acknowledged unauthorized use or possession of a firearm; (12) whether a juvenile court order has been issued for Landera pursuant to Neb. Rev. Stat. § 43-2,106.03 (Reissue 2008); (13) whether Landera is a criminal street gang member; and (14) such other matters as the county attorney deems relevant to his or her decision. See Neb. Rev. Stat. § 43-276 (Cum. Supp. 2010).

[9,10] In order to retain the proceedings, the court does not need to resolve every factor against the juvenile; moreover, there are no weighted factors and no prescribed method by which more or less weight is assigned to each specific factor. *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009). It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile. *Id.*

Landera does not argue that the trial court failed to adequately consider the factors in § 43-276. Rather, Landera argues that the State's position against moving the case to the juvenile court rested entirely on the fact that Landera would be 19 years old in 6 months and would no longer be subject to the juvenile court at that time. Landera suggests that the State purposely delayed filing charges against him to ensure that there would not be sufficient time for treatment in the juvenile court system and that he would be tried as an adult. The record does not reflect why Landera was not charged until October 2010, whereas the crimes were discovered in February 2010, and there is no evidence that the State intentionally delayed filing charges against him.

Further, the trial court did not rely solely on Landera's age in denying the motion to transfer. The court also noted Landera's maturity, that is, the fact that he was a high school graduate and had also been a college student living independently as an adult. In addition, the court noted that although Landera had no criminal history, the motivation for the offenses appeared to be the desire to view and distribute pornography, predominantly involving young children, and that such sexual preference may be associated with someone afflicted with pedophilia, a very serious and problematic affliction.

We conclude that the trial court did not err in denying Landera's motion to transfer the matter to juvenile court.

Specific Performance of Plea Bargain.

Landera next assigns that the trial court erred in failing to grant his motion for specific performance of the plea bargain by the State. Landera argues that the State did not comply with the plea agreement to recommend probation when it recommended probation with an additional condition that was not part of the agreement. Landera contends that as a result of the State's failure to comply with the agreement, his sentences should be vacated and the cause remanded to the district court for resentencing by a different judge with an order that the State specifically comply with the agreement it made with him.

Landera relies on *State v. Birge*, 263 Neb. 77, 638 N.W.2d 529 (2002), to support his argument. In *Birge*, the Nebraska Supreme Court held that where the State fails to comply with a plea agreement and the defendant objects at sentencing, the defendant is entitled to specific performance of the plea agreement before a new tribunal. The defendant in *Birge* entered into a plea agreement wherein the State agreed to dismiss certain charges and stand silent at the time of sentencing if the defendant entered no contest pleas to the remaining charges. At the sentencing hearing, defense counsel asked that the sentences run concurrently and argued for the minimum sentences allowed by law. The court asked the State if it wished to be heard, and the State responded that it asked the trial court to consider the full range of available sentences. Defense counsel

did not immediately object, but later called the trial court's attention to the fact that the State had agreed as part of the plea agreement to remain silent at sentencing and argued that the prosecutor had violated the agreement by making the comments it made. The State indicated a willingness to withdraw the remarks, and the court indicated that the State's statements had not affected the court's ultimate sentencing of the defendant. Defense counsel again objected to the prosecutor's comments, and the objection was overruled. The court then sentenced the defendant.

On appeal to this court, the defendant in *Birge* assigned as error the trial court's imposition of excessive sentences and the State's violation of the plea agreement. We determined that the prosecutor's comments at sentencing violated the State's plea agreement with the defendant, and we vacated the sentences and remanded the causes to the district court for resentencing before a different judge. See *State v. Birge*, Nos. A-00-984, A-00-1029, 2001 WL 968393 (Neb. App. Aug. 28, 2001) (not designated for permanent publication).

[11,12] The State petitioned the Nebraska Supreme Court for further review, which was granted. The State argued that the defendant had waived all errors with respect to the violation of the plea agreement because although he objected, he did not move to withdraw his pleas in the district court, and, in the alternative, that the error was harmless, as the district court had indicated that it was not influenced by the State's comments. The Supreme Court rejected both of these arguments and found:

> [T]he defendant is precluded from obtaining trial or appellate relief in the form of withdrawal of the plea unless the defendant moves to set aside the plea in the trial court; however, if the defendant objects at the trial level, despite failing to move to withdraw the plea, the defendant is nevertheless entitled at trial and on appeal to consideration of relief in another form, such as specific performance of the plea agreement.

State v. Birge, 263 Neb. 77, 84, 638 N.W.2d 529, 535 (2002). The Supreme Court concluded that because the defendant preserved the issue for review on appeal by noting his objection,

the Court of Appeals properly granted relief in the form of specific performance. The Supreme Court further concluded that once the State had violated the plea agreement at sentencing, the violation could not be cured either by the prosecutor's offer to withdraw the comments or by the trial court's statement that it will not be influenced by the prosecutor's comments in imposing sentence. The Supreme Court affirmed the decision of the Court of Appeals.

In the present case, Landera entered into a plea agreement with the State wherein Landera agreed to enter guilty pleas to 10 counts of possession of child pornography and to receive a psychiatric evaluation and a sex offender evaluation and follow through with all recommendations. In exchange, the State agreed to dismiss the remaining counts and to recommend probation. At the sentencing hearing, the State began its allocution by stating: "In reviewing the presentence [report], again, for today's sentencing, along with the [Diagnostic and Evaluation Center's] evaluation, I'm struck and I can't recommend probation." Landera's counsel immediately objected, read the plea agreement to the court, and requested that the State be ordered to comply with the agreement. The State went on to indicate that it was complying with the agreement, but only with a new condition that was not present in the initial agreement, the new condition being an upfront term of incarceration as a condition of probation. Although the State indicated that it intended to comply with the agreement and recommend probation, it did so only with an additional term not contemplated when the plea agreement was made with Landera.

We conclude that Landera's counsel preserved the issue of the State's violation of the plea agreement for appellate review, and we further conclude that the State violated the plea agreement when it recommended a term of incarceration. Landera is entitled to specific performance of the plea agreement, and therefore, we vacate the sentences and remand the cause to the district court for resentencing by a different judge.

Landera's Sentences.

Landera was sentenced to 30 months to 4 years in prison for each of the 10 counts of possession of child pornography.

Possession of child pornography is a Class IV felony. Neb. Rev. Stat. § 28-813.01(2) (Cum. Supp. 2010). Landera contends, and the State agrees, that the trial court erred in imposing a minimum sentence of 30 months' imprisonment on a Class IV felony because the greatest statutorily allowable minimum is 20 months. Although we have already determined that Landera should be resentenced by a different judge, this issue could come up again in resentencing, and therefore, we address it here.

With regard to sentences for Class IV felonies, Neb. Rev. Stat. § 29-2204(1)(a)(ii)(A) (Reissue 2008) mandates that the sentencing court "shall fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be . . . more than one-third of the maximum term."

[13] The maximum statutory sentence of imprisonment for a Class IV felony is 5 years, or 60 months. See Neb. Rev. Stat. § 28-105 (Reissue 2008). Therefore, since one-third of 60 months is 20 months, Landera could not be sentenced to a minimum of more than 20 months' imprisonment for the conviction of a Class IV felony. See *State v. Bartholomew*, 258 Neb. 174, 602 N.W.2d 510 (1999) (holding that defendant cannot be sentenced to minimum of more than 20 months' imprisonment for conviction of Class IV felony pursuant to § 29-2204(1)(a)(ii)(A)). Therefore, the minimum term of 30 months' imprisonment imposed by the trial court on each charge exceeds the minimum term of imprisonment provided by law.

Landera also argues that the overall sentence imposed for each charge is excessive. Given that Landera will be resentenced, we need not address whether his sentences are excessive.

CONCLUSION

We conclude that the trial court did not err in denying Landera's motion to transfer to juvenile court. We further conclude that the State violated the plea agreement with Landera and that thus, Landera is entitled to specific performance of the plea agreement. Therefore, we vacate Landera's sentences and remand the cause to the district court for resentencing by

a different judge. The State is ordered to specifically comply with the plea agreement it made with Landera when resentencing takes place. We also note for purposes of resentencing that the trial court erred in imposing minimum sentences that exceed the minimum sentence authorized by statute.

SENTENCES VACATED, AND CAUSE REMANDED FOR RESENTENCING.

STATE OF NEBRASKA, APPELLEE, V.
RUSSELL S. PITTMAN, APPELLANT.
817 N.W.2d 784

Filed July 24, 2012. No. A-11-415.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.
3. ____: ____. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
4. ____: ____. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
5. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** To establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), 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. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
6. **Effectiveness of Counsel: Proof: Appeal and Error.** To show prejudice due to 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.
7. **Effectiveness of Counsel: Appeal and Error.** When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant. That is, courts begin by assessing the strength of the claim appellate counsel failed to raise.

8. ____: ____. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal. When a case presents layered ineffectiveness claims, an appellate court determines the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
9. ____: ____. If trial counsel was not ineffective, then the defendant suffered no prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim.
10. ____: ____. If trial counsel was ineffective, then the defendant suffered prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim.
11. ____: ____. When a defendant suffers prejudice from appellate counsel's failure to bring a claim of ineffective assistance of trial counsel, an appellate court considers whether appellate counsel's failure to bring the claim qualifies as a deficient performance under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In other words, the appellate court examines whether the claim's merit was so compelling that appellate counsel's failure to raise it amounted to ineffective assistance of appellate counsel. If it was, then the defendant suffered ineffective assistance of appellate counsel. If it was not, then the defendant was not denied effective appellate counsel.
12. **Kidnapping: Sentences.** Neb. Rev. Stat. § 28-313(3) (Reissue 2008) does not create a separate offense, but is a mitigating factor which may reduce a defendant's sentence if he or she is convicted on a charge of kidnapping.
13. ____: ____. Neb. Rev. Stat. § 28-313 (Reissue 2008) creates a single criminal offense, even though it is punishable by two different ranges of penalties depending on the treatment accorded to the victim.
14. ____: ____. Neb. Rev. Stat. § 28-313(3) (Reissue 2008) provides mitigating factors which may reduce the sentence of those charged under § 28-313, and their existence or nonexistence should be determined by the trial judge.
15. **Criminal Attempt: Kidnapping: Sentences.** An attempted kidnapping in which Neb. Rev. Stat. § 28-313(3) (Reissue 2008) is applicable should be classified as a Class III felony offense, for which Neb. Rev. Stat. § 28-105 (Reissue 2008) provides the applicable sentencing range.
16. **Kidnapping: Sentences: Effectiveness of Counsel.** If trial counsel fails to object when the court imposed a sentence based on the classification of a kidnapping charge wherein Neb. Rev. Stat. § 28-313(3) (Reissue 2008) is applicable as a Class II felony offense and imposed a sentence which exceeded the statutory range available for a Class III felony offense, trial counsel's performance is deficient. Such deficient performance clearly prejudices the defendant, as it subjects him or her to a sentence which exceeds the statutory range available for the crime of which he or she was convicted.
17. **Kidnapping: Sentences: Effectiveness of Counsel: Appeal and Error.** If a defendant's appellate counsel does not raise on direct appeal any assertion that his or her trial counsel was ineffective in failing to object when the court imposed a sentence based on the classification of a kidnapping charge wherein Neb. Rev.

Stat. § 28-313(3) (Reissue 2008) is applicable as a Class II felony offense, appellate counsel's failure is clearly deficient performance and is clearly prejudicial to the defendant.

18. **Attorney and Client: Trial: Testimony: Waiver.** A defendant who has been fully informed of the right to testify may not acquiesce in his or her counsel's advice that he or she not testify, and then later claim that he or she did not voluntarily waive such right.
19. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** Trial counsel is afforded due deference to formulate trial strategy and tactics, and when reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Affirmed in part, and in part reversed and remanded with directions.

Leo J. Eskey, of Leo J. Eskey Law Offices, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

MOORE and PIRTLE, Judges.

PER CURIAM.

I. INTRODUCTION

Russell S. Pittman appeals from an order of the district court for Saunders County denying his motion for postconviction relief following an evidentiary hearing and from an order denying his motion to alter or amend judgment. Pittman was initially convicted on a variety of charges, including attempted kidnapping. On appeal, Pittman asserts he was entitled to postconviction relief because he received ineffective assistance of counsel, because the sentence imposed by the trial court on the attempted kidnapping charge was void, and because his conviction on that charge was not final. Pittman also asserts that the district court erred in denying his motion to alter or amend requesting additional findings of fact. We find merit to Pittman's assertion that his counsel was ineffective for not challenging the classification of his attempted kidnapping charge, but find no merit to the remainder of Pittman's assertions. As such, the order denying Pittman's motion for postconviction relief is affirmed in part and in

part reversed, and the cause is remanded with directions. The order denying Pittman's motion to alter or amend judgment is affirmed.

II. BACKGROUND

On September 1, 1995, Pittman was convicted after a bench trial of several offenses, including attempted kidnapping. The trial court imposed sentences for each conviction and ordered them to be served consecutively. With respect to the attempted kidnapping conviction, the court sentenced Pittman for a Class II felony offense, which is what the State alleged was the appropriate classification in the information charging Pittman. Pittman appealed his convictions and sentences to this court, and we affirmed the decisions of the trial court. See *State v. Pittman*, 5 Neb. App. 152, 556 N.W.2d 276 (1996).

On August 3, 2009, Pittman filed an amended petition for postconviction relief. In his amended petition, Pittman alleged a variety of grounds for postconviction relief, including assertions that he had received ineffective trial and appellate counsel, that the attempted kidnapping charge should have been classified as a Class III felony offense, and that his due process rights were violated. An evidentiary hearing was held on the amended petition, and following the hearing, the trial court entered an order denying and dismissing Pittman's amended petition for postconviction relief.

Pittman filed a motion to alter or amend judgment requesting that the trial court amend its order to include findings of fact as required under Neb. Rev. Stat. § 29-3001 (Reissue 2008). The trial court subsequently entered an order denying Pittman's motion to alter or amend judgment. This appeal followed.

III. ASSIGNMENTS OF ERROR

Pittman assigns, restated, that the district court erred in denying relief for four reasons. First, Pittman asserts that the court erred in failing to find that his trial and appellate counsel had been ineffective. Second, Pittman asserts that the court erred in failing to find that the sentence imposed on the attempted

kidnapping conviction was void. Third, Pittman asserts that the court erred in failing to find that his conviction on that charge was not final. Finally, Pittman asserts that the court erred in failing to grant his motion to alter or amend to include more specific factual findings.

IV. STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Golka*, 281 Neb. 360, 796 N.W.2d 198 (2011).

[2-4] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (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 articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Davlin, supra*.

V. ANALYSIS

1. Ineffective Assistance of Counsel Claims

Pittman first asserts that the district court erred in denying postconviction relief because the court erred in not finding that his trial and appellate counsel were ineffective. Pittman asserts that his appellate counsel was ineffective for failing to raise a variety of assertions regarding the alleged ineffectiveness of his trial counsel, including his trial counsel's failure to challenge the improper classification of the attempted kidnapping charge and his trial counsel's failure to properly investigate the case, consult with Pittman, and make appropriate objections. We find merit to the assertion concerning the proper classification of the attempted kidnapping charge, but no merit to the remainder of Pittman's assertions.

[5,6] To establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on

direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington, supra*, 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. *State v. Davlin, supra*. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *Id*. 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*.

[7,8] When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant. That is, courts begin by assessing the strength of the claim appellate counsel failed to raise. *Id*. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal. When, as here, the case presents layered ineffectiveness claims, we determine the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the *Strickland* test. See *State v. Davlin, supra*.

[9-11] If trial counsel was not ineffective, then the defendant suffered no prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim. *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009). If trial counsel was ineffective, then the defendant suffered prejudice when appellate counsel failed to bring such a claim. See *id*. We must then consider whether appellate counsel's failure to bring the claim qualifies as a deficient performance under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In other words, we examine whether the claim's merit was so compelling that appellate counsel's failure to raise it amounted to ineffective assistance of appellate counsel. If it was, then the defendant suffered ineffective assistance of appellate counsel. If it was not, then the defendant was not denied effective appellate counsel. *State v. Davlin, supra*.

(a) Counsel's Failure to Challenge Classification of Crime

Pittman first asserts that his appellate counsel was ineffective in failing to raise on direct appeal that his trial counsel had been ineffective for failing to challenge the classification of his attempted kidnapping charge. The record reflects that the attempted kidnapping charge was treated as a Class II felony offense at Pittman's arraignment and at his sentencing, that his trial counsel did not object or raise to the trial court that the classification was erroneous and that the proper classification should have been a Class III felony offense, and that his appellate counsel failed to raise on direct appeal that such failure was ineffective assistance of trial counsel. Because we conclude that the proper classification of the attempted kidnapping charge should have been a Class III felony offense, we find merit to Pittman's assertion in this appeal.

As noted, Pittman was charged with attempted kidnapping. The State asserted that he had attempted to abduct the victim with intent to terrorize her or to commit another felony. In the opinion issued by this court upon Pittman's direct appeal, we concluded that the State presented sufficient evidence at trial to demonstrate that he took a substantial step toward kidnapping the victim. The evidence at trial, however, also demonstrated that Pittman never succeeded in restraining the victim and did not cause her any serious bodily injury.

At the time of Pittman's conviction, Neb. Rev. Stat. § 28-313(1) (Reissue 2008) provided that a person commits kidnapping if he or she abducts another with intent to commit a felony. Neb. Rev. Stat. § 28-312(2) (Reissue 2008) defines the term "abduct" as meaning to restrain a person with intent to prevent his or her liberation, and § 28-312(1) defines the term "restrain" as meaning to restrict a person's movement in such a manner as to interfere substantially with his or her liberty.

At Pittman's trial, there was no dispute that he had not succeeded in restraining the victim's movement in such a manner as to substantially interfere with her liberty, had not successfully abducted her, and had not actually kidnapped her. Instead,

the charge and subsequent conviction were for his unsuccessful attempt to do so.

Because Pittman was charged with and convicted of a criminal attempt, classification of the charge against him required application of Neb. Rev. Stat. § 28-201(4) (Reissue 1995). That statute provided that criminal attempt is a Class II felony offense when the crime attempted is a Class IA felony offense and that criminal attempt is a Class III felony offense when the crime attempted is a Class II felony offense.

At the time of Pittman's attempt conviction, § 28-313(2) provided that kidnapping is a Class IA felony offense, unless § 28-313(3) was applicable. At that time, § 28-313(3) provided that "[i]f the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury, prior to trial," then the offense was classified as a Class II felony offense. Thus, if Pittman had been successful in kidnapping the victim, the classification of the kidnapping charge that could have been brought against him would have depended on whether the victim had been released or liberated without suffering serious bodily injury. § 28-313(2) and (3).

[12-14] The Nebraska Supreme Court has held that § 28-313(3) does not create a separate offense, but is a mitigating factor which may reduce a defendant's sentence if he or she is convicted on a charge of kidnapping. See *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002). Section 28-313 creates a single criminal offense, even though it is punishable by two different ranges of penalties "depending on the treatment accorded to the victim." *State v. Becerra*, 263 Neb. at 759, 642 N.W.2d at 148. As such, § 28-313(3) provides mitigating factors which may reduce the sentence of those charged under § 28-313, and their existence or nonexistence should be determined by the trial judge. *State v. Becerra, supra*.

As a result, the issue before us is really whether Pittman's conviction for attempted kidnapping should have been considered a Class II felony offense (because the crime which he attempted was considered a Class IA felony offense) or a Class III felony offense (because the crime which he attempted was considered a Class II felony offense) at the time of his

sentencing. Although the court did not indicate at sentencing how the court was classifying the charge against Pittman, the court imposed a sentence of 20 to 25 years' imprisonment; that sentence would have exceeded the statutory range for a Class III felony offense, but was within the statutory range for a Class II felony offense. See Neb. Rev. Stat. § 28-105 (Reissue 1989).

As the Supreme Court noted in *State v. Becerra*, 263 Neb. at 759, 642 N.W.2d at 148, the effect of § 28-313(3) is to provide a different classification and range of penalty for kidnapping "depending on the treatment accorded to the victim." When a victim is kidnapped, § 28-313(3) provides that the classification is lowered to a Class II felony offense and the sentencing range is mitigated when the victim is released or liberated without suffering serious bodily injury. In the present case, where the victim was never actually abducted such that she could or needed to be released or liberated, the question asked by the sentencing judge should have been whether she suffered serious bodily injury; if not, the statutory mitigation in § 28-313(3) should have been applied, the court should have considered the crime that Pittman was convicted of attempting to be a Class II felony offense, and the subsequent attempt conviction should have been classified as a Class III felony offense.

[15] As noted above, there was no dispute in this case that Pittman did not succeed in restraining or abducting the victim, and there was no dispute that the victim suffered no serious bodily injury. Indeed, at sentencing, the court concluded that Pittman's actions "did cause or threaten serious harm, *although not bodily harm*." As such, it is clear that the attempted kidnapping in this case should have been classified as a Class III felony offense, for which the applicable sentencing range at the time was 1 to 20 years' imprisonment. To hold otherwise and classify the charge against Pittman as a Class II felony offense, as the sentencing court did, would suggest the absurd result that a defendant who is unsuccessful in attempting to restrain or abduct a victim would be subject to the same sentence as a defendant who is actually successful in abducting a victim if that victim is released or liberated without suffering serious bodily injury. See *State v. Stein*, 241 Neb. 225, 486 N.W.2d

921 (1992) (in construing statute, it is presumed Legislature intended sensible, rather than absurd, result).

[16] At sentencing, Pittman's trial counsel failed to argue that the mitigating factors of § 28-313(3) were applicable and that the sentencing court should have classified the charge as a Class III felony offense. Pittman's trial counsel failed to object when the court imposed a sentence based on the classification of the charge as a Class II felony offense and imposed a sentence which exceeded the statutory range available for a Class III felony offense. Therefore, trial counsel's performance was deficient. Such deficient performance clearly prejudiced Pittman, as it subjected him to a sentence which exceeded the statutory range available for the crime of which he was convicted.

[17] Pittman's appellate counsel did not raise on direct appeal any assertion that his trial counsel had been ineffective in this regard. This failure was clearly deficient performance and was clearly prejudicial to Pittman. As such, we find that the district court in this postconviction action erred in failing to grant Pittman relief on this claim of ineffective assistance of counsel. We reverse Pittman's sentence on the attempted kidnapping conviction and remand the cause with directions to the district court to vacate Pittman's sentence on the attempted kidnapping conviction and to resentence him based on the statutory penalties for a Class III felony applicable at the time of Pittman's conviction.

(b) Other Claims of Ineffective Assistance of Counsel

Pittman also argues that his appellate counsel was ineffective in failing to raise on direct appeal other alleged instances of trial counsel's ineffectiveness. Pittman asserts that his trial counsel was ineffective in failing to adequately investigate Pittman's case, in failing to adequately consult with him, and in failing to make critical objections in Pittman's defense. We find no merit to these assertions.

Pittman alleges that his trial counsel failed to investigate certain aspects of the case, which Pittman had asked him to do, including the protection order that served as the basis for his

arrest, the location of his arrest, the condition of his vehicle, his explanation for items found in his vehicle, dispatch tapes and calls to the 911 emergency dispatch service, and notes written by Pittman located in his home. Based on the record before us, we conclude that Pittman has failed to demonstrate deficient performance or any prejudice in trial counsel's failure to investigate in these areas.

Pittman next contends that his trial counsel failed to investigate or call both the woman who was currently Pittman's girlfriend at the time of the crimes and a former girlfriend as defense witnesses after Pittman gave their names to trial counsel. Pittman admitted on cross-examination at the postconviction evidentiary hearing that trial counsel did contact and speak with both women. In addition, trial counsel testified that if he felt that the current girlfriend or anyone else would have been beneficial to Pittman's defense, he would have called him or her to testify. Again, Pittman has failed to demonstrate deficient performance or any prejudice in trial counsel's actions. We find no merit to Pittman's assertions that his appellate counsel was ineffective for failing to raise on appeal claims related to his trial counsel's alleged failure to investigate the case.

Pittman next contends that his trial counsel did not spend a sufficient amount of time consulting with him before his trial. He contends that his primary contact with trial counsel was only minutes before or after hearings and that this time was not sufficient. However, trial counsel's application for attorney fees documents numerous telephone calls between Pittman and trial counsel and Pittman acknowledged at the evidentiary hearing that there were numerous telephone calls between the two. Trial counsel testified that he could not recall the conversations with Pittman, but that as part of standard procedures with clients, he would discuss the pros and cons of a jury trial, whether the defendant should testify, and possible defenses. Pittman has not indicated there was information that he did not have the time to convey or that he was not able to convey to trial counsel in the conversations they had over the telephone or at his hearings. Pittman has failed to demonstrate that trial counsel was deficient or that he was prejudiced by trial counsel's actions.

[18,19] Pittman also contends that his trial counsel did not have a meaningful conversation with him about his right to testify. Pittman testified at the evidentiary hearing that he had a discussion with trial counsel on the first and last days of trial about whether he would testify. Trial counsel did not recall having specific conversations with Pittman about his testifying but assumed that they did have such conversations and that they decided he would not testify. According to Pittman's own testimony, he was informed by his trial counsel that he could testify, but he chose not to do so. A defendant who has been fully informed of the right to testify may not acquiesce in his or her counsel's advice that he or she not testify, and then later claim that he or she did not voluntarily waive such right. *State v. Rhodes*, 277 Neb. 316, 761 N.W.2d 907 (2009). Furthermore, trial counsel is afforded due deference to formulate trial strategy and tactics, and when reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *State v. Jim*, 278 Neb. 238, 768 N.W.2d 464 (2009). Pittman has failed to demonstrate that trial counsel's performance was deficient in regard to Pittman's right to testify. We find no merit to Pittman's assertion that his appellate counsel was ineffective for not raising on appeal claims related to his trial counsel's alleged failure to consult with him.

Pittman next argues that his trial counsel was ineffective in failing to object to a violation of the sequestration order. He argues that trial counsel failed to object to the presence of a particular witness for the State in the courtroom at the suppression hearing because her presence was a violation of the sequestration order. However, the record does not show that she entered the courtroom during the suppression hearing. Further, that witness did not testify at the suppression hearing, and Pittman testified at the evidentiary hearing on his postconviction motion that her testimony at trial was limited and was not significant. Pittman has failed to demonstrate that trial counsel's performance in regard to the sequestration order was deficient or that he was prejudiced by trial counsel's actions. We find no merit to Pittman's assertion that his appellate counsel was ineffective for not raising on appeal claims related to

his trial counsel's alleged failure to object to this alleged violation of the sequestration order.

Pittman has failed to show that trial counsel was ineffective in any other regard and, in turn, has failed to show that appellate counsel was ineffective in failing to raise on direct appeal any other instances of ineffective assistance of trial counsel. See *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009). As such, with the exception of our finding above concerning trial counsel's failure to challenge the improper classification of the attempted kidnapping charge and appellate counsel's failure to assert on appeal that trial counsel was ineffective in that regard, we find no merit to Pittman's assertions of ineffective assistance of counsel.

2. Void Sentence on Attempted Kidnapping Conviction

Pittman next argues that the trial court erred in failing to find that his sentence for attempted kidnapping was void because the attempted kidnapping conviction should have been considered a Class III felony offense, not a Class II felony offense. As we determined above, the attempted kidnapping conviction in this case should have been classified as a Class III felony offense for purposes of sentencing, rather than a Class II felony offense, and Pittman is entitled to be resentenced on that conviction in accordance with our analysis above.

3. Finality of Pittman's Conviction

Pittman next contends that his convictions are not yet final and that therefore, we can retroactively apply *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), to Pittman's case and conclude that the search of Pittman's vehicle following his arrest violated the Fourth Amendment. In *Gant*, the Court held that a warrantless search of a defendant's vehicle after the defendant has been handcuffed and placed in the back of a squad car violates the Fourth Amendment's prohibition of unreasonable searches and seizures. The Court noted that such searches are illegal unless the defendant "is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Arizona v. Gant*,

556 U.S. at 351. Pittman argues that based on *Gant*, the search of his vehicle following his arrest violated his Fourth Amendment right against unreasonable searches and seizures and we should exclude the evidence discovered due to the illegal search.

Gant was decided in 2009, well after Pittman's convictions in 1995. Pittman argues, however, that we can retroactively apply *Gant* to his case because his convictions are not yet final. In support of this argument, he relies on *United States v. Johnson*, 457 U.S. 537, 562, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982), in which the Court held that "a decision of [the U.S. Supreme Court] construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered." In *Johnson*, a decision of the Court construing the Fourth Amendment was rendered while the defendant had a petition for rehearing pending. The Court affirmed the U.S. Court of Appeals for the Ninth Circuit's retroactive application of such Fourth Amendment case to the defendant's case.

In the present case, Pittman argues that his convictions are not yet final because his sentence for attempted kidnapping was void from the moment it was imposed and subject to remand. We find no merit to this argument. Although his sentence for attempted kidnapping was improper and he will be resentenced on such conviction, Pittman's convictions were final at the time the decision in *Gant* was rendered.

4. Motion to Alter or Amend Judgment

Finally, Pittman asserts that the trial court erred in denying his motion to alter or amend judgment because the court's order denying his amended petition for postconviction relief failed to determine the issues and make findings of fact as required by § 29-3001. This statute provides that if a court grants a hearing on a motion for postconviction relief, it is obligated to "determine the issues and make findings of fact and conclusions of law." *Id*. We conclude that the court's order was sufficient to satisfy the statute.

In its order, the trial court first set forth a procedural summary of the case. It then stated that Pittman was arguing that

his trial counsel was ineffective, and it set out the applicable case law for ineffective assistance of counsel claims. The court concluded that "[t]he record reflects that the issues raised in [Pittman's] application for postconviction relief were both known to [Pittman] and apparent from the record. The issues related to the performance of trial counsel are procedurally barred." Next, the court stated that Pittman was also arguing that his appellate counsel was ineffective for failing to argue on appeal that trial counsel was ineffective. The court set out case law applicable to ineffective assistance of appellate counsel claims and then noted that the issues that were raised and decided on direct appeal could not be raised again in the postconviction action, because they were barred, and that the court did not consider them. The court further stated:

> After review of all of the evidence, argument and briefing of the parties, the court concludes that [Pittman] has failed to demonstrate that appellate counsel's performance was deficient or that appellate counsel failed to raise a claim—as to the performance of trial counsel—which failure resulted in actual prejudice to [Pittman].

We conclude that the trial court's order denying Pittman's amended petition for postconviction relief is sufficient to satisfy § 29-3001 in that it determines the issues and makes findings of fact and conclusions of law. Accordingly, the trial court did not err in denying Pittman's motion to alter or amend judgment. We find no merit to Pittman's assertions to the contrary.

VI. CONCLUSION

We conclude that Pittman's trial counsel and appellate counsel were ineffective in failing to raise at sentencing and on direct appeal that the attempted kidnapping conviction was a Class III felony offense for purposes of sentencing, rather than a Class II felony offense. We reverse Pittman's sentence for attempted kidnapping and remand the cause with directions to the district court to vacate Pittman's sentence on the attempted kidnapping conviction and to resentence him on the conviction based on the then-existing statutory penalties for a Class III felony offense. The remainder of the district court's

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

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

IRWIN, Judge, participating on briefs.

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

818 N.W.2d 624

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

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

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

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

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

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

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

MOORE, Judge.

INTRODUCTION

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ASSIGNMENTS OF ERROR

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

STANDARD OF REVIEW

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

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

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

ANALYSIS

Child Support.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Alimony.

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

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

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the

> supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

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

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

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

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

Division of Retirement Accounts.

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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

2. **Political Subdivisions: Police Officers and Sheriffs: Jurisdiction.** Neb. Rev. Stat. § 29-215(1) (Reissue 2008) provides that a law enforcement officer has the power and authority to enforce the laws of this state and of the political subdivision which employs the law enforcement officer or otherwise perform the functions of that office anywhere within his or her primary jurisdiction.
3. **Police Officers and Sheriffs: Arrests: Jurisdiction.** Neb. Rev. Stat. § 29-215(2) (Reissue 2008) provides that a law enforcement officer beyond his or her primary jurisdiction has the power and authority to arrest and detain suspects in a variety of specific situations. One of those situations is set forth in § 29-215(2)(d), which extends a law enforcement officer's authority outside his or her primary jurisdiction pursuant to an interlocal agreement.
4. **Governmental Subdivisions: Police Officers and Sheriffs: Jurisdiction.** Any municipality or county may, under the provisions of the Interlocal Cooperation Act or the Joint Public Agency Act, enter into a contract with any other municipality or county for law enforcement services or joint law enforcement services. Under such an agreement, law enforcement personnel may have such enforcement authority within the jurisdiction of each of the participating political subdivisions if provided for in the agreement.
5. **Statutes.** The meaning of a statute is a question of law.
6. **Criminal Law: Statutes.** It is a fundamental principle of statutory construction that penal statutes be strictly construed.
7. **Statutes: Legislature: Intent.** The principal objective of construing a statute is to determine and give effect to the legislative intent of the enactment.
8. ____: ____: ____. In construing 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.
9. **Criminal Law: Statutes: Words and Phrases.** The Nebraska Supreme Court has referred to statutory provisions of chapter 29 of the Nebraska Revised Statutes concerning criminal procedure in Nebraska as "penal statutes."
10. **Governmental Subdivisions: Police Officers and Sheriffs: Jurisdiction.** The mere existence of an interlocal agreement does not necessarily mean that such agreement confers authority for any and all actions by a law enforcement officer operating outside his or her primary jurisdiction.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Conviction and sentence vacated, and case remanded for further proceedings.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, and Emily Prest, Senior Certified Law Student, for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

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

IRWIN, Judge.

I. INTRODUCTION

Luke R. Ohlrich appeals his burglary conviction. On appeal, Ohlrich challenges the district court's denial of his motion to suppress and asserts that there was insufficient evidence to support the conviction. We find that the district court erred in denying Ohlrich's motion to suppress because the State failed to demonstrate that the police officer who arrested him had jurisdiction to make an arrest outside the officer's primary jurisdiction. We vacate Ohlrich's conviction and sentence, and remand the case for further proceedings.

II. BACKGROUND

This case began when the Bellevue Police Department began investigating an April 11, 2010, burglary of an apartment in Bellevue, Sarpy County, Nebraska. The items stolen included two televisions and a laptop computer. Det. Michael Legband was assigned to conduct the investigation.

Detective Legband reviewed Douglas County and Sarpy County "pawn records" and discovered that Ohlrich had pawned several items on April 23, 2010, including two televisions with the same model number as those stolen from the apartment. Detective Legband also discovered that Ohlrich's last known address was just down the hall from the apartment that had been burglarized. Finally, Detective Legband received a telephone call from an anonymous caller, indicating that Ohlrich and another suspect had been involved in the burglary.

Detective Legband attempted to locate Ohlrich in Bellevue, but was unsuccessful. Detective Legband, accompanied by Det. Roy Howell, then decided to travel to Omaha, Douglas County, Nebraska, to speak with the other suspect at his residence. When the two detectives arrived at the suspect's residence, they identified Ohlrich in front of the residence on the sidewalk. Detective Legband then had Detective Howell contact the Omaha Police Department, because the detectives were outside of their primary jurisdiction.

The record contains the following testimony of Detective Legband concerning the existence of an interlocal agreement

between the Bellevue Police Department and the Omaha Police Department:

> [Detective Legband: W]hen I drove up to that address, I — I saw . . . Ohlrich . . . standing on the sidewalk in front of the residence when we pulled up.
>
> Q. And then was it at that point a decision was made to contact the Omaha Police Department?
>
> A. Yes. I — I started stepping out of the car, and I advised Detective Howell to go ahead and call radio, tell 'em to get Omaha over.
>
> Q. Why would you call and get Omaha involved?
>
> A. Well, because if — because of the fact that . . . Ohlrich was a suspect, I thought we'd probably have enough probable cause to arrest him already, and because of the interlocal agreement, if we were going to make a custodial arrest, we wanted to have the Omaha police with us.
>
> Q. So it's your understanding that you have an interlocal agreement with the Omaha Police Department?
>
> A. The metro area agencies, yes.
>
> Q. And that you're required to notify, specifically in this case, the Omaha Police Department that you were there and may make an arrest?
>
> A. Yes.

Detective Legband made contact with Ohlrich, identified himself, and explained that he was investigating the burglary. Detective Legband referenced the two televisions that Ohlrich had pawned, and he informed Ohlrich that he believed they had been stolen. Ohlrich told Detective Legband that he had obtained the televisions "on E-Bay or one of the online things." While Detectives Legband and Howell spoke with Ohlrich, Ohlrich "seemed to be nervous and kind of acting antsy," and Detective Howell handcuffed Ohlrich.

Ohlrich was then placed in the front seat of Detective Legband's car. After being placed in the car, Ohlrich made a statement indicating that "he was involved." Detective Legband then read Ohlrich his *Miranda* rights.

After approximately 30 minutes, an Omaha Police Department officer arrived on the scene. Detective Legband

informed the Omaha Police Department officer that the detectives wanted to arrest and transport Ohlrich to Bellevue to speak with him, "and she said that was fine, that she didn't know anything about the burglary anyway." Ohlrich was transported to Bellevue and agreed to make a written statement. In his written statement, Ohlrich admitted to entering the apartment and stealing items, including two televisions and a laptop. He also detailed how he placed the items in a garage, contacted the other suspect, and then sold the items.

On June 10, 2010, the State charged Ohlrich by information with burglary. On August 24, Ohlrich filed a motion to suppress. In the motion to suppress, Ohlrich alleged that all physical evidence and statements should be suppressed, and he asserted that the arrest was "by Bellevue detectives operating outside their primary jurisdiction and not pursuant to an interlocal agreement with the Douglas County authorities." Ohlrich alleged that his written statement was "fruit of the tree of his illegal arrest."

A hearing was held on Ohlrich's motion to suppress, at which hearing testimony of the above factual background was received. On January 25, 2011, the district court entered an order overruling the motion to suppress. In the order, the court found that the arrest was authorized pursuant to Neb. Rev. Stat. § 29-215 (Reissue 2008), which, among other things, authorizes law enforcement officers to operate outside their primary jurisdiction when they have authority under an interlocal agreement or contract for joint law enforcement services.

After a trial, Ohlrich was found guilty and sentenced. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Ohlrich has assigned two errors. First, Ohlrich asserts that the district court "erred in overruling the motion to [s]uppress because the Sarpy [C]ounty law enforcement officers arrested [Ohlrich] outside their primary jurisdiction . . . without authorization for the arrest under [§] 29-215." Second, Ohlrich asserts that "[i]f the trial court had properly excluded the illegally obtained confession there would not have been sufficient evidence . . . ."

IV. ANALYSIS

[1] Ohlrich challenges the authority of Detectives Legband and Howell, detectives in Bellevue, Sarpy County, to execute a warrantless arrest in Omaha, Douglas County. Ohlrich argues in his brief that "the plain and ordinary meaning of [§] 29-215, a penal statute that must be strictly construed, compelled the trial court to sustain [Ohlrich's] [m]otion to [s]uppress on the jurisdictional issue alone." Brief for appellant at 14. We agree.

[2] Section 29-215(1) provides that "[a] law enforcement officer has the power and authority to enforce the laws of this state and of the political subdivision which employs the law enforcement officer or otherwise perform the functions of that office *anywhere within his or her primary jurisdiction*." (Emphasis supplied.) There is no dispute in this case that Detectives Legband and Howell were employed by the Bellevue Police Department and that their primary jurisdiction was Bellevue, in Sarpy County. There is also no dispute that the arrest of Ohlrich occurred at an Omaha residence, in Douglas County.

[3,4] Section 29-215(2) provides that a law enforcement officer "beyond his or her primary jurisdiction . . . has the power and authority . . . to arrest and detain suspects" in a variety of specific situations. One of those situations is set forth in § 29-215(2)(d), which extends a law enforcement officer's authority outside his or her primary jurisdiction pursuant to an interlocal agreement. That section, in part, specifies:

> Any municipality or county may, under the provisions of the Interlocal Cooperation Act or the Joint Public Agency Act, enter into a contract with any other municipality or county for law enforcement services or joint law enforcement services. Under such an agreement, law enforcement personnel *may have such enforcement authority* within the jurisdiction of each of the participating political subdivisions *if provided for in the agreement*.

Id. (emphasis supplied).

[5] The meaning of a statute is a question of law. *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004). On a question of law, an appellate court is obligated to reach a

conclusion independent of the determination reached by the court below. *Id*.

[6-9] It is a fundamental principle of statutory construction that penal statutes be strictly construed. *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011). The principal objective of construing a statute is to determine and give effect to the legislative intent of the enactment. *Id*. In construing 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. *Id*. The Nebraska Supreme Court has referred to statutory provisions of chapter 29 of the Nebraska Revised Statutes concerning criminal procedure in Nebraska as "penal statutes." See *State v. Stafford*, 278 Neb. 109, 767 N.W.2d 507 (2009).

Statutory language is to be given its plain and ordinary meaning. *State v. Warriner, supra*. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Id*. It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it the province of a court to read anything plain, direct, or unambiguous out of a statute. *Id*.

In the present case, the issue is whether Detectives Legband and Howell were authorized to execute a warrantless arrest outside their primary jurisdiction. There is no dispute that they did not have a warrant for Ohlrich's arrest, and there is no dispute that they arrested Ohlrich outside their primary jurisdiction.

Ohlrich asserted in his motion to suppress that the detectives lacked authority to execute the arrest outside their primary jurisdiction. There was testimony adduced concerning an interlocal agreement, and the trial court specifically found that the detectives had authority pursuant to an interlocal agreement. On appeal, Ohlrich assigned as error that the detectives lacked authority to arrest outside their primary jurisdiction and argued that the plain language of § 29-215 was sufficient to demonstrate a lack of authority. Although Ohlrich's argument on appeal is primarily focused on arguing that there was no "fresh attempt to apprehend" a suspect (for which authority

beyond an officer's primary jurisdiction is conferred by separate provisions of § 29-215), the issue of whether an interlocal agreement authorized the detectives' actions was before the trial court and is before this court.

The plain language of § 29-215(2)(d), set forth above, indicates that a law enforcement officer "may" have authority to arrest or detain a suspect outside his or her primary jurisdiction "if" authorized by an interlocal agreement. The trial court found that there was an agreement authorizing the actions of the Bellevue detectives in this case, and the State asserts on appeal that "Detective Legband testified that the Bellevue Police Department has an interlocal agreement with the other metro agencies, including the Omaha Police Department, which gives each agency authority in the jurisdictions of the other metro agencies." Brief for appellee at 14. We conclude that this is an overstatement of Detective Legband's testimony.

We set forth above the entirety of the testimony adduced concerning the interlocal agreement. That testimony indicated that there was "an interlocal agreement" between the Bellevue Police Department and other "metro area agencies" and that the agreement required the detectives "to notify . . . that [they] were there and may make an arrest." There was also testimony that an Omaha Police Department officer arrived on the scene and that when she was informed there was an intent to arrest Ohlrich, she gave consent to the arrest. There was not, however, any testimony concerning the actual authority conferred by the interlocal agreement to establish that this arrest was actually something for which the agreement authorized an arrest outside the detectives' primary jurisdiction.

[10] The plain language of the statute indicates that authority may be conferred *if* so provided in the interlocal agreement. It is apparent that the mere existence of *an* interlocal agreement does not necessarily mean that such agreement confers authority for any and all actions by a law enforcement officer operating outside his or her primary jurisdiction. Neb. Rev. Stat. § 13-804 (Reissue 2007) (the Interlocal Cooperation Act referred to in § 29-215), for example, sets forth the guidelines for the enactment of interlocal agreements and specifies a variety of details that must be included for such an agreement

to be effective. Similarly, Neb. Rev. Stat. § 13-2504 (Reissue 2007) (the Joint Public Agency Act referred to in § 29-215) sets forth the guidelines for the enactment of interlocal agreements and specifies a variety of details that must be included for such an agreement to be effective. There was no testimony in this case to indicate that the interlocal agreement between the Bellevue Police Department and the other "metro area agencies" authorized the warrantless arrest of Ohlrich by the detectives.

While an interlocal agreement could exist that authorizes Bellevue law enforcement officers to arrest or detain suspects in Omaha or Douglas County, and while the interlocal agreement referred to by Detective Legband in this case may authorize this conduct, the State failed to adduce evidence to establish that. As a result, the district court erred in finding that the evidence adduced at the motion to suppress hearing established that the arrest was authorized by the interlocal agreement and erred in not suppressing evidence subsequently obtained. As such, we vacate Ohlrich's conviction and sentence, and remand the case for further proceedings. The district court is directed to grant the motion to suppress and conduct further proceedings accordingly. See *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007) (Double Jeopardy Clause does not forbid retrial so long as sum of evidence admitted by trial court, whether erroneously or not, would have been sufficient to sustain guilty verdict).

V. CONCLUSION

The district court erred in finding that the arrest was authorized by an interlocal agreement because the State failed to demonstrate that the interlocal agreement authorized the action of the detectives in this case. We vacate Ohlrich's conviction and sentence, and remand the case for further proceedings.

CONVICTION AND SENTENCE VACATED, AND CASE REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. RANDALL J. BROMM, APPELLANT.

819 N.W.2d 231

Filed August 7, 2012. No. A-11-718.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Courts: Appeal and Error.** Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.
3. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion.
4. **Constitutional Law: Warrantless Searches.** Warrantless searches are generally unreasonable under the Fourth Amendment, subject to a limited number of specific exceptions, including (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.
5. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
6. **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. 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.
7. **Arrests: Police Officers and Sheriffs.** If an adjunct to the law enforcement team supplies erroneous information to a police officer who then makes an arrest based on such information, the good faith exception to the exclusionary rule does not apply.
8. **Warrantless Searches: Proof.** The State bears the burden of proving that the good faith exception to the exclusionary rule applies in the case of unconstitutional warrantless searches and seizures.
9. **Arrests: Police Officers and Sheriffs: Proof.** The State does not meet its burden of proving that the good faith exception to the exclusionary rule set forth in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), applies where it fails to show that erroneous information from dispatch upon which the arresting officer relied did not come from an adjunct to law enforcement.

Appeal from the District Court for Washington County, JOHN E. SAMSON, Judge, on appeal thereto from the County Court for Washington County, C. MATTHEW SAMUELSON, Judge. Judgment of District Court reversed, and cause remanded with directions.

John A. Svoboda, of Gross & Welch, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

SIEVERS, Judge.

Randall J. Bromm appeals from an order of the district court for Washington County affirming the Washington County Court's order denying Bromm's motion to suppress and finding him guilty of driving under the influence (DUI), pursuant to Neb. Rev. Stat. § 60-6,196 (Reissue 2010). The law enforcement officer's factual basis for the initial traffic stop of Bromm, which produced the evidence upon which he was convicted, was indisputably incorrect. Therefore, the issue becomes whether the good faith exception to the exclusionary rule is applicable, making such evidence admissible. We find that the good faith exception was not applicable and that Bromm's motion to suppress the evidence should have been sustained. Therefore, we reverse the conviction and remand the cause with directions.

BACKGROUND

Sgt. Walter Groves of the Washington County sheriff's office was traveling in his patrol car south on County Road 33 in Washington County, Nebraska, at approximately 11:30 p.m. on May 22, 2010, when he observed a dark-colored Chevrolet utility vehicle traveling north, and he obtained a license plate number on the vehicle. Groves ran a check on the license plate number, and it came back as being issued for a white Chevrolet Suburban. Groves positioned his patrol car behind the dark-colored vehicle and verified the vehicle's license information with his dispatcher. He then conducted a traffic stop and made

contact with the driver, Bromm. Upon doing so, he detected a strong odor of alcohol coming from inside the vehicle. Bromm gave Groves his registration information, and Groves verified that the vehicle identification number on the registration matched the number he received from dispatch. In the video recording of the stop in evidence, Groves can be heard saying to Bromm that "it looks like they got an error when they gave you your new registration, they didn't . . . change the color on there."

Groves testified that he had Bromm get out of his vehicle and sit in the front passenger seat of Groves' patrol car so that he could determine whether the odor of alcohol was coming from Bromm or from the various passengers riding in his vehicle. Groves testified that once the two of them were in the patrol car, he smelled alcohol on Bromm and Bromm admitted to drinking that evening, stating that he had a couple of beers at a friend's birthday party. Groves asked Bromm how many beers he had consumed that evening, and Bromm stated that he had three beers in the last 3 hours. Groves had Bromm turn his head toward him in order to conduct horizontal gaze nystagmus (HGN) testing. Groves testified over foundational objection by Bromm's counsel that he detected six HGN qualifiers in Bromm and that only four HGN qualifiers are necessary to show alcohol impairment. Due to the strong wind blowing that night, Groves did not have Bromm perform any field sobriety testing outside the patrol car. Bromm submitted to a preliminary breath test (PBT), which registered a blood alcohol content of .137. Bromm was taken into custody and transported to the sheriff's office. The probable cause affidavit recites that after waiting the requisite 15 minutes prior to retesting Bromm's blood alcohol content on the DataMaster, his breath tested .116 grams of alcohol per 210 liters of breath. Bromm was charged with DUI.

Bromm filed an amended motion to suppress on September 10, 2010, in which he alleged that law enforcement did not have a reasonable, articulable suspicion to stop his vehicle and that his arrest was based on a PBT which was not conducted according to the methods approved by the Nebraska Department of Health and Human Services under title 177

of the Nebraska Administrative Code. A hearing was held on the amended motion to suppress on October 25. Groves testified, and four exhibits were received into evidence: a copy of title 177, Groves' PBT checklist for Bromm, Groves' narrative police report, and a video recording of the traffic stop. Part of Bromm's theory at the hearing was that Groves did not administer the PBT properly because Bromm burped during the 15-minute observation period prior to the test, which he now claims should have started the waiting period anew. However, given the result we ultimately reach, we dispense with additional discussion of the "burp issue." We adopt the same approach with respect to Bromm's claim that the HGN test was not properly administered.

In its November 9, 2010, order, the county court found that Groves had probable cause to arrest Bromm because he "observed violations of law, to wit: Fictitious Plates." The order recites that Groves observed a dark-colored utility vehicle, Groves ran a check on the license plate number, and the information came back that those plates should be affixed to a white-colored vehicle. The county court found that even though the plates were actually for the vehicle Bromm was driving, Groves had a reasonable suspicion to stop the vehicle. Thus, Bromm's motion to suppress was overruled.

According to a February 28, 2011, order of the county court, a bench trial on stipulated facts was held on February 14, at which trial the parties stipulated that the court could consider all testimony and exhibits from the suppression hearing. The order recites that exhibit 5 was received into evidence at trial and that the matter was taken under advisement. The court's order of February 28, without comment, finds Bromm guilty of DUI.

Bromm appealed to the district court for Washington County, and the matter came before that court on May 4, 2011. The evidence from the county court proceedings was received, and the parties were given the opportunity to submit briefs. The issues identified in the district court's 14-page August 15 order are whether Groves (1) had reasonable suspicion to stop Bromm's vehicle, (2) followed proper procedures in administering the PBT, and (3) had probable cause to arrest Bromm.

The court found that although the reason for the traffic stop was "fallacious," the good faith exception to the exclusionary rule should apply because there was no evidence of who actually made the registration error—Bromm or a clerk of the Burt County treasurer's office—and thus, there is "no evidence that the error was made by an adjunct to the law enforcement team." See *State v. Hisey*, 15 Neb. App. 100, 723 N.W.2d 99 (2006).

In *Hisey*, we discussed how the exclusionary rule would provide incentives to the Department of Motor Vehicles (DMV), which we held was an adjunct to law enforcement, to perform its duties and functions correctly. Further, in *Hisey*, we held that the good faith exception to the exclusionary rule was inapplicable to mistakes by the DMV so as to validate an otherwise baseless stop of a motorist. However, in the present case, the district court found that *Hisey* was not controlling by reasoning as follows:

> The application of the exclusionary rule would have little effect on the person completing the application for motor vehicle title or on the operations of the Burt County Treasurer. Therefore, the good-faith exception to the exclusionary rule applies to the initial stop of [Bromm's] vehicle and the County Court was correct in its denial of this portion of [Bromm's] Motion to Suppress.

The district court found that the odor of alcohol emanating from Bromm, Bromm's admission that he had been drinking, and the results of the HGN and PBT tests amounted to sufficient probable cause to arrest him. In sum, the district court found that the county court did not err in overruling Bromm's motion to suppress or in finding him guilty of DUI. Bromm now appeals.

ASSIGNMENTS OF ERROR

We reduce Bromm's four assignments of error to their essence, which is that the county court erred in (1) overruling his motion to suppress all evidence obtained by law enforcement because there was not reasonable suspicion for the traffic stop and (2) finding him guilty of DUI because there was not probable cause for his arrest.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination. *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012).

[2,3] Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. See *State v. Lamb*, 280 Neb. 738, 789 N.W.2d 918 (2010). In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion. *Id.*

ANALYSIS

[4-6] Warrantless searches are generally unreasonable under the Fourth Amendment, subject to a limited number of specific exceptions, including (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest. See *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006). A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *Nolan, 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. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011). 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. *Id.*

Bromm argues that Groves did not have reasonable suspicion to stop his vehicle because the rationale for the stop, fictitious license plates in violation of Neb. Rev. Stat. § 60-399 (Reissue 2010), was due to a clerical error related to the registration of

his vehicle. Bromm likens the present case to *State v. Hisey*, 15 Neb. App. 100, 723 N.W.2d 99 (2006), in which we found that because the arresting officer relied on erroneous information contained in Richard Hisey's DMV records in making a traffic stop of his vehicle, the officer did not have probable cause to arrest him for DUI and driving with an open container of alcohol in his vehicle. In that case, the arresting officer observed Hisey driving his vehicle and parking it in front of his home. The officer had earlier attended a trial where Hisey's driver's license was impounded. Because the officer was under the impression Hisey's license was still impounded, she then called to check the status of his license with her dispatcher. The dispatcher told the officer that Hisey's license was currently impounded. The officer then arrested Hisey for driving with a suspended license. Hisey was also charged with having an open container of alcohol in his vehicle and, after a series of sobriety tests were performed, with DUI.

Before disposition of the charges against Hisey, it was discovered that his license was not actually under impoundment at the time of his arrest. The information conveyed by the police dispatcher to the arresting officer was erroneous. Our opinion in *Hisey* states that "the mistake occurred in the records of the DMV," 15 Neb. App. at 111, 723 N.W.2d at 109, which mistake was passed on by the dispatcher to the officer in the field, and the officer relied upon that information.

Because Hisey was not driving on a suspended license, the driving under a suspended license charge was dropped and a jury trial was held with respect to the other two charges. After trial, a jury found Hisey guilty of the open container and DUI charges, and the county court entered judgment accordingly. Hisey appealed to the district court, which found that all evidence received by law enforcement after the factually baseless stop of Hisey should have been suppressed. Thus, the district court vacated his convictions and sentences, and remanded the cause to the county court. The State appealed to this court.

In our *Hisey* opinion, we discussed a similar scenario that had been before the Nebraska Supreme Court in *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005), *disapproved on other*

grounds, State v. McCulloch, 274 Neb. 636, 742 N.W.2d 727 (2007). In *Allen*, a police officer requested dispatch to check the registration on a minivan. The dispatcher mistakenly ran a check on the wrong license plate number, causing the officer to stop the minivan and discover that the driver was operating the minivan on a suspended license. The *Allen* court held that there was an unreasonable seizure in violation of the Fourth Amendment, explaining:

> This is not a case in which police possess factual information supporting a reasonable suspicion of criminal activity which, upon further investigation, proves to be unfounded. Here, there was no factual foundation for the information which the dispatcher transmitted to [the officer], as it is undisputed that the information was false due to the dispatcher's mistake in running the wrong license plate number. [The officer] had no other reason for initiating the stop. Thus, the record reflects that neither [the officer] nor any other law enforcement personnel possessed any true fact which would support the reasonable suspicion necessary to justify an investigative stop. The stop was therefore an unreasonable seizure in violation of the Fourth Amendment.

269 Neb. at 77-78, 690 N.W.2d at 590.

[7] In this court's opinion in *State v. Hisey*, 15 Neb. App. 100, 723 N.W.2d 99 (2006), we found that there was not probable cause for the arrest because, similar to *Allen, supra*, the fact relied upon to establish probable cause—that Hisey's driver's license was under impoundment—was false. We then analyzed whether the exclusionary rule was the proper remedy or whether the good faith exception to that rule should apply. See *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (setting forth good faith exception to exclusionary rule). In *Hisey*, we cited *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995), in which the U.S. Supreme Court determined that if a court employee supplies erroneous information to a police officer who then makes an arrest based on such information, the good faith exception to the exclusionary rule applies "'[b]ecause court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of

ferreting out crime . . . they [court clerks] have no stake in the outcome of particular criminal prosecutions.'" 15 Neb. App. at 110, 723 N.W.2d at 109. We concluded in *Hisey* that the converse of the holding of *Evans* was controlling in *Hisey* because the DMV could be "fairly characterized as '"adjuncts to the law enforcement team."'" 15 Neb. App. at 111, 723 N.W.2d at 109, quoting *Shadler v. State*, 761 So. 2d 279 (Fla. 2000). See, also, *Evans, supra*.

In *Hisey*, we found that the DMV is closely related to law enforcement in the State of Nebraska, that it is integral to enforcement of the laws concerning motor vehicles and persons who operate vehicles, that the duties of the DMV are clearly interrelated with law enforcement duties, and that the DMV helps regulate and enforce the laws pertaining to licensing and driving in Nebraska. Further, we found that "the threat of exclusion of evidence will likely encourage DMV employees charged with recording and transmitting information on license impoundments to exercise greater caution. The purpose of the exclusionary rule will therefore be served if the evidence from the arrest in this case is suppressed." *Hisey*, 15 Neb. App. at 113, 723 N.W.2d at 111.

[8] In this case, similar to *Hisey, supra*, and *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007), we have a scenario where the basis for the traffic stop of Bromm—fictitious license plates—was caused by erroneous information provided to the arresting officer by the dispatcher. Although the sole basis for the stop of Bromm was "fallacious," to use the district court's term, the arresting officer's actions were clearly objectively reasonable. Therefore, we must determine whether the good faith exception to the exclusionary rule applies. In doing so, the question appears to be whether the identification of Bromm's vehicle as white on his vehicle's registration—which is the reason Groves suspected fictitious license plates, since Bromm's vehicle was dark in color—is attributable to an entity that can be categorized, like the DMV in *State v. Hisey*, 15 Neb. App. 100, 723 N.W.2d 99 (2006), as an adjunct to law enforcement. Bromm asserts, citing *Hisey*, that the State bears the burden of proving that the good faith

exception to the exclusionary rule applies in the case of unconstitutional warrantless searches and seizures, a proposition with which we agree. See *Allen, supra*. By implication, we assume his argument is that the State failed to meet its burden of proof and that thus, *Hisey* controls.

On the other hand, the State argues that the record is devoid of any suggestion that the DMV is the party responsible for the error. A copy of Bromm's vehicle registration was received at trial as part of exhibit 5. The registration lists the color of Bromm's vehicle as white. We note, for completeness, that there is evidence that Bromm's previous vehicle was white. The State argues that "[m]otor vehicle registrations are issued by the treasurer[']s office in most counties, Neb.Rev.Stat. §60-389 and §60-390, and plainly was done so in this case." Brief for appellee at 10. The State argues that the mistake on the registration was made by the Burt County treasurer's office, which is listed at the top of Bromm's registration, either through its own error or through Bromm's supplying it with the wrong information and that, unlike the DMV, the Burt County treasurer's office is not "'essentially a law enforcement agency.'" Brief for appellee at 11, quoting *Hisey, supra*. The State reasons as follows:

> Treasurers['] offices should not be considered an adjunct of law enforcement because they are not involved in promulgating rules and regulations that law enforcement must enforce, nor are they "integral to the laws concerning motor vehicles and persons who operate vehicles." *Hisey*, supra at 112. A county treasurer[']s office collects revenues for a county, collects all real estate and personal taxes in the county, disburses those moneys to the appropriate political entities, and registers motor vehicles in that county. In short, the treasurer[']s office is not "a vital part of the law enforcement infrastructure" of the state and [is not] "essentially a law enforcement agency." *Hisey*, supra at 113.

Brief for appellee at 10-11.

In *Hisey*, we said that "[t]he dispatcher received this erroneous information from the DMV's driver and vehicle records division's records, which mistakenly indicated that Hisey was

not eligible to get his impounded license back until May 2, 2004." 15 Neb. App. at 103, 723 N.W.2d at 104. However, this case is different in the sense that while the officer, Groves, got his information suggesting that Bromm's vehicle did not have proper license plates from his dispatcher, who has to be seen as "law enforcement" and not merely an "adjunct" thereto, there is no direct evidence as to where the dispatcher got the erroneous information such as was outlined in *Hisey*.

[9] As said earlier herein, the burden of proof is on the State to prove the applicability of the good faith exception to the exclusionary rule set forth in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). But, it is clear that the State has not proved that the erroneous information upon which Groves acted came from the Burt County treasurer's office—either through its mistake or because of Bromm's error when he registered his vehicle. Rather, we must conclude that the dispatcher got the information that Groves used to stop Bromm from the DMV. Therefore, we conclude that *State v. Hisey*, 15 Neb. App. 100, 723 N.W.2d 99 (2006), controls and that the good faith exception does not apply. Consequently, the county court, and in turn the district court, erred in not sustaining Bromm's motion to suppress the evidence gained as a result of the traffic stop. When such evidence is suppressed, it is clear that the conviction cannot stand.

CONCLUSION

Accordingly, we reverse the district court's order and remand the cause to that court with directions to reverse the county court's order and to direct the county court to vacate Bromm's conviction and sentence. Because of the result we reach, we need not address Bromm's other assignments of error.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM HALLIGAN, APPELLANT.

818 N.W.2d 650

Filed August 14, 2012. No. A-11-775.

1. **Criminal Law: Trial: Pretrial Procedure: Motions to Suppress: Appeal and Error.** In a criminal trial, after a pretrial hearing and order denying a motion to suppress, the defendant must object at trial to the admission of evidence sought to be suppressed to preserve an appellate question concerning the admissibility of that evidence.
2. **Trial: Juries: Evidence: Appeal and Error.** Allowing the jury to review exhibits during deliberations or rehear evidence is reviewed by the appellate court for an abuse of discretion.
3. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain a 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.
4. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within statutory limits absent an abuse of discretion by the trial court.
5. **Trial: Juries: Evidence.** At common law, the trial court traditionally has no discretion to submit depositions and other testimonial materials to the jury room for unsupervised review, even if properly admitted into evidence at trial.
6. **Trial: Juries: Evidence: Tape Recordings.** When a jury makes a request to rehear certain evidence, the common-law rule requires that a trial court discover the exact nature of the jury's difficulty, isolate the precise testimony which can solve it, and weigh the probative value of the testimony against the danger of undue emphasis. If, after this careful exercise of discretion, the court decides to allow some repetition of the tape-recorded evidence for the jury, it can do so in open court in the presence of the parties or their counsel or under strictly controlled procedures of which the parties have been notified.
7. **Trial: Juries: Evidence.** A trial court has broad discretion in deciding whether to submit nontestimonial exhibits to the jury during its deliberations.
8. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education and experience, social and cultural background, past criminal record or record of law-abiding conduct, and motivation for the offense, as well as the nature of the offense, and the violence involved in the commission of the crime.
9. ____. In imposing a sentence, the sentencing judge 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. **Judges.** An abuse of discretion occurs 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.

12. **Sentences: Appeal and Error.** So long as the trial court's sentence is within the statutorily prescribed limits, is supported by competent evidence, and is not based on irrelevant considerations, the sentence imposed is not an abuse of discretion.

Appeal from the District Court for Scotts Bluff County, LEO DOBROVOLNY, Judge, on appeal thereto from the County Court for Scotts Bluff County, JAMES M. WORDEN, Judge. Judgment of District Court affirmed.

David S. MacDonald, Deputy Scotts Bluff County Public Defender, for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

MOORE and PIRTLE, Judges, and CHEUVRONT, District Judge, Retired.

PIRTLE, Judge.

INTRODUCTION

Following a jury trial in the county court for Scotts Bluff County, William Halligan was found guilty of false reporting of a criminal matter under Neb. Rev. Stat. § 28-907(1)(a) (Reissue 2008). Halligan appeals from the judgment of the district court for Scotts Bluff County which affirmed the judgment of the county court.

BACKGROUND

On August 30, 2010, during the afternoon, Roger Sishc was standing outside of his trailer and saw Halligan sneaking up toward the trailer with a note wrapped around a rock. Sishc knew Halligan was upset because a woman Halligan had previously been romantically involved with, Diana Applegate, was staying with Sishc. Sishc asked Halligan if he was going to throw the rock through Sishc's window, and Halligan, who had not seen Sishc until this point, dropped the rock and started wrestling with Sishc. The altercation was brief, and neither Sishc nor Halligan was injured.

Later that same day, the Scotts Bluff County communications center received a call from a man stating he was Sishc. The man said that Applegate was at his house, that she was

drunk and high on methamphetamine, and that she was "tearing" up his home. The caller requested that law enforcement "come up here and get her . . . out." Deputy Kristopher Still and two other deputies were dispatched to the residence. When the deputies arrived, they found Applegate and Sishc eating dinner and watching a movie; there was no evidence of a disturbance. Sishc told Deputy Still that he was having problems with Halligan. He said that he and Halligan had wrestled and that Halligan kept driving by and trying to call Applegate in an attempt to get her to talk to him.

An investigation of the telephone call led the deputies to believe the call originated from a convenience store on 10th Street in Gering, Nebraska. Sishc told the deputies he had not left his residence all afternoon and had not gone to the convenience store at any time. Then Deputy Still and another deputy went to the convenience store and spoke with the clerk. The clerk stated she had been outside having a cigarette in the designated smoking area, which is near the pay telephone, just outside of the building. As she was smoking, she saw a man walk up to use the pay telephone, and she overheard the man identify himself as Sishc and say there was a woman named "Applegate" who was high on methamphetamine and "tearing" up his home. The clerk did not know the caller by name, but she said she could identify him. Deputy Still went to the sheriff's office and obtained a photograph of Halligan from the Department of Motor Vehicles and showed it to the clerk, who confirmed the man in the photograph was the man she had seen talking on the telephone.

Then Deputy Still went to Halligan's home, which is a block away from the convenience store. Halligan denied going to the store earlier that night, and he was ultimately arrested.

The State alleged that on August 30, 2010, Halligan furnished material information he knew to be false to a peace officer or other official with the intent to instigate an investigation of an alleged criminal matter or to impede the investigation of an actual criminal matter contrary to § 28-907(1)(a) and (2)(a), a Class I misdemeanor. Halligan was arraigned on September 10 and was appointed counsel from the public defender's office. Halligan filed a motion to suppress evidence

on September 22, and the hearing on this motion took place on November 17. The motion was taken under advisement, and it was overruled on November 30.

Trial was held on February 4, 2011. When the clerk testified at trial, she pointed to Halligan and identified him as the man who made the call. She stated there was no doubt in her mind that Halligan was the man she saw using the pay telephone on the night in question.

The director of the communications center in Scotts Bluff County also testified. The center handles dispatch calls for all agencies in the area, except the Nebraska State Patrol. If someone calls the 911 emergency dispatch service, the call goes through the communications center. The director retrieved the 911 call from August 30, 2010, and made a copy of that recording to be played, in its entirety, for the jury. The content of the 911 call is as follows:

> DISPATCH OPERATOR: 911.
>
> CALLER: This is Roger Sishc, at Monument View Trailer Court . . . . Diana Applegate is up here trashin' my trailer. I kicked her out, and she won't go, and she's just trashin' my trailer to . . . hell, and I want somebody to come up here and get her the [expletive] outta here. She's up, high on meth, and drunk. And I want somebody out here now.
>
> DISPATCH OPERATOR: Okay, and you said 68?
>
> (Phone call ends.)

Several witnesses testified that they recognized Halligan's voice on the recording of the 911 call. Sishc testified that he did not make the 911 call and that he recognized Halligan's voice on the recording. The convenience store clerk confirmed the 911 call was consistent with what she overheard on August 30, 2010. The dispatch operator who took this call testified that he had received calls from Halligan to the communications center before. He had also received calls from Halligan while working for the Gering fire department, and he recognized the voice on this call as Halligan's.

Halligan testified that he did not make the 911 call and that it was not his voice on the recording. Closing arguments were delivered, and the matter was submitted to the jury. During

deliberation, the jury asked permission to listen to the recording of the 911 call again. Halligan's counsel objected, and after consideration from the court, the objection was overruled. The judge reasoned that the recording is an extremely short portion of the trial and is at the core of the trial. The court allowed the jury to hear the recording one time, in the jury box, and did not allow either party to comment on the 911 call. After listening to the recording, the jury went back to the jury room.

The jury returned a verdict, and Halligan was found guilty. On February 9, 2011, the court sentenced Halligan to 1 year in jail, and on February 15, Halligan appealed this judgment to the district court for Scotts Bluff County. The district court, finding no clear error, affirmed the judgment of the county court in all respects, and on September 14, Halligan appealed to this court.

ASSIGNMENTS OF ERROR

Halligan's errors, consolidated and restated, are as follows: The county court erred when it (1) denied Halligan's motion to suppress the identification of Halligan by a witness through a photographic lineup, (2) allowed the jury to listen to the recording of the 911 call after deliberation began, (3) accepted the verdict of the jury, and (4) imposed an excessive sentence, although it was within the statutory limits.

STANDARD OF REVIEW

[1] It has long been the rule that in a criminal trial, after a pretrial hearing and order denying a motion to suppress, the defendant must object at trial to the admission of evidence sought to be suppressed to preserve an appellate question concerning the admissibility of that evidence. *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002).

[2] Allowing the jury to review exhibits during deliberations or rehear evidence is reviewed by the appellate court for an abuse of discretion. *State v. Halsey*, 232 Neb. 658, 441 N.W.2d 877 (1989).

[3] When reviewing a criminal conviction for sufficiency of the evidence to sustain a 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. McGee*, 282 Neb. 387, 803 N.W.2d 497 (2011).

[4] An appellate court will not disturb a sentence imposed within statutory limits absent an abuse of discretion by the trial court. *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011).

ANALYSIS

Motion to Suppress.

It has long been the rule that in a criminal trial, after a pretrial hearing and order denying a motion to suppress, the defendant must object at trial to the admission of evidence sought to be suppressed to preserve an appellate question concerning the admissibility of that evidence. *State v. Timmens, supra*. A failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and that party will not be heard to complain of the alleged error on appeal. *Id.*

Halligan alleges that the county court should have granted his motion to suppress the identification of him by the convenience store clerk because the identification occurred through an inherently suggestive photographic lineup. Prior to trial, Halligan filed in the county court a motion to suppress the identification. Halligan argued that the clerk's identification was tainted by the suggestive lineup and that her testimony regarding the identification of Halligan should be suppressed. This motion was denied in the trial court's order dated November 30, 2010.

At trial, Halligan did not renew his motion to suppress the clerk's in-court identification of him at trial or object to testimony regarding her identification of him by photograph on the night of August 30, 2010. Halligan's failure to object or renew his motion to suppress waives the objection, and the issue is not preserved for appeal. Therefore, we will not consider whether the county court erred in denying Halligan's motion to suppress the identification by the convenience store clerk.

Replaying Recording of 911 Call.

[5] Allowing the jury to review exhibits during deliberations or rehear evidence is reviewed by the appellate court for an abuse of discretion. *State v. Halsey*, 232 Neb. 658, 441 N.W.2d 877 (1989). At common law, the trial court traditionally has "'no discretion to submit depositions and other *testimonial* materials to the jury room for *unsupervised review*, even if properly admitted into evidence at trial.'" *State v. Dixon*, 259 Neb. 976, 987, 614 N.W.2d 288, 296 (2000) (emphasis supplied) (emphasis in original). The common-law rule is designed to curtail the principal danger involved in allowing the jury to rehear only part of the evidence; that is, the jury may give undue emphasis to the part of the evidence which is reheard.

[6] The *Dixon* court stated that "[w]hen a jury makes a request to rehear certain evidence, the common-law rule requires that a trial court discover the exact nature of the jury's difficulty, isolate the precise testimony which can solve it, and weigh the probative value of the testimony against the danger of undue emphasis." 259 Neb. at 987, 614 N.W.2d at 297. If, after this careful exercise of discretion, the court decides to allow some repetition of the tape-recorded evidence for the jury, it can do so in open court in the presence of the parties or their counsel or under strictly controlled procedures of which the parties have been notified. *Id.* See, also, *Chambers v. State*, 726 P.2d 1269 (Wyo. 1986).

[7] The Nebraska Supreme Court has stated that a trial court has "broad discretion in deciding whether to submit *nontestimonial* exhibits to the jury during its deliberations." *State v. Pischel*, 277 Neb. 412, 427, 762 N.W.2d 595, 607 (2009) (emphasis supplied).

Halligan argues that the court responded to the jury's request to rehear the recording of the 911 call without caution, because it did not inquire into the reason for the rehearing, which reason may have disclosed some improper motive. Thus, Halligan argues that it was an abuse of discretion not to inquire before replaying the recording, a practice "'fraught with some danger to a fair trial.'" Brief for appellant at 16.

Halligan relies heavily upon *State v. Dixon, supra*, where the court determined the district court erred in not conducting an

examination into the reasons for the jury's request, not weighing the probative value of the requested testimonial evidence against the danger of undue emphasis, and submitting two exhibits to the jury for unsupervised and unrestricted review. While it is true that in both cases, the jury was allowed to rehear evidence after the start of deliberations, the facts distinguish this case from *Dixon*.

Dixon prohibits testimonial evidence from going to the jury during deliberations. However, in *Pischel*, the Nebraska Supreme Court found that online conversations and statements therein were "evidence of the elements of the crime of use of a computer to entice a child or peace officer believed to be a child for sexual purposes; therefore, the transcripts of such conversations were substantive evidence of the crime charged." 277 Neb. at 428, 762 N.W.2d at 607. The same is true for this case; the recording of the 911 call is evidence of the elements of the crime of falsely reporting a criminal matter. As in *Pischel*, the evidence requested by the jury in this case was nontestimonial, substantive evidence, and the court has broad discretion in determining whether to allow the recording to be replayed.

Though the rule promulgated in *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000), regarding testimonial exhibits does not apply to this case, the court still took steps to avoid undue emphasis during the rehearing of nontestimonial evidence during deliberations. Upon the jury's request to listen to the recording of the 911 call again, the trial court called the matter to the attention of the parties in open court. Though the court did not question the jury regarding the reason for requesting a rehearing of the recording, the court did discuss possible reasons with the parties. Further, there can be only one reason the jury would ask to hear the recording—to determine whether it is Halligan's voice on the recording. The court discussed the request with the parties and determined that the probative value of replaying the recording of the 34-second 911 call outweighed the danger of undue emphasis, given the short duration of the call and the fact that it was the crux of the case. The court allowed the recording to be reheard one

time, in the courtroom, and in the presence of the parties and their counsel, and the court did not allow any further comment from either party. At that time, the jury was asked to return to the jury room and continue deliberation.

The court has broad discretion under *State v. Pischel*, 277 Neb. 412, 762 N.W.2d 595 (2009), to submit nontestimonial exhibits to the jury during deliberation and did so after considering, and taking, steps to minimize the possible undue emphasis it might cause. We find the court did not abuse this discretion, and this assignment of error is without merit.

Accepting Verdict of Jury.

Halligan alleges that the court erred in accepting the verdict of the jury because the evidence did not support the charge alleged in the complaint and the jury instructions.

When reviewing a criminal conviction for sufficiency of the evidence to sustain a 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. McGee*, 282 Neb. 387, 803 N.W.2d 497 (2011).

Halligan was charged with false reporting, in violation of § 28-907. The State's complaint included the language of the statute and alleged that on or about August 30, 2010, Halligan "did furnish material information he knew to be false to a peace officer or other official with the intent to instigate an investigation of an alleged criminal matter or to impede the investigation of an actual criminal matter, contrary to the statutes of the State of Nebraska."

Four elements were described in jury instruction No. 4: (1) that the defendant furnished material information to a peace officer, (2) that the defendant knew such information was false when he furnished it to the officer, (3) that such furnishing of false information was done by the defendant with the intent on his part to instigate an investigation of an alleged criminal matter or to impede the investigation of an actual criminal matter, and (4) that the incident occurred on or about August 30, 2010, in Scotts Bluff County.

Halligan focuses on the first element in the instruction and alleges the jury was limited to determining whether the false report was made to a peace officer, because the words "or other official" were omitted from jury instruction No. 4. Therefore, he argues, there was no evidence offered at trial that alleged false statements were made to a peace officer, because the dispatch operator for law enforcement, fire, and ambulance calls is not a peace officer.

The record shows jury instruction No. 2 includes the full statutory description of the alleged offense, including the words "or other official." The evidence shows that the communications center in Scotts Bluff County is not a branch of law enforcement, but it is used to field 911 calls for law enforcement, fire, and ambulance, and that it dispatches peace officers to necessary areas. Though the man who answered the 911 call is not a peace officer himself, he is an intermediary used by the general public to reach peace officers. The caller described the alleged criminal incident and stated, "I want somebody out here now." The statements the caller made to the communications center were made with the intent to summon a law enforcement officer to the stated address.

After viewing the evidence in the light most favorable to the prosecution, we find any rational trier of fact could have found that the essential elements of the crime of false reporting were present and sufficient to find Halligan guilty beyond a reasonable doubt. Therefore, this assigned error is without merit.

Excessive Sentence.

[8-10] When imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education and experience, social and cultural background, past criminal record or record of law-abiding conduct, and motivation for the offense, as well as the nature of the offense, and the violence involved in the commission of the crime. *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011). In imposing a sentence, the sentencing judge 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] An appellate court will not disturb a sentence imposed within statutory limits absent an abuse of discretion by the trial court. *Id.* An abuse of discretion occurs 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.*

Following the jury trial, where Halligan was found to be guilty of making a false statement under § 28-907, he was sentenced to 1 year in jail. Under the statute, this offense is a Class I misdemeanor, punishable by not more than 1 year's imprisonment, a $1,000 fine, or both. See § 28-907(2)(a) and Neb. Rev. Stat. § 28-106 (Reissue 2008). The punishment is clearly within the statutory limits, so we must determine whether there has been an abuse of discretion.

Halligan argues that at the time of sentencing, he was a 67-year-old man with pervasive heart disease living with a disability. Further, he contends he has limited relevant criminal history. At sentencing, he requested a fine, which he stated would accomplish the State's purposes of punishing his behavior and deterring similar behavior in the future.

The court considered Halligan's request, but determined a 1-year jail sentence would be appropriate. The court explained that this was one of the most serious false reporting cases the judge had ever seen. As a result of the false report, three deputies were dispatched to Sishc's trailer and the deputies were on high alert due to the nature of the reported crime. This call wasted resources and left the rest of the community vulnerable, because they were the only three deputies on duty at that time.

[12] So long as the trial court's sentence is within the statutorily prescribed limits, is supported by competent evidence, and is not based on irrelevant considerations, the sentence imposed is not an abuse of discretion. *State v. Rivera*, 14 Neb. App. 590, 711 N.W.2d 573 (2006). We find that the court did not abuse its discretion, and the sentence imposed is affirmed.

CONCLUSION

We find that by not renewing his motion to suppress at trial, Halligan waived his objection to the admissibility of the photographic identification, and we cannot consider this assignment of error on appeal. We find that the district court did not err in affirming the decision of the county court to allow the jury to listen to the recording of the 911 call after deliberation began, because it was not an abuse of the court's broad discretion with regard to nontestimonial evidence. We find that the court did not err in accepting the verdict of the jury, because a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Finally, we find that there was no abuse of discretion and that the sentence imposed was within the statutory limits and not excessive, given the circumstances of this case. We affirm the decision of the district court which affirmed the decision of the county court.

AFFIRMED.

ROBIN L. COLLING, NOW KNOWN AS ROBIN L. LUND, APPELLANT, V. MARK D. COLLING, APPELLEE.

818 N.W.2d 637

Filed August 14, 2012. No. A-11-945.

1. **Child Custody: Visitation: Appeal and Error.** Child custody and visitation determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Child Custody.** In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.
4. ____. A move to reside with a custodial parent's new spouse who is employed and resides in another state may constitute a legitimate reason for removal.

5. ____. In seeking removal of a child to another jurisdiction, remarriage will not always constitute a legitimate reason for relocation.
6. **Child Custody: Visitation: Appeal and Error.** In determining whether removal to another jurisdiction is in the child's best interests, an appellate court will consider (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.
7. **Child Custody.** The ultimate question in evaluating the parties' motives in seeking removal of a child to another jurisdiction is whether either party has elected or resisted a removal in an effort to frustrate or manipulate the other party.
8. ____. In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children, a court should consider the following factors: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the children and each parent; (7) the strength of the children's ties to the present community and extended family there; (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties; and (9) the living conditions and employment opportunities for the relocating parent because the best interests of the children are interwoven with the well-being of the custodial parent.
9. ____. It is important in contemplating removal of children to another jurisdiction to give due consideration to whether such move indeed will improve the children's lives, or merely maintain the status quo, only in a new location.
10. ____. While the wishes of a child are not controlling in the determination of custody, if a child is of sufficient age and has expressed an intelligent preference, his or her preference is entitled to consideration.
11. ____. A custodial parent's income can be enhanced because of a new spouse's career opportunities, for purposes of determining the potential that removal of children to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children.
12. ____. In considering removal of a child to another jurisdiction, the existence of educational advantages receives little or no weight when the custodial parent fails to prove that the new schools are superior.
13. **Child Custody: Visitation.** Consideration of the impact of removal of children to another jurisdiction on the noncustodial parent's visitation focuses on the ability of the court to fashion a reasonable visitation schedule that will allow the noncustodial parent to maintain a meaningful parent-child relationship.
14. ____: ____. Generally, a reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Angelica W. McClure, of Kotik & McClure Law, for appellant.

Wayne E. Janssen for appellee.

MOORE and PIRTLE, Judges, and CHEUVRONT, District Judge, Retired.

CHEUVRONT, District Judge, Retired.

I. INTRODUCTION

Robin L. Colling, now known as Robin L. Lund, appeals from the denial of her request to remove the parties' minor children from Nebraska to Georgia in order to live with her new husband. Although we reject the district court's finding that Robin did not have a legitimate reason to request removal, we find upon our de novo review that Robin failed to sufficiently demonstrate that removal would be in the children's best interests. Accordingly, we affirm the denial of Robin's complaint to modify the decree.

II. BACKGROUND

Robin and Mark D. Colling are the parents of three minor children: Nathan Colling, born in 1999; Andrew Colling, born in 2001; and Hannah Colling, born in 2003. On May 12, 2010, the district court dissolved the parties' marriage, granted them joint legal custody of the children, and awarded Robin physical custody of the children, subject to Mark's parenting time. The parties and the children have remained in Lincoln, Nebraska.

On March 28, 2011, Robin filed a complaint to modify the decree. She requested permission to remove the children to Georgia and alleged the following change of circumstances: (1) She was engaged to be married in June; (2) her fiance was "established" in Georgia, and she wanted to relocate there with the children; (3) Mark had not provided any money to support the children's activities; and (4) Mark had not established a residence for the children to live with him during his parenting

time. Mark filed a responsive pleading, asking that Robin's complaint be dismissed. In Mark's counterclaim, he asked that his visitation and child support obligation be modified if Robin were allowed to permanently remove the children; he did not request a change in custody.

The district court conducted a trial in August 2011. At that time, Nathan was 12 years old, Andrew was 10, and Hannah was 8. The evidence established that Robin married Brian Johnson on June 4 and that she wished to reside with him in Covington, Georgia. Covington is approximately 45 miles east of Atlanta, Georgia, and Johnson had lived in the area his whole life. However, Johnson testified that he would plan to move to Nebraska if Robin were not allowed to move to Georgia. Mark did not want the children removed to Georgia, because he believed that the move would greatly diminish his visitation time.

Robin is a certified teacher, and her teaching certificate is valid until 2016. She had been employed by Lincoln Public Schools, but she had taken a leave of absence and was not employed at the time of trial because she did not know whether she would be allowed to move. Robin explained that "it's unprofessional to leave the school teaching job in the middle of the school year" and that she could lose her teaching license if she did so. According to Robin's 2010 federal income tax return, her adjusted gross income was $45,262. If she were teaching in the Lincoln Public Schools during the 2011-12 school year, she would be paid $51,241. Robin anticipated beginning to substitute teach the following week, where she would earn a little over $90 a day, and hoped to work an average of 15 days a month. If not allowed to move with the children, Robin hoped to return to Lincoln Public Schools the following year.

Robin planned to pursue a teaching job if allowed to move to Georgia. Her Nebraska teaching certificate would be valid in Georgia for up to 3 years, within which time she would have to complete standardized testing to obtain a certificate in Georgia. Robin had applied in 11 different school districts in Georgia—all within a 30-minute drive—and applied for over 60 jobs. Only one school was ready to interview Robin, but she

canceled the interview because she "knew that [she] was not able to start when they needed [her] to." She would be able to substitute teach. Robin testified that most of the school districts paid wages comparable to Lincoln Public Schools, but that the Atlanta school district paid about $10,000 more a year. None paid less than what Robin would receive in Lincoln.

Johnson is a licensed real estate agent in Georgia, and he also works for a roofing contractor as a sales representative. Johnson testified that if he moved to Nebraska, he would have to become licensed as a real estate agent and "to start all over." He explained that in a given market, the real estate agent needs to know the market values in the area, what the schools are like, and whether the neighborhood is on an incline or a decline. Johnson felt that "it would probably take quite a few years" before he would be successful in practicing real estate in Nebraska. His income as a real estate agent was greatly affected beginning in 2007 by a drop in market prices. He generally earned a 3- to 3.5-percent commission based on the price of the home. His income taxes show his adjusted gross income to be $19,937 in 2009 and $20,165 in 2010. At the time of the August 2011 trial, Johnson thought that he had probably earned $30,000 to $35,000 so far that year and he hoped to earn around $40,000 to $45,000. However, it was unclear from the testimony whether these figures represented gross income or whether they took his costs into account, including payments to subcontractors.

Johnson felt that he had a very close relationship with the children. He did not have children of his own. Johnson testified that it was important for him to help foster the children's relationship with Mark. Johnson testified that there are sports activities, neighborhood parks, a state park, and amusement parks in the vicinity.

Mark did not have his own place to live. He testified that he was living at two different addresses because he could not afford rent and was trying to get out of debt. According to Mark, the cost of transportation to go to Georgia or to pay to bring the children back would be financially devastating and he would "have to figure out a different way to pay bills." He asked the court for a downward deviation of $200 from his

current child support obligation with the hope that he would then be able to afford to pay for at least two visits per year.

On October 14, 2011, the district court entered an order denying Robin's complaint to modify. The court observed that Robin had taken a leave of absence from a guaranteed teaching position that was paying her $51,241 per year and that she had applied for over 60 vacancies in Georgia but had not secured employment. The court also discussed Johnson's employment and financial situation. The district court stated, "Although the court has not found a Nebraska case defining the adjective 'legitimate', its definition from various sources includes words or phrases like 'logical reasoning', 'reasonable', 'rationale' [sic] and 'in accordance with established or accepted patterns'." The court concluded that "[i]t is clearly more reasonable and rationale [sic], notwithstanding the additional initial financial and other stress it may cause, that . . . Johnson move to Nebraska, where more income is readily available to the family." Because the court found that Robin failed to meet her burden of establishing a legitimate reason to remove the children, it did not address whether removal would be in the best interests of the children.

Robin timely appeals.

III. ASSIGNMENTS OF ERROR

Robin assigns two errors. First, she alleges that the district court erred in concluding that she did not have a legitimate reason to remove the children to Georgia. Second, she claims that the court erred in failing to address whether removal to Georgia was in the best interests of the children.

IV. STANDARD OF REVIEW

[1,2] Child custody 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. See *Rosloniec v. Rosloniec*, 18 Neb. App. 1, 773 N.W.2d 174 (2009). 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*.

V. ANALYSIS

[3] 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. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002). After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. *Id*.

1. Legitimate Reason to Leave State

[4,5] Robin argues that the district court erred in finding that she did not have a legitimate reason for leaving Nebraska. It appears that the district court focused on which location would be financially the most rational or logical for Robin. Here, Robin wished to move in order to reside with Johnson, who has lived and worked in Georgia his whole life. Remarriage is commonly found to be a legitimate reason for a move in removal cases. See *Curtis v. Curtis*, 17 Neb. App. 230, 759 N.W.2d 269 (2008). And the Nebraska Supreme Court has determined that a move to reside with a custodial parent's new spouse who is employed and resides in another state may constitute a legitimate reason for removal. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). In addressing this issue, the district court concluded:

> The mere fact that [Robin] has remarried someone living in Georgia, in and of itself, does not establish a legitimate reason to remove the children to Georgia. The facts in this case do not support a finding that leaving a job paying an annual salary of over $51,000 to move to a location where [Robin] has not been able [to] secure employment to live with her husband, whose income has declined substantially over at least the past two years, is reasonable, rationale [sic] or is in accordance with any type of acceptable pattern. In fact, just the opposite is true. It is clearly more reasonable and rationale [sic], notwithstanding the

> additional initial financial and other stress it may cause, that . . . Johnson move to Nebraska, where more income is readily available to the family.

In making this finding, the district court was applying a factor relating to the best interests analysis to the issue of legitimacy. While one easily could conclude that Robin's proposed move to Georgia was imprudent, it cannot be said to be illegitimate. This is not to say that remarriage will always constitute a legitimate reason for relocation. Under the circumstances of this case, we conclude that Robin's desire to relocate to Georgia in order to live with her new spouse, although perhaps not the most economically sound decision, is a legitimate reason to leave Nebraska. Accordingly, the district court erred in its contrary determination.

2. Children's Best Interests

Because the district court concluded that Robin did not have a legitimate reason to remove the children, it did not reach the best interests analysis. See *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000) (if party seeking removal fails to establish legitimate reason, trial court's inquiry is concluded). However, because we have found that Robin did meet the threshold requirement, we will consider upon our de novo review whether she demonstrated that removing the children to Georgia is in their best interests.

[6] The custodial parent has the burden to demonstrate that it is in the children's best interests to continue living with him or her. See *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007). Mark has not requested a change in custody, and Robin and Johnson will plan to live in Nebraska if not allowed to remove the children to Georgia. In determining whether removal to another jurisdiction is in the child's best interests, we will consider (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. See *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002).

(a) Each Parent's Motives

[7] The ultimate question in evaluating the parties' motives is whether either party has elected or resisted a removal in an effort to frustrate or manipulate the other party. *Id*. Robin sought removal because she married a resident of Georgia and wished to live with him there. On the other hand, Mark opposed the move because he wished to continue having frequent visitations with the children. There is no evidence that either party has acted in bad faith. The district court specifically found that "there is absolutely no evidence that [Robin's] request to remove the children to Georgia is based upon some ulterior motive to frustrate [Mark's] parenting time with the children." We agree. Rather, Robin had a compelling motive to seek the move and Mark had an equally compelling motive to resist the move. We conclude that the parties' motives are balanced and that this factor does not weigh in favor of or against the move.

(b) Quality of Life

[8,9] In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children, a court should consider the following factors: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the children and each parent; (7) the strength of the children's ties to the present community and extended family there; (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties; and (9) the living conditions and employment opportunities for the relocating parent because the best interests of the children are interwoven with the well-being of the custodial parent. See *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000). We will consider each factor in turn. Depending on the circumstances of a particular case, any one factor or combination of factors may be variously

weighted. *McLaughlin v. McLaughlin, supra*. And while custody is not to be interpreted as a sentence to immobility, it is important in contemplating a move such as this one to give due consideration to whether such move indeed will improve the children's lives, or merely maintain the status quo, only in a new location. See *Maranville v. Dworak*, 17 Neb. App. 245, 758 N.W.2d 70 (2008).

(i) Children's Emotional, Physical, and Developmental Needs

We first consider the impact on the children's emotional, physical, and developmental needs in assessing the extent to which the move could enhance the children's lives. Mark testified that Andrew, the second child, became "stressed" by new things. For example, Andrew cried the first time he played soccer and cried another time when there were tryouts for a mixed team of 11- and 12-year-olds and none of Andrew's friends were present. John Odell, a therapist, met with Nathan and Hannah one time and Andrew three times. He opined that the children had "the emotional strength to go through the move" to Georgia. According to Odell, "[w]hether the move will be successful will be the plans that [are] set up and the parents' attitudes after the move." Odell diagnosed Andrew with an adjustment disorder, meaning that a change had occurred and that Andrew had not yet adjusted to it. Odell met with Andrew more often than the other children to work on skills to cope with anxiety. According to Odell, a move could be permanently traumatic to Andrew but research showed that there were normally very few long-term effects when children move.

The children were involved in various activities in Nebraska. They all take piano lessons, Nathan takes guitar lessons, and Andrew takes violin lessons. Hannah has played soccer and volleyball. Nathan enjoys theater, specifically acting. In Lincoln, he had been involved in four performances over 3 years. Robin explained that there had not been opportunities for Nathan to try out for other plays. In Georgia, there were several nearby playhouses and filming for television shows and movies had occurred in close vicinity to Johnson's home.

Andrew plays soccer; however, Robin learned in June 2011 that there would not be a "select team" for Andrew's level that year. Andrew had tried out for a select team in Georgia and made the team.

Although there was some evidence that the move could potentially have an adverse effect on Nathan or Andrew, any ill effects are unlikely to last for long. Similar musical, theatrical, and athletic opportunities for the children could most likely be found in Georgia, and Georgia may present better opportunities for Nathan's acting and Andrew's soccer playing. It appears that the emotional, physical, and developmental needs of the children could be met in either Nebraska or Georgia. Thus, the factor does not weigh either for or against the move.

(ii) Children's Preference

[10] The court conducted an in camera interview with Nathan, and his testimony is confidential. While the wishes of a child are not controlling in the determination of custody, if a child is of sufficient age and has expressed an intelligent preference, his or her preference is entitled to consideration. *Miles v. Miles*, 231 Neb. 782, 438 N.W.2d 139 (1989). Although we do not discuss the content of Nathan's testimony, we have considered his preference and reasoning. We do not know what preference Andrew or Hannah may have. We accord no weight to this factor.

(iii) Enhancement of Income or Employment

Another factor to consider is whether Robin's income or employment will be enhanced. As the district court emphasized, Robin took a leave of absence from her employment in Lincoln which would have paid her $51,241. She was not employed at the time of trial but anticipated being able to earn income as a substitute teacher. Robin hoped to teach in Georgia if allowed to move, but she had not secured employment despite applying for over 60 positions in various school districts. She testified that she could also substitute teach in Georgia. According to Robin, most of the school districts in Georgia paid wages comparable to Lincoln Public Schools, none paid less than what she would receive in Lincoln, and

the Atlanta school district paid about $10,000 more a year. The district court found that Robin had "not established a reasonable expectation of an improvement in her career opportunities, if she is permitted to remove the children to Georgia." We agree.

[11] A custodial parent's income can be enhanced because of a new spouse's career opportunities, for purposes of determining the potential that removal of children to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children. *Maranville v. Dworak*, 17 Neb. App. 245, 758 N.W.2d 70 (2008). Johnson testified about the decline in his income as a real estate agent, but he hoped to earn more money in the future. He testified that if he moved to Nebraska, he would have to become licensed as a real estate agent in Nebraska and essentially start over. By moving to Georgia, Robin and Johnson could consolidate households. But the same could be said if Johnson moved to Nebraska.

Mark employed an expert to compare the opportunities for teaching and real estate professionals in Lincoln and Covington. According to the expert,

> the data do not suggest that a move to Covington . . . would clearly improve incomes or professional opportunities. To the contrary, the evidence on wages, economic growth, housing values, etc. that I have been able to gather from a variety of government sources suggests that the Lincoln area offers at least as attractive a professional future for teachers and real estate professionals. While the lack of full data and the inherent impossibility of predicting the future prevent me from making definitive predictions of future incomes and professional success, there clearly is not a strong case for moving too [sic] Covington for professional reasons.

Because Robin took a leave of absence from her job in Lincoln, she did not have full-time employment as a teacher in either Nebraska or Georgia for the 2011-12 school year. Johnson, however, continued to earn modest income in Georgia as a real estate agent and as a sales representative. This factor does not weigh in favor of removal.

(iv) Improvement of Housing or Living Conditions

At the time of trial, Robin was renting a house in Lincoln for $850 a month. She testified that the rent would increase by $200 if an additional adult moved in and that there would be a $35 pet fee if Johnson brought his small dog. Nathan and Andrew shared a room, which was not a legal bedroom. The children were able to walk home from school. But Robin testified that she had to purchase a city bus pass for Nathan to get to school.

Johnson owns a home in Covington, and his mortgage payment is $517 a month. He testified that he is "upside down" on his house, owing more than it is worth. Johnson's house has three bedrooms and two bathrooms, so Nathan and Andrew would need to continue sharing a bedroom. However, Johnson planned to build an addition to the back of the property to give him an additional bedroom and an office. His house is approximately 4 to 5 miles from where Nathan would attend school and approximately 3 miles from the elementary schools.

We recognize that housing costs would be reduced if Robin lived with Johnson in Georgia; however, the evidence does not establish any significant improvement in housing or living conditions. This factor does not weigh in favor of or against removal.

(v) Existence of Educational Advantages

[12] Another factor to consider is whether Georgia offers educational advantages. This factor receives little or no weight when the custodial parent fails to prove that the new schools are superior. *Maranville v. Dworak*, 17 Neb. App. 245, 758 N.W.2d 70 (2008). Robin researched schools in Georgia. She looked to see whether the schools made progress under the "'No Child Left Behind'" program, looked at their extracurricular activities, and spoke with parents to get their thoughts on the teachers and the quality of the education. Mark offered into evidence articles from the Covington newspaper which addressed the failure of some area schools to meet the adequate yearly progress under the "No Child Left Behind" program. But Robin testified the schools that the children would attend had made "annual yearly

progress." Also, according to Robin, the afterschool activities in Georgia are free, while she has to pay a fee in Lincoln.

In Nebraska, Nathan and Andrew were put into differentiated classes due to their status as gifted students. Nathan was put into such classes because he was a good student and had received high scores on achievement tests. His gifted status in the Lincoln Public Schools will last until he graduates from high school. Andrew had been labeled as highly gifted. Andrew had worked with a mentor on the subject of math, but he did not yet have a mentor for the 2011-12 school year. In Georgia, there is also a program for gifted students. According to Robin, Andrew would be accepted into Georgia's gifted program. Robin testified that students graduating from a school district in Georgia with a grade point average of 3.0 or higher are eligible for the "HOPE Scholarship" program, which provides free tuition to any in-state Georgia college or university. Mark researched the HOPE Scholarship program and opined that it would not necessarily provide a free education, because the scholarship was based upon the cost of attendance at certain schools and there was a limit on the per-hour rate at particular institutions. For instance, the estimated cost of attendance per year at the Georgia Institute of Technology was approximately $20,000 per year, which included tuition, books, fees, room, and board. It appeared to Mark that the scholarship would cover up to 15 credit hours of tuition, which would be about $6,000 to $9,000 of that total cost.

We accord no weight to this factor, because Robin failed to prove that the schools in Georgia would be superior to the children's schools in Lincoln. Although the HOPE Scholarship program could provide an educational advantage in the future, there is no guarantee that any of the children would ultimately attend a college or university in Georgia or that they would be unable to obtain comparable scholarship assistance in other ways.

(vi) Quality of Relationship Between Children and Parents

It appears that the children have a good relationship with both parties. Robin, as the custodial parent, is the primary

caregiver. But Mark testified that he has maintained a close relationship with his children and that he spends the majority of his time with them during visitations. However, Mark testified that he has a limited amount of vacation time and has sometimes had to arrange for other family members to watch the children while he was at work. He testified that he takes care of errands on the weekends on occasion and that he takes the children along. He attended Nathan's soccer games on the weekends and attended night games when he could. From speaking with the children, Odell ascertained that "they did a lot of fun things" with Robin. He did not see a problem with the children doing errands with their parents "if it's part of a balance. . . . It's good for parents to . . . take kids on errands, but it's also important to do things that the children enjoy . . . ." We conclude that this factor does not weigh in favor of or against the move.

(vii) Ties to Community and Extended Family

The children's ties to Lincoln as well as their ties to Covington are another factor. Robin's parents, a brother, and a sister live in Nebraska. The children see them about once a month for 2 or 3 hours when they get together for dinner. Her family vacations together in Minnesota for a week approximately every other year. Robin has two nieces, and Nathan is close to one of them. Robin thought that if she moved to Georgia with the children, they would see her family about six times a year. Mark's three sisters live in Lincoln. Mark has visitation with the children at the house of one of his sisters. Mark testified that Andrew "gets along great" with Mark's family. Mark's parents live in McCook, Nebraska, but they were in the process of relocating to Lincoln so that they would be closer to their grandchildren. Mark's mother testified that she sees the children 6 to 10 times a year.

Robin's brother and sister-in-law live approximately 4 hours away from Johnson's home. Johnson's mother lives in the Covington area, as does his brother and his three sisters and their children.

The bulk of Robin's and Mark's families live in Nebraska. The children see many of these family members approximately

once a month. Further, the children have grown up in Lincoln and have undoubtedly made friends there. We conclude that this factor weighs against removal.

(viii) Likelihood of Antagonizing Hostilities

Robin testified that she and Mark had been able to communicate regarding visitation time with the children and that they had a good communication system. The evidence did not establish the likelihood that allowing or denying the move would antagonize hostilities between the parties. Thus, we conclude that this factor does not weigh either in favor of or against the move.

(ix) Conclusion Regarding Quality of Life

After considering all of the quality-of-life factors, we conclude upon our de novo review that Robin did not establish removal would enhance the quality of life for her children or herself.

(c) Impact on Noncustodial Parent's Visitation

[13,14] The third factor for our consideration in the best interests analysis is the impact the move will have on Mark's parenting time. In the divorce decree, the district court granted Mark parenting time which included every other weekend from 7 p.m. Friday to 9 a.m. Monday, every Wednesday from 5 to 8 p.m., and 4 weeks during the summer school vacation. Obviously, Mark could not exercise the weekend and Wednesday evening visitation if the children lived some 1,000 miles away in Georgia. Thus, this consideration focuses on the ability of the court to fashion a reasonable visitation schedule that will allow the noncustodial parent to maintain a meaningful parent-child relationship. See *Maranville v. Dworak*, 17 Neb. App. 245, 758 N.W.2d 70 (2008). Generally, a reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent. *Id*. The frequency and the total number of days of visitation and the distance traveled and expense incurred go into the calculus of determining reasonableness. *Id*. Indications of the custodial parent's willingness to comply with a modified visitation schedule also have a place in this analysis. *Id*.

The district court did not attempt to create a visitation schedule. However, the parties each submitted proposed parenting plans. We will discuss each party's plan.

Under Robin's parenting plan, the parties generally would have alternating holidays with the children. Mark would have the children for every Memorial Day and Thanksgiving. Robin would have parenting time with the children every Easter and Labor Day weekend. Because the drive takes approximately 1½ days, Robin's parenting plan took into consideration the travel time. Christmas parenting time would begin within 48 hours after the children were released from school and end at noon on December 27. New Year's Day would begin at noon on December 27 and end 48 hours before the children return to school. She provided for 4 consecutive weeks of summer visitation for Mark. He would also have parenting time during the children's week-long school breaks, which would begin at 8 a.m. on Monday and end at 8 p.m. on Friday. Robin's parenting plan provided for telephone parenting time each week on any day between 5 and 9 p.m. for not less than 30 minutes per week and for cybervisitation each week on any day between 5 and 9 p.m. for not less than 60 minutes per week. Mark testified that Robin had mentioned buying him a small camera so that he could see the children over the Internet. Although Mark agreed that seeing the children would "be better than nothing," he would miss out on physical interactions and hugs. Robin agreed to pay for any expenses in getting the children to Nebraska.

Under Mark's parenting plan, he would have summer visitation every year beginning 12 days after the last day of school and continuing until 5 days before the first day of school. During that time, Robin would be entitled to parenting time in Nebraska on alternating weekends from 7 p.m. Friday until 9 a.m. Monday. Christmas would begin at 6 p.m. on the day the children were released from school and conclude at 7 p.m. on the day before school was to begin. Mark would pay the costs of transportation for the summer visitation and Christmas visitation. Mark could also exercise visitation in Georgia on every other weekend and on Wednesday evenings.

Mark testified that he researched the cost of transportation for visits both by automobile and by airplane, which he testified was roughly 2,000 miles round trip. Using a standard mileage rate of $.50 a mile, Mark calculated the cost by automobile to be nearly $1,000. Further, if he made the trip, he would incur expenses for a motel room on the way there and on the way back. Mark testified that the cost of flying all the children would be over $1,400, which included a fee for an unaccompanied minor but did not include baggage fees. Robin believed the round-trip tickets would cost $1,200.

Robin sought to remove the children a considerable distance away from Mark. She offered to pay for the transportation costs and truly seemed willing to work with Mark to provide him with parenting time. However, Mark would no longer be able to attend the children's activities without considerable cost and planning. His visits with the children every Wednesday evening would be reduced to telephone calls or communicating via the Internet. Under either proposed parenting plan, Mark simply would not be able to enjoy similar parenting time with the children. We cannot say that this factor weighs in favor of removal.

VI. CONCLUSION

We conclude that the district court abused its discretion in determining that Robin's desire to live with her new husband in Georgia did not constitute a legitimate reason to leave the state. However, upon our de novo review and after consideration of all the factors involved in the best interests analysis, we cannot say that removing the children to Georgia is in their best interests. Accordingly, we affirm the court's order denying Robin's complaint to modify the decree.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DARRELL E. WHITE, APPELLANT.

819 N.W.2d 473

Filed August 21, 2012. No. A-11-515.

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.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
4. **Self-Defense.** The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
5. ____. The use of deadly force shall not be justifiable unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping, or sexual intercourse compelled by force or threat.
6. ____. The use of deadly force is not justifiable if the actor provoked the use of force against himself in the same encounter or the actor knows that he can avoid the necessity of using such force with complete safety by retreating.
7. ____. In the use of deadly force for self-protection, the actor shall not be obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be.
8. ____. There is no logical basis for requiring one to retreat when attacked in one's home by a cohabitant but not requiring retreat if the attacker is a stranger.
9. ____. When one is attacked within one's dwelling, the right to defend oneself and the privilege of nonretreat should apply equally, regardless of whether the attacker is a cohabitant or an unlawful entrant.
10. **Jury Instructions: Convictions: Appeal and Error.** Before an error in the giving of jury instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.
11. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
12. **Constitutional Law: Double Jeopardy: Evidence: Appeal and Error.** The Double Jeopardy Clauses of the federal and state Constitutions do not forbid a retrial after an appellate determination of prejudicial error in a criminal trial so long as the sum of all the evidence admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Reversed and remanded for a new trial.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, and Mandy M. Gruhlkey for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

IRWIN, Judge.

I. INTRODUCTION

Darrell E. White appeals his convictions in the district court for Sarpy County, Nebraska, on charges of second degree murder and use of a weapon in the commission of a felony. The charges arose from an incident wherein White stabbed a cohabitant of his apartment, resulting in the cohabitant's death. On appeal, White asserts a variety of errors, including that the court erred in failing to instruct the jury White did not have a duty to retreat if he was not the first aggressor (i.e., that he had a privilege of nonretreat) and that there was insufficient evidence to support the convictions. We find that the district court erred in failing to instruct the jury that White did not have a duty to retreat if he was not the first aggressor, as requested by White. Accordingly, we reverse, and remand for a new trial.

II. BACKGROUND

The events giving rise to this case occurred during the late hours of September 21, 2010. A 911 emergency dispatcher received a telephone call from White, during which White indicated that he had just stabbed his roommate, Todd Berg. White indicated to the 911 dispatcher that he had stabbed Berg in the chest because Berg "came after" him. During a later interview, White indicated that Berg had been living with him for approximately 9 months.

Bellevue police officers were dispatched to the location. Officer James Murray was the first officer to make contact with White at the residence. Officer Murray testified that he took White into custody and placed White in handcuffs.

Inside the residence, officers encountered Berg lying in a reclined position on a couch, with his feet on the footrest. Berg was not moving and had labored breathing, taking "one gasping breath about every 10 to 15 seconds." Officers were unable to get a response when speaking to Berg and were unable to get any reaction in Berg's eyes, even when shining lights into the eyes. In addition, Berg's pulse was "very light." Berg ultimately died.

A single knife wound was observed in Berg's chest. Officers located a black butterfly-style knife with blood on the blade, which blood "went all the way up to the handle of the knife." No firearm was located.

Officers Timothy Flohrschutz and Michael Pilmaier also responded to the scene. Officer Flohrschutz testified that White indicated to the officers that Berg "had tried to stab him, so he stabbed [Berg] in return." Officer Pilmaier transported White from the scene to the Sarpy County sheriff's office. Officer Pilmaier testified that White made a variety of statements about the events, including that "his roommate was trying to kill him," that "his roommate was crazy," and that "he was trying to protect himself" because "Berg was coming after him." White also indicated to Officer Pilmaier, on more than one occasion, that he had "nothing to do with" what happened to Berg.

At the Sarpy County jail, White was interviewed by Officer Robert Bailey. During that interview, White initially told Officer Bailey that he did not know what had happened to Berg. He explained that he and Berg had been drinking whiskey, that Berg had gone for a walk, and that he did not remember Berg's returning from the walk or how Berg had died. White denied having killed Berg.

Later during the interview, White indicated that he believed he had called the 911 emergency dispatch service because Berg had told him to do so and that he had thought Berg was playing a practical joke on him. White indicated that Berg started gasping for air and that then "he was gone" and there had been nothing that White could do.

Eventually, White indicated that Berg had come after him and that he had stabbed Berg to defend himself. White told

Officer Bailey that Berg had come after him "like a freight train" and that he had been threatened by Berg's size and weight. White indicated that he had attempted to stab Berg in the arm, but had missed and struck Berg in the chest. White also indicated that Berg had fallen onto the knife while tackling White. White told Officer Bailey that Berg had acted violently toward White, that Berg had a "look in his eyes," that Berg had rushed at him, and that he had stabbed Berg out of defense, not aggression.

On November 8, 2010, White was charged by information with second degree murder and use of a weapon in the commission of a felony. Trial was held on March 8 through 11 and 14, 2011. At the conclusion of the trial, the court's proposed jury instructions included an instruction on self-defense. White requested an instruction to the jury that he "was under no duty to retreat from his dwelling" if he was not the first aggressor. The district court concluded that the privilege of nonretreat is applicable only when a defendant acts in self-defense against an unlawful intruder and that the privilege is not applicable in incidents between cohabitants. As such, the court rejected White's requested jury instruction.

The jury returned verdicts of guilty on both charges. After a motion for new trial was overruled, the court sentenced White to consecutive terms of 50 to 70 years' imprisonment on the second degree murder conviction and 10 to 20 years' imprisonment on the use of a weapon conviction. This appeal followed.

III. ASSIGNMENTS OF ERROR

White has assigned a variety of errors on appeal, including a challenge to the State's use of a peremptory challenge during jury selection, an assertion of prosecutorial misconduct, a challenge to the sentence imposed, and an assertion of cumulative error impacting his right to a fair trial. In addition, White challenges the court's denial of his requested jury instruction on the privilege of nonretreat and asserts that there was insufficient evidence to support the convictions. We find that resolution of these last two assertions of error resolves the appeal, and we decline to further address the remaining assertions.

See *State v. Enriquez-Beltran*, 9 Neb. App. 459, 616 N.W.2d 14 (2000) (appellate court is not obligated to engage in analysis which is unnecessary to adjudicate case and controversy before it).

IV. ANALYSIS

1. Privilege of Nonretreat

White first challenges the district court's refusal to give a requested jury instruction concerning the privilege of nonretreat. White sought to have the jury instructed that he did not have a duty to retreat if he was not the first aggressor. The issue of whether one has a duty to retreat or a privilege of nonretreat when acting in self-defense in the dwelling against another who is a cohabitant is an issue of first impression in Nebraska. We conclude that the rule followed by the majority of other jurisdictions, applying the privilege of nonretreat in this situation, is a better reasoned approach than the minority rule, limiting the privilege of nonretreat to incidents involving unlawful intruders. As such, we conclude that the court erred in denying White's requested jury instruction.

[1-3] Whether jury instructions given by a trial court are correct is a question of law. *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009). 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*. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009); *State v. Edwards, supra*.

(a) Correct Statement of Law

The first issue we must address, which is essentially the dispositive point of this appeal, is whether White's proffered jury instruction was a correct statement of the law. White

asserts that the privilege of nonretreat should apply if he was not the first aggressor in the altercation with Berg, regardless of whether Berg was a cohabitant or an unlawful entrant. The State asserts, and the district court found, that the privilege of nonretreat applies only if the other party involved in the altercation is an unlawful entrant. This is an issue of first impression in Nebraska, but we side with the majority of jurisdictions in agreeing with White.

[4-7] Neb. Rev. Stat. § 28-1409 (Reissue 2008) provides that the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion. Section 28-1409(4) provides that the use of deadly force shall not be justifiable unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping, or sexual intercourse compelled by force or threat. Section 28-1409(4)(a) and (b) further provides that the use of deadly force is not justifiable if the actor provoked the use of force against himself in the same encounter (i.e., was the first aggressor) or the actor knows that he can avoid the necessity of using such force with complete safety by retreating (i.e., the duty to retreat). Section 28-1409(4)(b)(i) provides that the actor shall not be obliged to retreat (i.e., has a privilege of nonretreat) from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be.

The privilege of nonretreat has not been the subject of any substantial discussion in Nebraska jurisprudence. In *State v. Menser*, 222 Neb. 36, 382 N.W.2d 18 (1986), the defendant requested an instruction including the privilege of nonretreat, but the Nebraska Supreme Court affirmed the trial court's refusal of the instruction, because it was uncontroverted that the altercation between the defendant and the victim did not occur in the defendant's dwelling; the altercation occurred on a sidewalk in front of the defendant's dwelling. The court held that the privilege of nonretreat was inapplicable, given

that the defendant had in fact retreated voluntarily from his dwelling and was on a public sidewalk at the time of the altercation. *Menser* does not provide any insight into the question of whether the privilege of nonretreat should apply when the other party is a cohabitant or should be limited to situations involving unlawful intruders. In the present case, the district court recognized that *Menser* was not insightful on this issue and the court concluded that the statutory language concerning the privilege of nonretreat was intended to apply only in situations involving unlawful intruders.

The briefs of the parties have provided us with less than four pages of discussion, combined, on this issue of first impression. On appeal, White's brief cites no authority from any jurisdiction suggesting that the privilege has ever been applied to altercations between cohabitants; instead, White merely argues that the statutory language does not make a distinction. The State, similarly, does not reveal to the court in its brief that there has ever been application of the privilege concerning altercations between cohabitants; instead, the State indicates that "[o]ther courts have ruled [in accordance with the State's position and the district court's holding]," and cites to a handful of jurisdictions so holding. Brief for appellee at 15. Our research, however, reveals that this is an issue upon which other jurisdictions are split and, moreover, that the approach taken by the State and the district court is in a significant minority. See *State v. Shaw*, 185 Conn. 372, 441 A.2d 561 (1981) (noting that majority of jurisdictions have adopted rule that privilege of nonretreat applies equally to altercations with cohabitants and unlawful intruders). See, also, Annot., Homicide: Duty to Retreat Where Assailant and Assailed Share the Same Living Quarters, 67 A.L.R.5th 637 (1999) (citing 14 jurisdictions holding that privilege of nonretreat is applicable to cohabitants and 7 jurisdictions holding that it is not applicable to cohabitants, one of which (Florida) subsequently receded from that holding).

In *Weiand v. State*, 732 So. 2d 1044 (Fla. 1999), the Florida Supreme Court receded from its prior jurisprudence in *State v. Bobbitt*, 415 So. 2d 724 (Fla. 1982), and adopted the majority view that the privilege of nonretreat was applicable in

situations involving altercations between cohabitants. See, also, *State v. Smiley*, 927 So. 2d 1000 (Fla. App. 2006) (recognizing that subsequent statutory enactment entirely eliminated duty to retreat in Florida). As the court noted in *Weiand v. State, supra*, the privilege of nonretreat has early common-law origins, citing *People v. Tomlins*, 213 N.Y. 240, 107 N.E. 496 (1914). In *Weiand*, the Florida Supreme Court quoted from Judge Cardozo's explanation in *Tomlins* of the historical basis of the privilege:

> "It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home. More than 200 years ago it was said by Lord Chief Justice Hale: In case a man 'is assailed in his own house, he need not flee as far as he can, as in other cases of se defendendo, for he hath the protection of his house to excuse him from flying, as that would be to give up the protection of his house to his adversary by flight.' *Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home. . . . The rule is the same whether the attack proceeds from some other occupant or from an intruder.*"

732 So. 2d at 1049-50 (emphasis supplied in *Weiand v. State, supra*).

[8] In *Weiand*, the Florida Supreme Court recognized that there was no logical basis for requiring one to retreat when attacked in one's home by a cohabitant but not requiring retreat if the attacker is a stranger. The danger posed and the sanctuary of the dwelling is the same regardless of the status of the attacker. The court further recognized that in addition to creating an illogical rule, denying the privilege of nonretreat in situations involving altercations between cohabitants was contrary to sound public policy, especially in cases of domestic violence. For example, one attacked by a paramour within the confines of one's dwelling would have a privilege of nonretreat, while one attacked by a spouse or family member would not have such a privilege and would have a duty to retreat away from the dwelling if possible. Such a rule, in addition

to providing an illogical distinction based on the identity of the attacker, would undermine public policy concerns about domestic violence in the home.

In *State v. Glowacki*, 630 N.W.2d 392 (Minn. 2001), the Minnesota Supreme Court recognized the competing views espoused by the minority of jurisdictions holding that the privilege of nonretreat is inapplicable to situations involving altercations between cohabitants. The Minnesota Supreme Court noted the jurisdictions taking the minority view generally assert that the value of human life and the importance of resolving disputes without violence support such a distinction and that cohabitants have a heightened obligation to treat one another with tolerance and respect. The Minnesota Supreme Court, while recognizing the minority approach, elected to join the majority of jurisdictions and adopted the rule that the privilege of nonretreat is applicable regardless of whether the aggressor is also rightfully in the home. Although we do not discount the sanctity of life or the notion that cohabitants should treat one another with tolerance and respect, the issue of retreat arises only once a cohabitant has already thrown tolerance and respect out the window and attacked; at such a point, we do not find it a compelling argument that one attacked by a cohabitant should, out of deference for continuing respect and tolerance toward the attacker, flee from the dwelling to seek safety.

[9] We also conclude that the majority rule is the more reasoned approach. We conclude that when one is attacked within one's dwelling, the right to defend oneself and the privilege of nonretreat should apply equally, regardless of whether the attacker is a cohabitant or an unlawful entrant. Such a rule leads to more uniform application than a rule that requires distinctions about the lawful or unlawful status of an attacking occupant. See *State v. Glowacki, supra*. Such a rule avoids the illogical distinction created by a rule that makes the privilege of nonretreat dependent upon both the location of the attack and the identity of the attacker. See *Weiand v. State*, 732 So. 2d 1044 (Fla. 1999). See, also, *State v. Shaw*, 185 Conn. 372, 380-81, 441 A.2d 561, 565 (1981), quoting *Jones v. The State*, 76 Ala. 8 (1884) ("'[w]hy, it may

be inquired, should one retreat from his own house . . . when assailed by a stranger who is lawfully upon the premises? Whither shall he flee, and how far, and when may he be permitted to return? He has a lawful right to be and remain there . . . .'") Such a rule is also in conformity with public policy concerns recognizing the plight of those who are victims of domestic abuse within the home. See, *State v. Glowacki*, *supra*; *Weiand v. State, supra*.

"'[T]he right to fend off an unprovoked and deadly attack is nothing less than the right to life itself, which [the] Constitution declares to be a basic right.'" *Weiand v. State*, 732 So. 2d at 1057, quoting *Perkins v. State*, 576 So. 2d 1310 (Fla. 1991) (Kogan, J., specially concurring). Thus, the privilege of nonretreat instruction should be equally available to anyone who is attacked within his or her dwelling, provided that the other necessary elements for the application of self-defense are present. See *Weiand v. State, supra*. There is no issue before us concerning the propriety of a self-defense instruction in this case, nor is there an issue concerning the reasonableness of White's use of force, which remains a matter for the jury to be properly instructed on. As such, we conclude that the district court erred in finding that White's proposed jury instruction concerning the privilege of nonretreat was not a correct statement of the law.

(b) Warranted by Evidence

Next, we consider whether the requested instruction was warranted by the evidence. Our review of the record reveals that there was sufficient evidence adduced to warrant the giving of the requested instruction about White's privilege of nonretreat.

White did not testify in his own behalf. Nonetheless, there was evidence adduced that White made a number of statements to law enforcement officers responding to the scene and interviewing him after his arrest. Those statements provided sufficient evidence to warrant the requested instruction, because they provided a basis for the jury to find that White was not the initial aggressor in the altercation occurring in White's dwelling.

When White called the 911 dispatcher requesting assistance for Berg, he indicated that he had stabbed Berg in the chest because Berg "came after" him. White indicated to Officer Murray, the first officer to make contact with White, that "his roommate had threatened to shoot him, and that's why he had to stab [Berg]." Similarly, Officer Flohrschutz, another of the early responding officers, testified that White indicated to the officers that Berg "had tried to stab him, so he stabbed [Berg] in return."

Officer Pilmaier transported White from the scene to the Sarpy County sheriff's office. Officer Pilmaier testified that White made a variety of statements about the events, including that "his roommate was trying to kill him," that "his roommate was crazy," and that "he was trying to protect himself" because "Berg was coming after him."

During an interview conducted at the Sarpy County jail, White indicated that Berg had come after him and that he had stabbed Berg to defend himself. White told Officer Bailey, the officer conducting the jail interview, that Berg had come after him "like a freight train" and that he had been threatened by Berg's size and weight. White indicated that he had attempted to stab Berg in the arm, but had missed and struck Berg in the chest. White told Officer Bailey that Berg had acted violently toward White, that Berg had a "look in his eyes," that Berg had rushed at him, and that he had stabbed Berg out of defense, not aggression.

Although White made other statements from which the jury might have rejected his claim of self-defense, the evidence adduced concerning these statements made by White would have supported a finding that he was not the initial aggressor and that Berg was the initial aggressor in the altercation in their dwelling. We note that while the State objected to the requested instruction, the State did not assert that there was no evidence to support a finding that White was not the initial aggressor and the State did not generally oppose the giving of a self-defense instruction. We conclude that the instruction was warranted by the evidence adduced.

(c) Prejudice

Finally, we must consider whether the court's refusal to give White's requested instruction about the privilege of nonretreat resulted in prejudice. We conclude that the instructions given did not correctly state the law, because they informed the jury that White had a duty to retreat if possible and that, accordingly, the failure to give the instruction concerning the privilege of nonretreat resulted in prejudice.

[10,11] Before an error in the giving of jury instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant. *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011). All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. *State v. Schmidt*, 276 Neb. 723, 757 N.W.2d 291 (2008).

Instruction No. 7 given to the jury in this case was the court's instruction concerning self-defense. That instruction informed the jury that among the other findings required to conclude that White acted in self-defense, the jury was required to conclude that "before using deadly force [White] either tried to get away or did not try because he reasonably did not believe he could do so in complete safety." As such, when the court refused to give White's requested instruction about the privilege of nonretreat, the jury was left having been instructed that White had a duty to retreat, even from within his dwelling, before a finding of self-defense would be appropriate.

We conclude that the jury should have been instructed that White was not required to retreat from within his dwelling if Berg was the initial aggressor. There was evidence adduced to support a finding that Berg was the initial aggressor. The instructions given to the jury, without an instruction on the privilege of nonretreat, actually instructed the jury that White did have a duty to retreat. The jury was incorrectly instructed about a fundamental aspect of White's defense of self-defense. We certainly cannot find such error to be harmless.

2. Sufficiency of Evidence

[12] Having found reversible error, we must consider whether White can be subjected to a retrial. See *State v. Smith*, 19 Neb. App. 708, 811 N.W.2d 720 (2012). The Double Jeopardy Clauses of the federal and state Constitutions do not forbid a retrial after an appellate determination of prejudicial error in a criminal trial so long as the sum of all the evidence admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *State v. Riley*, 281 Neb. 394, 796 N.W.2d 371 (2011).

White has asserted that there was insufficient evidence to support his convictions. Our review of the record reveals that White made numerous statements acknowledging that he had stabbed Berg. In addition, although White made statements suggesting that he acted in self-defense and that Berg was the first aggressor, there were also many discrepancies in his statements and the jury could have concluded that his statements lacked credibility and that his actions were not in self-defense. Although White alleged that he had acted in self-defense and, as noted above, the jury was not properly instructed about the privilege of nonretreat, there was sufficient evidence adduced to support the convictions for second degree murder and use of a weapon in the commission of a felony. As such, we conclude that White can be retried on the charges.

V. CONCLUSION

We find that there is no duty to retreat (i.e., there is a privilege of nonretreat) when acting in self-defense in the dwelling against another who is a cohabitant. We find that the district court erred in failing to instruct the jury that White did not have a duty to retreat if he was not the first aggressor, as requested by White. We also find, however, that there was sufficient evidence adduced to support the convictions and that the case is appropriately reversed and remanded for a new trial.

Reversed and remanded for a new trial.

DANIEL A. MEINTS, APPELLANT, V. CITY OF BEATRICE, NEBRASKA, APPELLEE.

820 N.W.2d 90

Filed August 21, 2012. No. A-11-683.

1. **Administrative Law: Judgments: Appeal and Error.** Neb. Rev. Stat. § 25-1901 et seq. (Reissue 2008) statutorily mandates that a party seeking judicial review of an administrative determination must comply with the petition in error prerequisites when the review sought is of a final order made by a tribunal, board, or officer exercising judicial functions.
2. ____: ____: ____. Neb. Rev. Stat. § 25-1901 (Reissue 2008) provides for a district court to review the judgment rendered or final order made by a tribunal inferior in jurisdiction and exercising judicial functions.
3. **Administrative Law: Appeal and Error.** A board or tribunal exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner.
4. **Evidence: Proof: Words and Phrases.** Adjudicative facts pertain to questions of who did what, where, when, how, why, and with what motive or intent.
5. **Administrative Law: Appeal and Error.** To perfect a petition in error, Neb. Rev. Stat. § 25-1903 (Reissue 2008) directs the petitioner to file the petition to the district court, setting forth the errors complained of.
6. **Administrative Law: Records: Appeal and Error.** Neb. Rev. Stat. § 25-1905 (Reissue 2008) directs the petitioner to file with his or her petition a transcript of the proceedings or a praecipe directing the tribunal, board, or officer to prepare the transcript of the proceedings.
7. **Administrative Law: Jurisdiction: Appeal and Error.** Compliance with Neb. Rev. Stat. §§ 25-1903 and 25-1905 (Reissue 2008) is jurisdictional.
8. **Administrative Law: Jurisdiction: Records: Appeal and Error.** The plain language of Neb. Rev. Stat. § 25-1905 (Reissue 2008) requires that for jurisdiction to attach, the transcript of proceedings or praecipe must be filed specifically with the petition in error in the court requested to review such judgment.
9. **Administrative Law: Final Orders: Records: Appeal and Error.** Neb. Rev. Stat. § 25-1905 (Reissue 2008) plainly indicates that the transcript required to be filed with a petition in error must contain the final judgment or order sought to be reversed, vacated, or modified.
10. **Legislature: Courts: Pleadings: Appeal and Error.** Neb. Rev. Stat. § 25-1937 (Reissue 2008) provides that when the Legislature enacts a law providing for an appeal, but without providing the procedure therefor, the procedure for appeal to the district court shall be the same as for appeals from the county court to the district court in civil actions, and that trial in the district court is to be de novo upon the issues made up by the pleadings.

Appeal from the District Court for Gage County: DANIEL E. BRYAN, JR., Judge. Affirmed.

Terry K. Barber, of Barber & Barber, P.C., L.L.O., for appellant.

Torrey L. Janus Gerdes, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Daniel A. Meints appeals an order of the district court for Gage County, Nebraska, dismissing Meints' complaint seeking judicial review of a decision of the City of Beatrice board of appeals (Board of Appeals). The district court dismissed Meints' complaint, because the court found that Meints had failed to present either a transcript of the proceedings conducted before the Board of Appeals or a praecipe requesting such transcript. We find no error and affirm.

II. BACKGROUND

In March 2009, the City of Beatrice, Nebraska (the City), issued Meints a notice concerning certain real property in Beatrice, owned by Meints, and ordering the demolition of a structure on the property. Meints appealed that notice and order to the City's Board of Appeals. In April, the Board of Appeals met and considered Meints' appeal, denied the appeal, and upheld the City's notice and order.

In May 2009, Meints filed a pleading in the district court for Gage County, captioned "Complaint and Praecipe." In his complaint, Meints alleged that the City and the Board of Appeals had erred in ordering demolition of the structure on his property, alleged that he had been denied due process related to the Board of Appeals' proceedings, and sought "judicial review" of the action of the City and the Board of Appeals. Meints did not include any transcript of the proceedings conducted by the Board of Appeals, nor did he include any praecipe requesting the preparation of such transcript of proceedings. In February 2010, Meints filed another pleading, captioned "Amended Complaint." In the amended complaint, Meints made substantially the same assertions; he again did not include a transcript

or a praecipe for the preparation of a transcript of the proceedings conducted by the Board of Appeals.

In June 2011, the City moved for summary judgment. The City alleged that Meints' action was properly considered a petition in error under Neb. Rev. Stat. § 25-1901 et seq. (Reissue 2008) and alleged that because Meints had failed to file a transcript or a praecipe for transcript containing the Board of Appeals' determination, the district court was without jurisdiction. On July 13, the district court found that it lacked jurisdiction and dismissed Meints' action. This appeal followed.

III. ASSIGNMENT OF ERROR

Meints' sole assignment of error is that the district court erred in finding that it lacked jurisdiction and in dismissing his action.

IV. ANALYSIS

Meints asserts that the district court erred in finding that he was required to comply with the jurisdictional prerequisites of § 25-1901 et seq. He asserts that the court should have found that his request for judicial review was appropriate under alternative means, such as Neb. Rev. Stat. § 25-1937 (Reissue 2008). We find no merit to Meints' assertions.

[1] The district court concluded that § 25-1901 et seq. applied to Meints' action and that his failure to comply with the statutory prerequisites for properly bringing a petition in error prevented the court from obtaining jurisdiction. We agree. As we recently noted in *Turnbull v. County of Pawnee*, 19 Neb. App. 43, 810 N.W.2d 172 (2011), § 25-1901 et seq. statutorily mandates that a party seeking judicial review of an administrative determination must comply with the petition in error prerequisites when the review sought is of a final order made by a tribunal, board, or officer exercising judicial functions. We conclude that these provisions are applicable to Meints' action, because the City's Board of Appeals exercised judicial functions. We also conclude that contrary to Meints' assertions on appeal, § 25-1937 did not provide an alternative process for Meints to seek judicial review of the Board of Appeals' decision.

1. Section 25-1901 et seq.

We first find that § 25-1901 et seq. did apply to Meints' attempt to secure judicial review of the Board of Appeals' decision, because the information available to us on appeal indicates that the Board of Appeals performed judicial functions. As a result, § 25-1903 imposed an obligation on Meints to present a transcript or praecipe for transcript of the proceedings before the Board of Appeals, and Meints' failure to do so was a jurisdictional defect.

[2-4] Section 25-1901 provides for a district court to review the judgment rendered or final order made by a tribunal inferior in jurisdiction and exercising judicial functions. *Turnbull v. County of Pawnee, supra*. A board or tribunal exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner. *Id*.; *Camp Clarke Ranch v. Morrill Cty. Bd. of Comrs*., 17 Neb. App. 76, 758 N.W.2d 653 (2008). Adjudicative facts pertain to questions of who did what, where, when, how, why, and with what motive or intent. *Id*. They are roughly the kind of facts which would go to a jury in a jury case. *Id*.

The notice and order sent by the City to Meints in this case is contained in the bill of exceptions, and it indicates that the City determined a residential structure on Meints' property was unsafe, unfit for human occupancy, not sufficiently maintained or in sufficient state of repair, and dangerous. Pursuant to that notice, Meints was ordered to demolish the structure. Meints then appealed to the Board of Appeals.

The bill of exceptions in this case includes an affidavit of Meints' counsel. In that affidavit, Meints' counsel stated that he appeared and represented Meints at the Board of Appeals hearing and that the Board of Appeals received exhibits during the hearing, including more than 20 photographs of the structure Meints had been ordered to demolish. In addition, Meints' counsel's affidavit included as an attachment the minutes from the Board of Appeals meeting, which minutes indicate that the Board of Appeals also heard from a building inspector and a code enforcement officer and that after Meints and his counsel had presented their case, the Board of Appeals voted

unanimously to affirm the notice and order provided to Meints to demolish the structure.

The questions resolved by the Board of Appeals, concerning whether the residential structure on Meints' property was unsafe and dangerous and in need of demolition, were adjudicative in nature, and the Board of Appeals engaged in a judicial function in hearing Meints' appeal of the City's notice and order. As a result, the petition in error statutes were applicable to Meints' attempt to secure judicial review of the City's and the Board of Appeals' orders, and the petition in error statutes dictated the proper steps for perfecting jurisdiction in the district court. See *Turnbull v. County of Pawnee*, 19 Neb. App. 43, 810 N.W.2d 172 (2011).

[5-7] To perfect a petition in error, § 25-1903 directs the petitioner to file the petition to the district court, setting forth the errors complained of. *McNally v. City of Omaha*, 273 Neb. 558, 731 N.W.2d 573 (2007); *Turnbull v. County of Pawnee, supra*. In addition, § 25-1905 directs the petitioner to file with his or her petition a transcript of the proceedings or a praecipe directing the tribunal, board, or officer to prepare the transcript of the proceedings. *McNally v. City of Omaha, supra*; *Turnbull v. County of Pawnee, supra*. The Nebraska Supreme Court has held that compliance with these statutory provisions is jurisdictional. *Id*.

There is no dispute in this case that Meints filed a complaint in the district court purporting to set forth the errors complained of. There is also no dispute in this case that Meints did not file a transcript of the proceedings held before the Board of Appeals, nor did he file a praecipe directing the Board of Appeals to prepare a transcript of the proceedings.

[8,9] The plain language of § 25-1905 requires that for jurisdiction to attach, the transcript of proceedings or praecipe must be filed specifically with the petition in error in the court requested to review such judgment. See, *River City Life Ctr. v. Douglas Cty. Bd. of Equal.*, 265 Neb. 723, 658 N.W.2d 717 (2003); *Turnbull v. County of Pawnee, supra*. Section 25-1905 also plainly indicates that the transcript must contain the final judgment or order sought to be reversed, vacated, or modified.

See, *River City Life Ctr. v. Douglas Cty. Bd. of Equal., supra*; *Turnbull v. County of Pawnee, supra*. Meints' failure to comply with the plain language of these provisions precluded jurisdiction from being conferred on the district court under the petition in error statutes.

2. Alternative Basis for Jurisdiction

Meints asserts that even if § 25-1901 et seq. is applicable to his case, as we have found it is, the district court should be found to have had jurisdiction to hear his complaint under an alternative basis; namely, Meints asserts that § 25-1937 should be found to provide for the district court's jurisdiction over Meints' complaint in this case. We disagree.

In *In re Application of Olmer*, 275 Neb. 852, 752 N.W.2d 124 (2008), the Nebraska Supreme Court addressed the question of whether, in a particular case, both §§ 25-1901 et seq. and 25-1937 might provide alternative bases for district court jurisdiction to judicially review lower tribunal proceedings. In *In re Application of Olmer*, the Supreme Court concluded that the lower tribunal, a county board of commissioners, had exercised judicial functions and that § 25-1901 et seq. was applicable to provide a basis for district court jurisdiction. The Supreme Court also concluded, however, that the petition in error statutes were not the sole method of appeal available to the plaintiff, because the court concluded that the facts of the case demonstrated that § 25-1937 was also applicable.

[10] Section 25-1937 provides that when the Legislature enacts a law providing for an appeal, but without providing the procedure therefor, the procedure for appeal to the district court shall be the same as for appeals from the county court to the district court in civil actions, and that trial in the district court is to be de novo upon the issues made up by the pleadings. In *In re Application of Olmer, supra*, the Supreme Court found that the Legislature had specifically provided in Neb. Rev. Stat. § 23-114.01(5) (Reissue 2007) that an aggrieved party had a right to appeal a decision by the county planning commission or county board of commissioners regarding conditional use or special exceptions and that the appeal was to be made to the district court. The Legislature, however, did not prescribe the proper procedure for doing so. As a result,

§ 25-1937 was also applicable to the plaintiff's action in district court and provided him with two alternative means of seeking judicial review.

The same is not true in Meints' case. There is no legislative grant of a right to appeal a decision of a board of appeals in a city of the first class, as the City is in this case. As a result, distinguishable from *In re Application of Olmer, supra*, Meints' case is not one where the Legislature has specifically provided a right for him to appeal the Board of Appeals' decision but has not prescribed the proper method for taking such an appeal. Section 25-1937 does not apply to provide an alternative basis for the district court's jurisdiction in the present case, and we find Meints' assertions to the contrary to be without merit.

V. CONCLUSION

Meints sought judicial review of the City's Board of Appeals' decision to uphold the notice and order that Meints demolish a structure on residential property. Meints sought judicial review of an order of a lower tribunal that had performed judicial functions, and the provisions of § 25-1901 et seq. were applicable, including the requirement that Meints file with his petition in error a transcript of the lower tribunal proceedings or a praecipe requesting the preparation of such a transcript. Meints failed to comply with this jurisdictional prerequisite, and the district court did not err in dismissing his action. We affirm.

AFFIRMED.

CYNTHIA A. FRIEDMAN, APPELLEE, V.
BRUCE R. FRIEDMAN, APPELLANT.
819 N.W.2d 732

Filed August 21, 2012. No. A-11-747.

1. **Jurisdiction.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Jurisdiction: Appeal and Error.** Notwithstanding whether or not the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.

3. **Equity.** Where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation.
4. **Final Orders: Appeal and Error.** The three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.
5. **Divorce: Child Custody: Final Orders: Appeal and Error.** Custody determinations and proceedings regarding marital dissolution are special proceedings within the meaning of a statute defining final, appealable orders.
6. **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 the appellant prior to the order from which the appeal is taken.
7. **Courts: Judgments: Appeal and Error.** Where the appellate court remands a cause with directions to enter judgment for the plaintiff in a certain amount, the judgment of the appellate court is a final judgment in the cause and the entry thereof in the lower court is a purely ministerial act.
8. **Courts: Judgments: Jurisdiction: Appeal and Error.** The trial court must enter judgments in accordance with the direction of an appellate court, and in so doing, the trial court has no jurisdiction to change those judgments.
9. **Judgments: Appeal and Error.** Judgment on a mandate entered in strict conformity with the latter is a final determination of all matters decided and disposed of by the reviewing court.
10. **Final Orders: Appeal and Error.** An order spreading the mandate entered in accordance with an appellate court decision does not affect a substantial right and is thus not a final, appealable order.

Appeal from the District Court for Howard County: KARIN L. NOAKES, Judge. Appeal dismissed.

Amy Sherman, of Sherman & Gilner, P.C., L.L.O., for appellant.

Bruce R. Friedman, pro se.

James A. Wagoner for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

SIEVERS, Judge.

Bruce R. Friedman appeals from an August 15, 2011, order of the district court for Howard County spreading our mandate

in cases Nos. A-10-919 and A-10-920 filed on June 22, 2011, as an unpublished memorandum opinion. Bruce claims that the district court did not follow our mandate because it failed to "'balance the books,'" brief for appellant at 6, which he asserts we ordered the district court to do in our unpublished memorandum opinion. Bruce asks that we remand the cause with instructions for it to do so. Because the order spreading our mandate from which Bruce appeals does not affect a substantial right, we dismiss this appeal for lack of jurisdiction, pursuant to Neb. Ct. R. App. P. § 2-107(A)(2) (rev. 2012).

JURISDICTIONAL ANALYSIS

[1,2] 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. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). Notwithstanding whether or not the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Schmidt v. State*, 255 Neb. 551, 586 N.W.2d 148 (1998).

In our unpublished memorandum opinion, we reversed the finding of the district court for Howard County that Bruce's garnishment of Cynthia A. Friedman's wages was a frivolous action and we vacated the award of attorney fees and costs imposed on him by the trial court. We also reversed the court's finding that Bruce was in contempt for failure to pay unreimbursed medical expenses in the amount of $6,541.12, although we affirmed the finding that he owed that amount. The opinion regarding those two cases details some of the disputes between Bruce and Cynthia, and it resolves some of them. In a bit of dicta, we observed in our opinion that this case

> cries out for a complete "balancing of the books." And our decision in *Griess* [*v. Griess*, 9 Neb. App. 105, 608 N.W.2d 217 (2000)], provides authority for the trial court to use its equitable powers to accomplish that in a fair and equitable manner. Perhaps, by now, the court has ruled on Bruce's filing of June 2, 2010, seeking credit and "who owes who what" has been resolved—but if not, such obviously needs to be done.

[3] In *Griess v. Griess*, 9 Neb. App. 105, 608 N.W.2d 217 (2000), we recounted our holding from *Janke v. Chace*, 1 Neb. App. 114, 487 N.W.2d 301 (1992), that where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation. It was in this vein that our earlier unpublished memorandum opinion made the suggestion quoted above. This is also the basis of Bruce's present appeal.

In any event, the trial court entered its order spreading our mandate on August 15, 2011. The order is in conformity with the conclusions and directions in our opinion, but it does not address in any way "'who owes who what'" or the "'balancing of the books'" that our dicta suggested needed to be done. The trial court clearly made no order or directive with reference thereto. In short, the trial court properly did not include our dicta in its order spreading our mandate. On September 6, Bruce filed his notice of appeal from the district court's order spreading our mandate, which notice of appeal expressly states that he is appealing from the August 15 order.

We note, however, that another order was entered by the district court on September 2, 2011, before Bruce filed this appeal. That order, which was added to our record via a supplemental transcript requested by Cynthia, orders the parties to attend mediation within 60 days from the date the order was filed "regarding the issues raised in [Bruce's M]otion for Credit of Child Support and [Cynthia's] Motion and Application to Modify and [Cynthia's] Renewed Motion to Retroactively Amend [Bruce's] Child Support Deviation for Travel Expense and Medical Care Obligation." We have located two of the three motions identified in the September 2 order in our voluminous record. After reviewing those motions, it is clear that the September 2 order directing the parties to mediation is an attempt to have the parties figure out "'who owes who what'" and the "'balancing of the books,'" to use our earlier opinion's terminology.

The essence of Bruce's two assignments of error is that the trial court's order spreading our mandate was not in compliance

with our mandate because it did not decide what debits and credits related to this divorce needed to be applied to Bruce's financial obligations to Cynthia. Cynthia's response is that the only thing that kept the trial court from balancing the books was the fact that Bruce filed this appeal on September 9, 2011, preventing the parties, and ultimately the court, from acting on its order of September 2 regarding mediation of the issues raised by the three unresolved motions.

[4-6] The three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered. *McCaul v. McCaul*, 17 Neb. App. 801, 771 N.W.2d 222 (2009). Custody determinations and proceedings regarding marital dissolution, such as this one, are special proceedings within the meaning of a statute defining final, appealable orders to include orders affecting a substantial right made during a special proceeding. See *id*. 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 the appellant prior to the order from which the appeal is taken. *Holste v. Burlington Northern RR. Co*., 256 Neb. 713, 592 N.W.2d 894 (1999).

[7,8] "'Where the appellate court remands a cause with directions to enter judgment for the plaintiff in a certain amount, the judgment of the appellate court is a final judgment in the cause and the entry thereof in the lower court is a purely ministerial act. . . .'" *Jurgensen v. Ainscow*, 160 Neb. 208, 212, 69 N.W.2d 856, 858 (1955) (quoting 3 Am. Jur. *Appeal and Error* § 1236 (1936)). The trial court must enter judgments in accordance with the direction of this court, and in so doing, the trial court has no jurisdiction to change those judgments. See *Jurgensen v. Ainscow, supra*. No modification of the judgment so directed can be made, nor may any provision be engrafted on or taken from it. *Id*. That order is conclusive on the parties, and no judgment or order different from, or

in addition to, that directed by it can have any effect. *Id*. The order spreading our mandate that Bruce appeals from comports with these well-established principles.

Moreover, the order spreading our mandate does not diminish a claim or defense that was available to Bruce, and thus, it does not affect his substantial rights. This is true even if we were to include the September 2, 2011, order directing the parties to mediation in our jurisdictional analysis. That order for mediation is statutorily authorized given that the unresolved motions are essentially proceedings to modify. See Neb. Rev. Stat. §§ 42-364(6) and 43-2937 (Cum. Supp. 2010). The September 2 order does not affect Bruce's substantial rights because his claims remain intact and unresolved, notwithstanding the September 2 order.

[9,10] Judgment on a mandate entered in strict conformity with the latter is a final determination of all matters decided and disposed of by the reviewing court. *Jurgensen v. Ainscow, supra*. Given that a trial court must enter judgments in accordance with the decision and directions of this court and that the trial court has no jurisdiction to change those judgments, the order spreading our mandate in the present case is not an order that affects a substantial right and is thus not a final, appealable order.

CONCLUSION

We conclude that the order Bruce appeals from that spreads our mandate is an order made in a special proceeding, but it does not affect a substantial right. Therefore, we lack jurisdiction and this appeal is hereby dismissed.

APPEAL DISMISSED.

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

819 N.W.2d 741

Filed August 28, 2012. No. A-11-953.

1. **Juvenile Courts: Appeal and Error.** Prompt adjudication determinations are initially entrusted to the discretion of the juvenile court and will be upheld unless they constitute an abuse of discretion.
2. **Juvenile Courts: Criminal Law: Speedy Trial.** With respect to the calculations of the running of the speedy adjudication clock, an appellate court's criminal speedy trial jurisprudence is generally applicable in the juvenile context.
3. **Speedy Trial: Proof.** In the context of a statutory speedy trial case, the State has the burden to prove not only the reason for a delay, but also that the length of the delay is reasonable or for good cause.
4. **Speedy Trial: Appeal and Error.** The time during which an appeal of a denial of a motion for discharge is pending on appeal is excludable from the speedy trial clock.
5. **Jurisdiction: Speedy Trial: Appeal and Error.** The period of time excludable due to an appeal concludes when the district court first reacquires jurisdiction over the case by taking action on the mandate of the appellate court.
6. **Juvenile Courts: Time.** Absolute discharge from a delinquency petition is not statutorily mandated when a juvenile is not adjudicated within the required time period.
7. ____: ____. If the 6-month speedy adjudication period has not expired, there is no need to examine the factors that guide the discretionary determination to grant absolute discharge of an adjudication proceeding.
8. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case before it.

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Christine D. Kellogg for appellant.

Donald W. Kleine, Douglas County Attorney, Malina Dobson, Debra Tighe-Dolan, and Tony Hernandez, Senior Certified Law Student, for appellee.

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

SIEVERS, Judge.

I. INTRODUCTION

Shaquille H. appeals from an order of the separate juvenile court of Douglas County that denied his motion to discharge due to an alleged violation of his right to a speedy adjudication. After our review, we find that the juvenile court properly denied the motion for discharge, and thus, we affirm.

II. BACKGROUND

On September 14, 2010, the State of Nebraska filed a complaint in the county court for Douglas County alleging that Shaquille, who was born in May 1994, violated Neb. Rev. Stat. § 28-1202 (Cum. Supp. 2010) and Omaha Mun. Code, ch. 20, art. VII, § 20-204 (1993). Bond was set at $25,000, which he could meet by posting 10 percent thereof. Shaquille filed a motion to transfer the case to the separate juvenile court of Douglas County on October 13. After a hearing on November 4, the motion was denied. Shaquille filed a motion to reconsider transfer on November 8, and a hearing was set for the next day. Shaquille's motion to reconsider transfer was granted on November 9, and Shaquille was remanded to the Douglas County sheriff pending resolution of the case.

The State filed an amended petition in the separate juvenile court of Douglas County on November 10, 2010, alleging violations of Neb. Rev. Stat. § 43-247(1) (Reissue 2008). Specifically, the amended petition recites in count I, that Shaquille carried a concealed weapon on his person, in violation of § 28-1202(1), and in count II, that he possessed a "pistol, revolver or other form of short-barreled hand firearm," in violation of Neb. Rev. Stat. § 28-1204(1) (Cum. Supp. 2010). A detention hearing was held on that same date, and the court ordered Shaquille to be detained in the Douglas County Youth Center or post 10 percent of a $2,000 bond. Shaquille was arraigned on December 8, and a written denial was entered on his behalf. The juvenile court judge at the adjudication hearing stated that there was a request to "exonerate" the bond. The best we can discern from the record is that Shaquille was released from custody sometime between November 10 and

December 8 and that he has not been in custody in connection with this matter since his release.

A pretrial conference was held on January 6, 2011, and the matter was set for adjudication on February 11. Due to a funeral, the court, on its own motion, rescheduled the adjudication to April 13. Shaquille's counsel indicated to the court that Shaquille was unable to attend the April 13 hearing due to his father's having a conflicting doctor's appointment and being unable to give him a ride. His counsel requested a continuance. The matter was rescheduled for July 1, in anticipation of a plea, according to the record. However, Shaquille failed to appear on July 1. The State requested that a capias be issued and Shaquille's counsel moved for a continuance—both requests were denied. Instead, the court gave Shaquille until July 5 to appear, and the record shows that he did appear on July 1, after the hearing had concluded. Shaquille apparently changed his mind about entering a plea in this case. An order and notice of July 1 recites that Shaquille's counsel requested the matter be rescheduled and that "by agreement of counsel," the adjudication was set for October 14.

Shaquille filed a motion to discharge on October 12, 2011. The juvenile court judge called counsel for the parties into the courtroom on October 13 regarding continuing the adjudication in order to attend the judge's aunt's funeral. Shaquille's motion to discharge was discussed at that time, although no specific ruling was made. At the conclusion of this discussion, the court decided that the adjudication would remain set for the following day, but the motion for discharge had not yet been formally decided.

At the October 14, 2011, adjudication hearing, the parties began by addressing Shaquille's motion to discharge. Counsel provided argument to the court, and the State called the juvenile court's bailiff to "testify that this [case] was brought in as timely as possible" according to counsel for the State. The bailiff testified that she could not specifically recall rescheduling Shaquille's case; however, she stated, "Any case that I would have continued would have been continued to the first available date that worked around counsel's conflicts and

the Court's calendar." On cross-examination, counsel asked whether judges from neighboring counties can come in and handle any of the hearings, and the bailiff replied, "There's been exceptions when judges from other counties can come in and help, but that is with permission from the Chief Justice." After the bailiff's testimony, the judge provided his rationale for denying the motion to discharge. He reasoned, summarized, that because the purpose of the juvenile court is rehabilitative and that because the nature of the charges against Shaquille is quite serious, it would not be in Shaquille's best interests to grant the motion. No specific findings were made with regard to excludable time periods. A written and file-stamped order of October 14 denying the motion for discharge is in our record. The State then called its first adjudication witness, shortly after which the trial was continued to December 22. On November 8, Shaquille appealed from the court's denial of his motion to discharge.

III. ASSIGNMENTS OF ERROR

Shaquille assigns, renumbered and restated, that the separate juvenile court erred in denying his motion to discharge because (1) his statutory right to a speedy adjudication was violated, (2) his constitutional right to a speedy adjudication was violated, and (3) there was no evidence that discharge would not be in his best interests.

IV. STANDARD OF REVIEW

[1] Prompt adjudication determinations are initially entrusted to the discretion of the juvenile court and will be upheld unless they constitute an abuse of discretion. *In re Interest of Britny S.*, 11 Neb. App. 704, 659 N.W.2d 831 (2003).

V. ANALYSIS

1. Was Shaquille's Statutory Right to Speedy Adjudication Violated?

[2] Shaquille first argues that the trial court erred in denying his motion to discharge on the ground that his statutory right to a speedy adjudication was violated because, taking into consideration any periods of excludable time, the case was

pending for more than 6 months. The petition was filed in juvenile court on November 10, 2010. Pursuant to Neb. Rev. Stat. § 43-271(1)(b) (Reissue 2008):

> The hearing as to a juvenile in custody of the probation officer or the court shall be held as soon as possible but, in all cases, within a six-month period after the petition is filed, and as to a juvenile not in such custody as soon as practicable but, in all cases, within a six-month period after the petition is filed.

This statute also provides that the computation of the 6-month period provided for in the statute "shall be made as provided in section 29-1207, as applicable." Thus, generally, our criminal speedy trial jurisprudence with respect to the calculations of the running of the speedy trial clock is applicable in the juvenile context. Under § 43-271, the speedy adjudication clock begins on November 11, the day after the juvenile petition was filed, and the last day would be May 10, 2011. See *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002) (exclude day petition was filed, count forward 6 months, and back up 1 day).

(a) Delay Not Attributable to Shaquille and Delay for Good Cause

[3] The adjudication hearing was originally scheduled for February 11, 2011. However, the court, on its own motion, rescheduled the adjudication to April 13. We have previously said that in the context of a statutory speedy trial case, the State has the burden to prove not only the reason for a delay, but also that the length of the delay is reasonable or for good cause. *In re Interest of Britny S., supra*, citing *State v. Wilcox*, 224 Neb. 138, 395 N.W.2d 772 (1986). The record shows that this period of delay was due to the funeral of an attorney who practiced law in juvenile court. The judge remarked in that regard, "I [rescheduled the adjudication hearing] on the Court's own motion February 9th . . . out of respect for [Steve] Renteria and to attend [his funeral] service, and [out of respect for] his long service in this court and others." The bailiff's testimony was that she would have rescheduled the hearing on the first available day on the court's calendar. Clearly, the

permissible inference from the testimony is that the judge's docket is busy and crowded.

In *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996), the Nebraska Supreme Court found that there was no abuse of discretion in the juvenile court's conclusion that a crowded docket alone was insufficient as good cause to extend the 6-month period prescribed in § 43-271. However, in that case, the court found that there was "no evidence [presented] that would allow the juvenile court to make findings regarding specific causes of delay as enumerated in § 29-1207(4)(a) through (f) and the extensions attributable to such causes with respect to a particular juvenile." 250 Neb. at 525, 550 N.W.2d at 27. The opinion continues, "At best, the evidence adduced by the State only allows this court to conclude that in general, there was a crowded docket in the Douglas County Separate Juvenile Court at the time of the discharge." *Id.* at 525-26, 550 N.W.2d at 27.

The instant case is clearly distinguishable from *In re Interest of Brandy M. et al., supra*. We have evidence in Shaquille's case regarding the rationale for each period of excludable delay under Neb. Rev. Stat. § 29-1207(4)(a) through (f) (Cum. Supp. 2010), as well as testimony from the juvenile court's bailiff that the continued adjudications were scheduled as promptly as possible, which we take to mean as soon as the judge had an opening on his calendar. Accordingly, we find that this period of delay was reasonable and for good cause. See § 29-1207(4)(f). Thus, we exclude this 61-day period (February 12 to April 13) in computing when the statutory adjudication clock would run. See § 29-1207(4)(f) (other periods of delay not specifically enumerated in this section are excludable if court finds they are for good cause).

(b) Delay Attributable to Shaquille

Shaquille did not appear at the April 13, 2011, adjudication hearing—the excuse offered by counsel was that Shaquille's father was unable to reschedule a doctor's appointment and that as a result, he could not get Shaquille to the hearing. His counsel made an oral motion for a continuance, there was no objection from the State, and such motion was granted. The

adjudication was rescheduled to July 1. Section 29-1207(4)(b) provides that "the period of delay resulting from a continuance granted at the request or with the consent of the defendant or his or her counsel" is excludable. Hence, the period from April 14 to July 1, 79 days, is excludable.

Shaquille did not appear at the July 1, 2011, hearing. Shaquille's counsel moved for a continuance at the hearing, and the court denied the motion. The State requested that a capias be issued, and the court denied such request, giving Shaquille until July 5 to appear in court. According to an order in evidence dated July 1, 2011, and filed on July 6, Shaquille appeared with his father on July 1, following the hearing, and his counsel requested that the hearing be reset. That order recites that "by agreement of counsel" the matter was "reset" for an adjudication hearing on October 14. We find that this period of delay, July 2 to October 14, was excludable under § 29-1207(4)(b), as this continuance was granted with Shaquille's consent. Thus, we find that the period of time from July 2 to October 14, 105 days, is also excludable.

Therefore, a total of 184 days are excludable due to these two periods of delay attributable to Shaquille. Taking into consideration this 184-day excludable time period, plus the 61 days of excludable time we previously determined were for good cause attributable to the court, the State had until January 10, 2012, to bring Shaquille to trial (May 10, 2011 + 245 days). When Shaquille moved for discharge of the complaint on October 12, 2011, there were still 90 days remaining on the 6-month statutory speedy adjudication clock. Shaquille's first assignment of error is thus without merit.

(c) Time Excluded Due to Motion to Discharge

The time between the filing of Shaquille's motion for discharge on October 12, 2011, and the juvenile court's denial of such motion on October 14 does not enter into the calculation because the time through October 14 has already been deemed excludable within Shaquille's excludable time discussed above. Clearly, we cannot count an excludable day twice.

[4] Our record reveals that trial was started on the morning of October 14, 2011, after the motion to discharge was

denied. However, trial was continued at 11:29 a.m. by the court because of the judge's aunt's funeral that the judge wanted to attend. The court announced that the trial would be continued to December 22. The present appeal was filed on November 8. The applicable law is that the time during which an appeal of a denial of a motion for discharge is pending on appeal is excludable from the speedy trial clock under § 29-1207(4)(a) as "other proceedings concerning the defendant." See *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002). And the time between October 14 until November 8, the day the appeal was filed, is excluded under the good cause catchall clause of § 29-1207(4)(f), given the evidence in the record from the bailiff about how matters are rescheduled when continued, together with the judge's explanation about his aunt's funeral. Thus, there is a showing of good cause for this timeframe. The speedy adjudication clock was tolled on October 15 and continues to be tolled during the pendency of this appeal.

(d) Summary of Statutory Speedy Adjudication Calculation

[5] As said at the outset, without any excludable time, the 6-month speedy adjudication clock would have run out on May 10, 2011. We have found 61 days excludable for the lawyer's funeral; 79 days excludable for the consented continuance after Shaquille's failure to appear on April 13; 105 days excludable for his second failure to appear on July 1, and the resulting continuance; and 25 days from October 15 (the day after the continuance due to the judge's aunt's funeral) until the appeal to this court was filed on November 8, which tolls the running of the clock until the appeal is finally concluded and the trial court takes action on our mandate. This is a total of 270 days, meaning that when the notice of appeal was filed, the State had until February 4, 2012, in which to do the adjudication. Consequently, the State will have an additional 86 days left on the speedy adjudication clock when the juvenile court regains jurisdiction after action is taken on our mandate. See *State v. Ward*, 257 Neb. 377, 597 N.W.2d 614 (1999), *disapproved on other grounds, State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004) (period of

time excludable due to appeal concludes when district court first reacquires jurisdiction over case by taking action on mandate of appellate court).

2. Was Shaquille's Constitutional Right to Speedy Adjudication Violated?

Shaquille next assigns that his constitutional right to speedy adjudication was violated because, by the time he filed his motion to discharge, more than 6 months had elapsed since the criminal complaint was filed in county court. Shaquille cites *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996), apparently in support of that proposition. However, in *In re Interest of Brandy M. et al.*, the Nebraska Supreme Court specifically declined to decide whether the U.S. and Nebraska Constitutions provide a "speedy trial" right in the context of delinquency adjudication proceedings. However, unlike this case, in *In re Interest of Brandy M. et al.*, the court found a violation of the speedy adjudication statute, plus there is no indication from *In re Interest of Brandy M. et al.* that a criminal complaint was first filed against any one of the 10 juveniles that were the subject of that opinion, followed by a transfer to the juvenile court as occurred in Shaquille's case. Thus, *In re Interest of Brandy M. et al.* is procedurally quite different from this case. Nonetheless, we believe that the following quote from *In re Interest of Brandy M. et al.* is instructive:

> [W]e find no reason to decide this constitutional issue [of whether a speedy trial right exists in the context of a delinquency adjudication], as §§ 43-271 and 43-278, when properly construed, confer a statutory right to a prompt adjudication hearing to all juveniles within § 43-247(1), (2), (3)(b), and (4). This construction is based first of all upon the three conditions of custody identified in the clear and unambiguous language of § 43-271: (1) juveniles in the temporary custody of an officer of the peace without a warrant, (2) juveniles in the custody of the probation officer or court, and (3) juveniles not in custody.
>
> . . . .

> It is readily apparent from the plain language of § 43-271 that the Legislature intended to provide a statutory right to a prompt adjudication hearing for all juveniles. However, those juveniles being held in custody are to receive an adjudication hearing as soon as *possible*, whereas the juveniles not being held in custody are to receive an adjudication hearing as soon as *practicable*. Both sets of juveniles should receive an adjudication hearing within a 6-month period after the petition is filed pursuant to § 43-271, but a statutory scheduling preference is granted to those juveniles that are in custody pending adjudication.

250 Neb. at 518-19, 550 N.W.2d at 23-24 (emphasis in original).

Here, even if we start the speedy adjudication clock with the filing of the charges in Douglas County Court on September 14, 2010, there is still time left on the 6-month speedy adjudication clock provided for by § 43-271. The last date to adjudicate Shaquille would have been March 14, 2011, absent excludable time periods. There are two excludable periods of delay attributable to Shaquille between the filing of the criminal complaint in county court and the subsequent filing of the juvenile petition, after Shaquille successfully had the case transferred to juvenile court, that must be included in the calculus, which excludable periods we did not discuss with reference to his statutory right to a speedy adjudication. The first excludable period is due to Shaquille's motion to transfer to juvenile court, which was filed on October 13, 2010, and denied on November 4, for a total of 22 excludable days, and the second excludable period is due to Shaquille's motion to reconsider transfer, which was filed on November 8 and granted on November 9, equaling 1 excludable day. See § 29-1207(4)(a). Thus, there is a total of 23 excludable days that occurred before the transfer motion was granted. These 23 days would be added to the 270 days of excludable time as discussed above that accumulated while the matter was pending in the juvenile court.

Accordingly, the last day to adjudicate Shaquille under his theory that we should start the count on September 14, 2010, when the criminal charges were filed in county court, was

March 14, 2011, plus 293 days of excludable time, which would be January 1, 2012. Thus, even under Shaquille's theory, when the motion to discharge was filed on October 12, 2011, the State had 51 days left on the speedy adjudication clock, starting the count on October 13. Even if there were a constitutional right to a speedy adjudication, an issue we do not decide, and if we were to start the clock with the filing of charges in county court, the 6-month guideline of § 43-271 is not violated. It follows, from that result, that no constitutional right is implicated—even if such exists, an issue we do not decide. Put another way, because of the foregoing calculation showing time left on the speedy adjudication clock, we conclude, as the Supreme Court did in *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996), that there is no need in this case to determine whether a juvenile facing a delinquency adjudication has a constitutionally grounded right to a speedy adjudication.

3. Was Discharge in Shaquille's Best Interests?

[6-8] Shaquille's final allegation is that the juvenile court abused its discretion in overruling his motion to discharge, because it failed to determine that discharge would not be in his best interests. Shaquille's argument is premised on the adjudication's not having been held within the statutory 6-month window under § 43-271. However, absolute discharge from a delinquency petition is not statutorily mandated when a juvenile is not adjudicated within the required time period. See *In re Interest of Brandy M. et al., supra*. But here, we have determined that, as opposed to *In re Interest of Brandy M. et al.*, the statutory 6 months has not run, and thus, there is no need to examine the factors set forth in *In re Interest of Brandy M. et al.* that guide the discretionary determination to grant absolute discharge when the speedy adjudication clock has run out. Because the 6-month speedy adjudication clock had not run when the motion to discharge was filed, the trial court did not need to determine whether discharge would be in Shaquille's best interests, and neither do we. See *In re Trust Created by Hansen*, 281 Neb. 693, 798 N.W.2d 398 (2011) (appellate court

is not obligated to engage in analysis that is not necessary to adjudicate case before it).

VI. CONCLUSION

For the foregoing reasons, we find that the juvenile court did not abuse its discretion when it denied Shaquille's motion for discharge.

AFFIRMED.

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

819 N.W.2d 736

Filed August 28, 2012. No. A-12-163.

1. **Jurisdiction: Appeal and Error.** An appellate court determines jurisdictional issues not involving factual disputes as a matter of law, which requires the appellate court to reach independent conclusions.
2. ____: ____. 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.
3. **Criminal Law: Judgments: Jurisdiction: Appeal and Error.** Absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.
4. **Courts: Juvenile Courts: Appeal and Error.** Most cases arising under Neb. Rev. Stat. § 43-2,106.01(1) (Cum. Supp. 2010) are governed by Neb. Rev. Stat. § 25-1912 (Reissue 2008), which sets forth the requirements for appealing district court decisions. But, the plain language of § 43-2,106.01(2)(d) carves out an exception for delinquency cases in which jeopardy has attached, such as where the State's petition is dismissed for lack of evidence.
5. ____: ____: ____. In delinquency cases where jeopardy has attached, an appeal may be taken only under the procedures of Neb. Rev. Stat. §§ 29-2317 to 29-2319 (Reissue 2008).
6. **Courts: Appeal and Error.** The language of Neb. Rev. Stat. § 29-2317 (Reissue 2008) requires the appeal of a county court judgment to the district court sitting as an appellate court.
7. ____: ____. Reference to the county court in Neb. Rev. Stat. §§ 29-2317 to 29-2319 (Reissue 2008) also applies to the separate juvenile court.
8. **Statutes: Appeal and Error.** Appeals under specific statutory provisions require strict adherence to the statute's procedures.

9. **Courts: Juvenile Courts: Legislature: Intent: Appeal and Error.** Had the Legislature intended that appeals under Neb. Rev. Stat. § 43-2,106.01(2)(d) (Cum. Supp. 2010) be made to the Court of Appeals, that subsection would have referred to Neb. Rev. Stat. §§ 29-2315.01 to 29-2316 (Reissue 2008) instead of to Neb. Rev. Stat. §§ 29-2317 to 29-2319 (Reissue 2008).
10. **Statutes.** When the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language.
11. **Juvenile Courts: Statutes: Jurisdiction: Appeal and Error.** Where the State fails to follow the statutory procedures outlined in Neb. Rev. Stat. § 29-2317 (Reissue 2008), as referenced in Neb. Rev. Stat. § 43-2,106.01 (Cum. Supp. 2010), an appellate court lacks jurisdiction to consider the merits of the appeal.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH CRNKOVICH, Judge. Appeal dismissed.

Donald W. Kleine, Douglas County Attorney, Paulette Merrell, and Kailee Smith, Senior Certified Law Student, for appellant.

Thomas C. Riley, Douglas County Public Defender, and Shannon C. Kelly for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

SIEVERS, Judge.

The State of Nebraska appeals from an order of the separate juvenile court of Douglas County dismissing its petition against Lori S. for insufficient evidence. Because Lori was placed legally in jeopardy within the meaning of Neb. Rev. Stat. § 43-2,106.01(2)(d) (Cum. Supp. 2010), the State was required to take an exception proceeding to the district court according to the procedures outlined in Neb. Rev. Stat. § 29-2317 (Reissue 2008). It did not do so, and therefore, we lack jurisdiction over the merits of its appeal.

BACKGROUND

On August 16, 2011, the State filed a petition alleging that Lori came within the meaning of Neb. Rev. Stat. § 43-247(1) (Reissue 2008) in that she violated a law of the State or a municipal ordinance of the city of Omaha. Specifically, citing Neb. Rev. Stat. § 28-310(1)(a) and (b) (Reissue 2008), the State alleged that on or about May 30, at or near 705 Riverfront Drive in Omaha, Lori intentionally, knowingly, or

recklessly caused bodily injury to Jelissa J. or threatened her in a menacing manner.

An adjudication hearing was held on January 19, 2012. The victim, Jelissa, testified, as did Lori. Jelissa testified that she was walking with friends at about 11:30 p.m. in Omaha on May 30, 2011, across "the bridge downtown that leads from Omaha to Iowa" when "Lori came up from behind [her] and grabbed [her] hair and pulled [her] down and started fighting." Jelissa testified that Lori punched her several times and that then, when the attack subsided, Jelissa exited the bridge and walked to her truck. She testified that Lori again came after her and hit her with her fist, after which she fell to the ground and Lori continued hitting her. Jelissa testified that she sustained injuries in the attack, including a black eye, a bloody nose, and scratches on her knees. Jelissa's testimony was that she tried to defend herself by hitting Lori and grabbing her hair and that then "eventually a guy that [she] know[s] pulled [Lori] off [her]." Jelissa testified that, in all, the entire incident lasted around 20 minutes. Jelissa testified that the police arrived on the scene and that she filed a report, indicating to the police that she wanted to press charges against Lori. Jelissa testified that she knew Lori from childhood but that they were not friends.

Lori testified to a similar series of events on the night in question; however, her testimony was that she was not the initial aggressor and that it was actually Jelissa who attacked her first, both on the bridge and in the parking lot. She testified that tension between her and Jelissa began at a graduation party on May 17, 2011. Lori and Jelissa had differing accounts of what occurred at the graduation party, but they were both in agreement that a fight nearly broke out between them at that time. This incident appears to have been a continuation of that existing tension. Lori did not report the altercation to law enforcement.

At the close of evidence, the juvenile court judge stated that she found the State's witness to be more believable, but that she could not say the State proved its case beyond a reasonable doubt. She dismissed the State's petition for lack of evidence. The State now appeals.

ASSIGNMENT OF ERROR

The State alleges that the separate juvenile court erred in dismissing the petition for lack of evidence.

STANDARD OF REVIEW

[1] An appellate court determines jurisdictional issues not involving factual disputes as a matter of law, which requires the appellate court to reach independent conclusions. *In re Interest of Sean H.*, 271 Neb. 395, 711 N.W.2d 879 (2006).

ANALYSIS

[2,3] 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.* Absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case. *Id.*

The State appeals the order of the separate juvenile court, claiming that we have jurisdiction pursuant to § 43-2,106.01, which governs appellate jurisdiction for separate juvenile courts, and Neb. Rev. Stat. § 25-1912 (Reissue 2008). See *In re Interest of Sean H., supra*. Section 43-2,106.01 provides:

> (1) Any final order or judgment entered by a juvenile court may be appealed to the Court of Appeals in the same manner as an appeal from district court to the Court of Appeals. The appellate court shall conduct its review in an expedited manner . . . .
>
> (2) An appeal may be taken by:
>
> . . . .
>
> (d) The county attorney or petitioner, *except that in any case determining delinquency issues in which the juvenile has been placed legally in jeopardy, an appeal of such issues may only be taken by exception proceedings pursuant to sections 29-2317 to 29-2319*.
>
> . . . .

(Emphasis supplied.)

[4,5] Most cases arising under § 43-2,106.01(1) are governed by § 25-1912, which sets forth the requirements for appealing district court decisions. *In re Interest of Sean H.*,

supra. But, the plain language of § 43-2,106.01(2)(d) carves out an exception for delinquency cases in which jeopardy has attached, such as here where the State's third degree assault charge against Lori was dismissed for lack of evidence. See *In re Interest of Sean H., supra* (jeopardy attached in separate juvenile court proceeding where manslaughter charge was dismissed for insufficient evidence). In such cases, an appeal may be taken only under the procedures of § 29-2317 to Neb. Rev. Stat. § 29-2319 (Reissue 2008). *In re Interest of Sean H., supra*.

[6,7] Sections 29-2317 to 29-2319 outline exception proceedings, which allow prosecuting attorneys to "take exception to any ruling or decision of the county court . . . by presenting to the court a notice of intent to take an appeal to the district court." § 29-2317(1). The language of § 29-2317 requires the appeal of a county court judgment to the district court sitting as an appellate court. *In re Interest of Sean H., supra*. Reference to the county court in §§ 29-2317 to 29-2319 also applies to the separate juvenile court. *In re Interest of Sean H., supra*. The relevant portions of § 29-2317 provide:

> (1) A prosecuting attorney may take exception to any ruling or decision of the county court made during the prosecution of a cause by presenting to the court a notice of intent to take an appeal to the district court with reference to the rulings or decisions of which complaint is made.
>
> . . . .
>
> (3) The prosecuting attorney shall then file the notice in the district court within thirty days from the date of final order and within thirty days from the date of filing the notice shall file a bill of exceptions covering the part of the record referred to in the notice. Such appeal shall be on the record.

[8-11] Here, the State filed its notice of appeal from the order of the separate juvenile court not with the district court, as is required by § 29-2317, but with this court. Appeals under specific statutory provisions require strict adherence to the statute's procedures. *In re Interest of Sean H.*, 271 Neb. 395, 711 N.W.2d 879 (2006). Had the Legislature intended

that appeals under § 43-2,106.01(2)(d) be made to the Court of Appeals, that subsection would have referred to Neb. Rev. Stat. §§ 29-2315.01 to 29-2316 (Reissue 2008) instead of to §§ 29-2317 to 29-2319. *In re Interest of Sean H., supra*. When the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language. *Id*. Because the State failed to follow the statutory procedures outlined in § 29-2317, as referenced in § 43-2,106.01, we lack jurisdiction to consider the merits of this appeal.

CONCLUSION

Because this case is not properly before this court, we dismiss for lack of jurisdiction.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
JESSICA BURBACH, APPELLANT.
821 N.W.2d 215

Filed September 4, 2012. No. A-11-424.

1. **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.
2. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: 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.
3. **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.
4. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
5. **Criminal Law: Words and Phrases.** "Stealing" has commonly been described as taking without right or leave with intent to keep wrongfully.

6. **Theft: Intent.** The focus of Neb. Rev. Stat. § 28-324 (Reissue 2008) is on the intent to deprive the owner of his or her property permanently, to keep it from him or her.
7. **Aiding and Abetting: Proof.** Aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed.
8. **Aiding and Abetting.** To be guilty of aiding and abetting, no particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there be an express agreement to commit the crime. Mere encouragement or assistance is sufficient.
9. **Jury Instructions.** Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case.
10. **Jury Instructions: Appeal and Error.** An appellate court reviews a court's failure to give a jury instruction not requested by the complaining party only for plain error.
11. **Appeal and Error.** Plain error will be noted only where an error is evident from the record, 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.
12. **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.

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

Korey L. Reiman, of Reiman Law Firm, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

MOORE and PIRTLE, Judges, and CHEUVRONT, District Judge, Retired.

PIRTLE, Judge.

INTRODUCTION

Jessica Burbach was convicted in the district court for Lancaster County of aiding and abetting a robbery in connection with her actions when an undercover police officer tried to purchase drugs and the transaction went awry. On appeal, Burbach raises issue with the sufficiency of the evidence to support the verdict, certain jury instructions, and her sentence. Having found no merit to any of Burbach's arguments, we affirm her conviction and sentence.

BACKGROUND

On September 2, 2010, the State filed an information in the district court for Lancaster County charging Burbach with aiding and abetting a robbery that occurred on July 29. A jury trial was held, and the evidence presented at trial is summarized as follows:

On July 28, 2010, the day before the robbery, Lincoln police officer David Nelson was working undercover and made a controlled purchase of drugs at the residence of Charles Marrs in Lincoln, Nebraska. Nelson purchased $100 worth of crack cocaine from an individual named "Paul James" and then left the apartment.

The next day, July 29, 2010, Nelson, who was equipped with a hidden radio transmitter, attempted to make another controlled purchase of drugs at Marrs' apartment. Nelson knocked on the apartment door, and it was opened by Burbach and Marrs, who asked him who he was and what he wanted. Nelson asked for James, who then came to the door and said Nelson was "cool." Nelson testified that there were 10 to 12 people in the living room of the apartment when he arrived.

Nelson and James went into a bedroom, where Nelson gave James $150 in exchange for a piece of crack cocaine. After the transaction was complete, Nelson walked out of the bedroom and into the living room, where he was stopped by Marrs, who said he wanted a "hit" or "pinch" for the house, which Nelson understood to mean that Marrs wanted a small amount of the drug Nelson had just purchased for allowing the deal to take place in his residence. Nelson resisted at first, but testified that Marrs' tone went from asking for a hit to essentially demanding one. In an effort to avoid everyone else in the living room asking for a hit, Nelson led Marrs back to the bedroom, where he put a small amount of the crack cocaine in Marrs' pipe.

Nelson testified that other people in the apartment, including Burbach, began questioning his identity and suspecting that he was a police officer. Nelson testified that he heard Burbach say "make him take a blast," which Nelson understood to mean inhaling some of the crack cocaine from a pipe after the crack cocaine is ignited. James then came into

the bedroom and told Nelson to take a "blast" from the pipe. Marrs began putting the pipe close to Nelson's face. Burbach and two others then came and stood in the doorway of the bedroom, blocking the exit, and they were telling him to take a blast. Nelson testified that all the individuals in the bedroom were talking loudly and aggressively and repeatedly telling him to take a hit from the pipe to prove he was not a police officer.

Marrs continued putting the pipe by Nelson's face, and another individual started putting a second pipe by Nelson's face. Nelson testified that he kept making excuses as to why he would not take a hit. Nelson also tried to walk out of the bedroom, but was prevented from doing so by the individuals in the doorway. About that time, the individuals in the bedroom started accusing Nelson of being a police officer. Nelson insisted that he was not a police officer and eventually lifted his shirt to show them that he did not have any recording devices or wires taped to his chest. That action did not convince the group that Nelson was not a police officer, and the individuals continued to insist that he take a hit to prove that he was not a police officer.

Nelson testified that the people in the bedroom were getting closer and closer to him and that the situation was getting worse. James then grabbed Nelson's groin and felt the transmitter Nelson was wearing and declared that Nelson was a police officer. The other individuals began saying, "[D]on't sell to him. He's a cop." They continued to crowd around him, and Nelson testified that he was feeling very threatened at the time.

At that point, James told Nelson to give the drugs back. Nelson refused at first and tried to get out of the room again, but was unable to. He testified that by this time, the individuals were so close to him that he was physically pushing hands and bodies away from him. James then reached into his pocket, and Nelson feared that he was grabbing a gun, which he was not. James took a handful of cash out of his pocket and told Nelson to take his money back and to give the drugs back to James. Nelson took the money and gave the drugs back and then made his way out of the bedroom.

When he got to the apartment door, there was an individual standing at the door with his hand over the dead bolt. Nelson had to push him out of the way and unlock the door before he could leave. Nelson testified that during the encounter, he felt threatened and did not believe he would have been allowed to leave the apartment without giving up the drugs.

The recording from the transmitter Nelson was wearing was entered into evidence and played for the jury, and a transcription of the audio was provided for the jurors to allow them to read along as the audio was played. Burbach can be heard several times telling Nelson to "take a hit" and "take a blast" to prove that he is not a police officer, and she can be heard saying, "[L]ock the door." Nelson identified Burbach as the person on the audio saying, "[L]ock the door."

At the conclusion of trial, the jury found Burbach guilty of aiding and abetting a robbery. The trial court entered judgment on the verdict and sentenced Burbach to 4 to 6 years' imprisonment. Burbach appeals.

ASSIGNMENTS OF ERROR

Burbach assigns, restated, that the trial court erred in (1) finding that there was sufficient evidence to support the verdict, (2) failing to give certain jury instructions, and (3) imposing an excessive sentence.

STANDARD OF REVIEW

[1,2] 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. McGee*, 282 Neb. 387, 803 N.W.2d 497 (2011). And whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: 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. *Id.*

[3] 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. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012).

[4] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

ANALYSIS

Sufficiency of Evidence.

Burbach makes three arguments in regard to the sufficiency of the evidence. First, Burbach argues that the evidence was insufficient to show that James took the drugs back "'without right,'" suggesting that he maintained a possessory or ownership interest in the drugs. Brief for appellant at 13. Second, Burbach argues that the evidence was insufficient to show that James had an intent to steal. Third, Burbach argues that there was insufficient evidence to show that she aided and abetted James in getting the drugs from Nelson.

As to Burbach's first argument, that there was insufficient evidence to show that James took the drugs back without right, a rational trier of fact could conclude that once Nelson and James had each tendered his part of the bargain, the transaction was done and James no longer had any right or possessory interest in the drugs. Burbach contends that it is unclear whether James had an ownership or possessory interest in the crack cocaine when he asked for it back. However, the evidence shows that after Nelson entered Marrs' apartment on July 29, 2010, Nelson and James went to the bedroom where they negotiated the sale. James showed Nelson several pieces of crack cocaine he had in his hand, and James offered to sell one of the pieces for $300. Nelson told him that all he had was $150. After some discussion back and forth, James broke off a piece of crack cocaine and gave it to Nelson. Nelson put it in a cigarette wrapper and then gave James $150. At that point, the transaction was complete insofar as each party had tendered his part of the bargain and both had what they wanted. Believing the transaction was complete, Nelson walked out of

the bedroom and intended to leave the apartment, just as he had done the day before when he purchased drugs from James, until he was stopped by Marrs. The evidence is sufficient to show that James had no ownership or possessory interest in the crack cocaine after he gave it to Nelson in exchange for $150.

[5,6] In regard to Burbach's second sufficiency of the evidence argument, we determine that there is sufficient evidence for a rational trier of fact to conclude that James intended to steal the drugs from Nelson. The term "to steal" is not defined by the robbery statute, which provides that "[a] person commits robbery if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever." Neb. Rev. Stat. § 28-324(1) (Reissue 2008). "Stealing" has commonly been described as "taking without right or leave with intent to keep wrongfully." *State v. Barfield*, 272 Neb. 502, 519, 723 N.W.2d 303, 317 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007), quoting *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006). The focus of the statute is on the intent to deprive the owner of his or her property permanently, to keep it from him or her. *State v. Barfield, supra*. Similarly, the Nebraska Jury Instructions define "to steal" as "to take the property of another with the intent to deprive . . . him . . . of it . . . permanently." NJI2d Crim. 4.4.

The evidence supports a conclusion that James, with the help of Burbach and others, forced Nelson to give James the crack cocaine before he would be permitted to leave the apartment. The evidence shows that James told Nelson to give him the drugs back and that Nelson refused at first and tried to get out of the bedroom to no avail. James then took money out of his pocket and insisted that Nelson take his money back and give the drugs to James. Nelson ultimately gave the drugs to James and took his money back. Nelson testified that he felt threatened during the incident and felt that he had no choice but to give the drugs to James. Further, as previously discussed, James had no right to the drugs after the transaction was complete. James obtained the drugs only by placing Nelson in fear

and then taking the drugs with the intent to keep them. There is sufficient evidence to support a finding that James intended to steal the drugs from Nelson.

[7,8] As to Burbach's third insufficiency of the evidence argument, we conclude there was sufficient evidence to show that Burbach aided and abetted James in getting the drugs from Nelson. Aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed. *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010). No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there be an express agreement to commit the crime. *Id*. Mere encouragement or assistance is sufficient. *Id*.

Burbach argues that the evidence shows that she was involved only in trying to determine if Nelson was a police officer and that there is no evidence that she helped James get the drugs from Nelson. However, Burbach was clearly involved in the process of placing Nelson in fear so that James could take the drugs from him. The evidence shows that Burbach was blocking the bedroom doorway so Nelson could not leave. Nelson also testified that Burbach told someone to "lock the door," preventing Nelson from leaving the apartment, and that the door was locked when Nelson went to leave the apartment. Burbach was involved in crowding around Nelson, closing in on him in a small confined space, and refused to step aside so he could get out of the bedroom. Burbach was instrumental in ensuring that Nelson did not leave until James had regained the drugs from him. The evidence is sufficient to support a finding that she aided and abetted the robbery of Nelson.

Burbach's assignment of error alleging that there was insufficient evidence to support a guilty verdict for aiding and abetting a robbery is without merit.

Jury Instructions.

Burbach argues that there were two errors in the instructions given to the jury. First, she argues that the trial court did not give the jury an adequate definition of "to steal" and that it should have used the alternate instruction she offered instead. The instruction given to the jury defined "to steal" as "to take

the property belonging to another with the intent to deprive the owner of it permanently." Burbach contends that this definition was inadequate and that the jury needed an instruction which further defined "to steal." Burbach's proposed instruction provided:

> **"Intent to steal"** partly means to take the property of another with the intent to permanently deprive him of it. Additionally, the State has the burden to prove beyond a reasonable doubt that at the time of the taking of property:
>
> 1) the property belonged to [Nelson]; and
>
> 2) [Burbach] knew:
>
> a) the property belonged to [Nelson], and
>
> b) the property did not belong to . . . James; and
>
> c) . . . James had no legal right to take the property.
>
> 3) [Burbach] intended to permanently deprive [Nelson] of the property.

[9] However, the definition of "to steal" used by the trial court is nearly identical to the pattern instruction found in the Nebraska Jury Instructions. Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case. *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011). Given that the trial court gave the jury the definition of "to steal" found in the Nebraska Jury Instructions, we cannot say that the trial court erred in giving such instruction and in failing to give the alternative instruction proposed by Burbach.

[10,11] Next, Burbach argues that the trial court erred in failing to give an instruction directing the jury to consider Burbach's intent in relation to the robbery. She contends that while her actions leading up to James' asking for the crack cocaine back from Nelson were relevant and allowable for the jury to hear, the jurors should have been instructed that they should determine whether those actions were to assist James in unlawfully demanding the crack cocaine back from Nelson. However, Burbach admits that she did not request such an instruction at trial. Because Burbach did not request this instruction, we review the court's failure to give it only

for plain error. See *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011). Plain error will be noted only where an error is evident from the record, 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*. Having reviewed the record, we find no plain error in the trial court's failure to give an instruction in regard to Burbach's intent in relation to the robbery.

Burbach's assignment of error in regard to jury instructions is without merit.

Excessive Sentence.

Finally, Burbach argues that her sentence of 4 to 6 years' imprisonment is excessive. The crime of which Burbach was convicted, aiding and abetting a robbery, is a Class II felony, punishable by up to 50 years in prison.

[12] 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. Payan*, 277 Neb. 663, 765 N.W.2d 192 (2009).

Burbach has an extensive adult criminal history dating back to 2001 and committed crimes as a juvenile before that. Much of her record consists of theft offenses, driving on a suspended license, and disturbing the peace, but interspersed are more serious offenses such as delivery of a controlled substance and escape. Given Burbach's criminal history and the fact that the sentence she received was on the lower end of the statutory range, we do not conclude that the trial court abused its discretion in the sentence it imposed. Burbach's final assignment of error is without merit.

CONCLUSION

We conclude that the evidence was sufficient to support a guilty verdict for aiding and abetting a robbery, that there were no errors in the jury instructions, and that Burbach's sentence is not excessive. Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

CLINT A. JENSEN, APPELLANT, V. ANGELA J. JENSEN, APPELLEE.

820 N.W.2d 309

Filed September 4, 2012. No. A-11-657.

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. **Divorce: Property Division: Alimony.** In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, 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.
3. **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.
4. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
5. ____. 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.
6. ____. Disparity in income or potential income may partially justify an award of alimony.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS, Judge. Affirmed.

Kim M. Seacrest, of Seacrest Law Office, P.C., L.L.O., for appellant.

Angela J. Jensen, pro se.

IRWIN, SIEVERS, and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

Clint A. Jensen appeals from a decree in the district court for Lincoln County dissolving his marriage to Angela J.

Jensen. The only issue Clint contests is the district court's award of alimony to Angela. Based on the reasons that follow, we affirm.

BACKGROUND

The parties were married on June 7, 1985, and three children were born during the marriage. The parties separated on April 14, 2010. Clint moved out of the marital home, and Angela continued to live in the marital home with the parties' youngest child, who was 17 years of age. The other two children had reached the age of majority. After the parties separated, Clint continued to pay the mortgage on the marital home in the amount of $913 per month, plus the utilities for the home, and he also provided groceries for the parties' youngest child. The marital home was put on the market for sale at the end of July 2010.

On July 9, 2010, Clint filed a complaint for dissolution of marriage. Angela subsequently filed an answer and counterclaim. In May 2011, the parties entered into a settlement agreement whereby they settled all issues except an appropriate award of alimony. However, the parties did agree that Clint would not be obligated to pay any alimony until after the marital home sold, as long as he continued to pay the mortgage on the home and the utility bills. The settlement agreement also reflected that the youngest child graduated from high school in May 2011, moved out of the family home, and was living independently, and it reflected that based on the emancipation of the child, there was no obligation of child support.

A trial was held on June 7, 2011. At the time of trial, the home had not sold and was still on the market. Angela continued to live in the home, and Clint continued to pay the mortgage and the utility bills. Angela never made an application for temporary child support or temporary spousal support during the pendency of the case.

The evidence also showed that Clint was 47 years old at the time of trial. He has a high school diploma and an associate degree in criminal justice. Clint had been working for a railroad for many years, where he has had various positions and

has worked his way "up the ranks." During the last 3 years of the marriage, Clint was making more than $90,000 per year. At the time of trial, his net earnings were approximately $5,000 per month.

Angela was also 47 years old at the time of trial. She has a high school diploma and has attended "about a year and a half" of college. She was employed off and on during the marriage, but she primarily stayed home with the children, which was mutually agreed upon by the parties. At the time of trial, she was employed as a cocktail waitress making $6 per hour and working about 14 hours per week. She was also providing babysitting services in her home. She testified that between her two part-time jobs, she was making about $680 per month. She further testified that she is capable of working 40 hours per week and capable of making at least $8 per hour, based on past employment.

Following trial, the trial court entered a decree of dissolution in which it incorporated the parties' settlement agreement. It further ordered Clint to pay Angela $1,500 per month in alimony for 149 months, to start after the sale of the marital home. The trial court also denied Clint's request for a credit against his alimony obligation based on the mortgage payments he made during the pendency of the case.

ASSIGNMENTS OF ERROR

Clint assigns that the trial court erred in (1) awarding Angela alimony in the amount of $1,500 per month for a total of 149 months and (2) denying his request for a credit against his alimony obligation based on the mortgage payments he made during the pendency of the case.

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. *Thompson v. Thompson*, 18 Neb. App. 363, 782 N.W.2d 607 (2010).

ANALYSIS

Clint first assigns that the trial court erred in awarding Angela alimony in the amount of $1,500 per month for a total of 149 months. He argues that she is capable of supporting herself and that an award of $1,500 per month in alimony is too high.

[2-4] In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, 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. *Myhra v. Myhra*, 16 Neb. App. 920, 756 N.W.2d 528 (2008). 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. *Id.* In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Id.*

[5,6] 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. *Id.* However, disparity in income or potential income may partially justify an award of alimony. *Id.*

In the instant case, the parties were married for 26 years. Angela has a high school diploma and has taken some college courses. She worked sporadically during the marriage, but the parties had agreed that she would primarily stay at home with the children. At the time of trial, Angela was earning about $680 per month. She testified, however, that she was capable of working 40 hours per week and capable of making $8 per hour, which would result in a gross annual income of $16,640. Based on her earning potential and her monthly living expenses, Angela asked the court to award her between $2,100 and $2,300 per month in alimony.

There is great disparity between the parties' incomes. Clint's income has consistently increased during his employment with the railroad, and during the last 3 years of the marriage, he was earning more than $90,000 in gross annual wages. Thus, we conclude that the trial court's award of $1,500 per month in alimony to Angela for a total of 149 months is reasonable based on the facts of this case and was not an abuse of discretion.

Clint also assigns that the trial court erred in denying his request for a credit against his alimony obligation based on the mortgage payments he made during the pendency of the case. Clint argues that he is entitled to such credit because Angela has not cooperated with the Realtors in allowing open houses and showings, which has contributed to the house's not being sold. Angela denied hindering the process of selling the home. She admitted that at one point, she denied the Realtor's request for an open house because at that time the house was not ready to be shown. She also acknowledged that she refused to allow the Realtor to show the home to a potential buyer on one occasion because she was out of town. She estimated that the house has been shown to 10 potential buyers.

Based on the record before us, we do not conclude that Angela's actions have contributed to the house's not being sold. The marital home was put on the market for sale at the end of July 2010. As of June 7, 2011, the date of trial, the home had not sold but had been shown to potential buyers on numerous occasions.

Clint apparently began making the mortgage payments voluntarily after the parties separated and subsequently agreed in the property settlement to continue paying the mortgage until the marital home sold. When Clint and Angela entered into the settlement agreement, there was no way of knowing how long it would take to sell the house, and the agreement simply stated that Clint would continue paying the mortgage until the house sold. There was no time limit set. Further, during the pendency of the case, Clint did not pay any temporary child support or temporary spousal support and Angela never made application for such support. Both parties were apparently content with the arrangement they had agreed upon, and

there is no basis upon which to conclude that the trial court erred in denying Clint's request for a credit against his alimony obligation.

CONCLUSION

We conclude that the trial court did not err in awarding alimony to Angela in the amount of $1,500 per month for a total of 149 months or in denying Clint's request for a credit against his alimony obligation based on the mortgage payments he made during the pendency of the case. Accordingly, the decree of dissolution entered by the district court is affirmed.

AFFIRMED.

IN RE GUARDIANSHIP OF JORDAN M., A CHILD UNDER 18 YEARS OF AGE. MATTICE M., APPELLANT, V. KAAREN H., APPELLEE.

820 N.W.2d 654

Filed September 18, 2012. No. A-12-017.

1. **Guardians and Conservators: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 2008 & Cum. Supp. 2010), are reviewed for error on the record.
2. **Guardians and Conservators: Parent and Child.** The father and mother are the natural guardians of their minor children and are duly entitled to their custody, being themselves not otherwise unsuitable.
3. **Guardians and Conservators: Parental Rights.** The court may appoint a guardian for a minor if all parental rights of custody have been terminated or suspended by prior or current circumstances or prior court order.
4. ____: ____. The appointment of a guardian for a minor child does not result in a de facto termination of parental rights; rather, a guardianship is no more than a temporary custody arrangement established for the well-being of a child.
5. **Guardians and Conservators: Child Custody.** Granting one legal custody of a child confers neither parenthood nor adoption; a guardian is subject to removal at any time.
6. **Child Custody: Parental Rights: Presumptions.** The parental preference principle establishes a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent.
7. **Guardians and Conservators: Parental Rights: Proof.** As a part of the parental preference principle, an individual who seeks appointment as guardian of a minor child over the objection of a biological or adoptive parent bears the burden of

proving by clear and convincing evidence that the biological or adoptive parent is unfit or has forfeited his or her right to custody.

8. **Parent and Child: Words and Phrases.** Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.

Appeal from the County Court for Douglas County: EDNA ATKINS, Judge. Affirmed.

Martha J. Lemar and Catherine Mahern, of Milton R. Abrahams Legal Clinic, for appellant.

Karen S. Nelson, of Schirber & Wagner, L.L.P., for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Kaaren H. filed a petition for guardianship of her granddaughter, Jordan M. Jordan's biological mother, Mattice M., objected to the guardianship. Following a trial, the county court granted Kaaren's petition for guardianship. Mattice now appeals, and for the reasons set forth herein, we affirm.

II. BACKGROUND

Kaaren is Jordan's paternal grandmother. Kaaren's son, who is Jordan's father, was incarcerated at the time of the guardianship proceedings and did not object to Kaaren's petition for guardianship of Jordan. As such, he is not a party to this appeal.

Mattice is Jordan's mother. Mattice has five children—four daughters and one son. Jordan is Mattice's youngest child, and these guardianship proceedings involve only Jordan. Mattice has custody of her three older daughters. Mattice's son resides with Mattice's mother, Tricia M., as a result of a permanent arrangement made between Mattice and Tricia at the time of his birth.

At the time of Jordan's birth in October 2010, Mattice and her daughters resided in Tricia's home. Also living in Tricia's home at that time were Tricia; 9 of Tricia's 15 children,

including an adult child and her 3 young children; and Mattice's son, who is cared for by Tricia. In total, then, there were 16 children and 3 adults residing in the home, which has 3 bedrooms and 1 bathroom.

Mattice and her daughters, including Jordan, moved out of Tricia's home and into an apartment sometime around the first part of 2011. In March 2011, shortly after moving into the apartment, Mattice was arrested for hindering the apprehension of a fugitive from justice after she wired money to an escaped convict in Texas and that convict then traveled to Nebraska to stay with Mattice at her apartment.

Mattice pled guilty to the charge. She was incarcerated in Texas and, upon her release, was required to serve 5 years of probation. Prior to her incarceration, Mattice executed a document providing Tricia with a limited power of attorney over Mattice's four daughters, including Jordan. Jordan and her sisters returned to live with Tricia in her home.

After Jordan returned to live with Tricia, Kaaren went to Tricia's home to visit Jordan. Subsequent to this visit, Kaaren filed a petition for the appointment of a temporary and permanent guardian for Jordan. In the petition, Kaaren alleged that she was in a better position than Tricia to provide care and support for Jordan, because she is employed, has stable housing, and has an established and ongoing relationship with Jordan, and because "there are a significant number of young children" residing in Tricia's home and Tricia cannot provide appropriate care and supervision for Jordan.

The county court appointed Kaaren as Jordan's temporary guardian and scheduled a hearing to address Kaaren's request to serve as permanent guardian.

A hearing was held on June 7, 2011. At the time of the hearing, Mattice remained incarcerated in Texas. As such, she did not appear at the hearing, but Tricia did appear to contest the appointment of Kaaren as Jordan's permanent guardian.

At the June 7, 2011, hearing, Kaaren testified that she has had regular and consistent contact with Jordan since Jordan's birth. Prior to Mattice's incarceration, Kaaren and Mattice had an agreement that every other week, Kaaren would care for Jordan for 3 or 4 days at a time.

Kaaren testified that she began having concerns regarding Jordan's safety when Jordan was 3 weeks old and Kaaren observed a burn on Jordan's left wrist the size of an eraser on a pencil. Kaaren testified that she believed the burn was from a cigarette and that she knew Tricia smoked cigarettes. Kaaren also testified regarding her concerns that Tricia does not properly restrain Jordan in a car seat while transporting her. Kaaren indicated that she does not believe that Tricia can properly care for Jordan because of the number of children residing in her home.

Kaaren testified that after Mattice's arrest, she went to Tricia's home to visit Jordan. When she arrived at the home, Tricia was not there and there were teenage children caring for Jordan. Kaaren observed that Jordan was "urine soaked" up to her armpits. Kaaren changed Jordan's diaper and clothes and gave her a bottle and was then told to return Jordan to one of the teenagers. One of these teenagers told Kaaren that Jordan did not have a bed to sleep on at Tricia's house.

Kaaren testified that when she picked up Jordan from Tricia's home after being appointed as her temporary guardian, Jordan was very sick. In fact, Jordan was immediately admitted to a hospital for 4 days for upper respiratory issues.

Tricia also testified at the June 7, 2011, hearing. She testified that currently, 12 children reside with her in her home. She indicated that she is not concerned about her home's being overly crowded, and she stated that Jordan does have a bed in her home, which Tricia referred to as a "Pack 'n Play." Tricia denied that Jordan ever had a cigarette burn on her wrist and denied that Jordan was "urine soaked" when Kaaren came to visit her after Mattice was arrested. Tricia testified that Jordan was never neglected.

After Tricia testified, the guardianship hearing was continued until November 18, 2011. By the time of this second day of the hearing, Mattice had been released from jail and had returned to Nebraska. Mattice appeared at the hearing and contested Kaaren's petition for guardianship of Jordan.

Mattice testified at the November 18, 2011, hearing. She admitted that she had sent $300 to a "fugitive from justice" who had been convicted of attempted murder and who was a

registered sex offender. She also admitted that this man had shown up at her home after she sent him the money and that he stayed with her for 1 day before they were both arrested. However, Mattice testified that she did not invite him to her home and that she did not know the extent of his crimes until after her arrest. She admitted she had made a mistake.

Mattice indicated that she had been released from jail on June 30, 2011, and that she is currently on probation for the next 5 years. She is not employed and lives in a domestic violence shelter with her three older daughters. She testified that she would soon be moving to a transitional apartment. At the time of the hearing, she was taking a parenting class and a class to learn to be self-sufficient.

When Mattice returned to Nebraska after being released from jail, she had sporadic contact with Jordan. On July 4, 2011, she contacted Kaaren about seeing Jordan, but she did not contact her again during that month and could not recall contacting her again in August. In September, Mattice tried to have more regular contact, which Kaaren has facilitated.

Mattice denied that Jordan had ever been burned by a cigarette. She claimed that the mark on Jordan's left wrist identified by Kaaren was either a birthmark or a mark left by a hospital bracelet that had been put on too tightly. Later, she testified that she did not know how the mark got there.

Mattice testified that she was capable of taking care of her children and that she did not want the court to grant Kaaren's request for a permanent guardianship.

At the close of the hearing, the court informed the parties that it was ready to render a decision. The court went on to state that it was granting Kaaren's petition for a permanent guardianship. The court explained:

> [T]he Court finds that this child shall remain with the paternal grandmother for now. I find that the natural mother's conduct constitutes — I don't want to say that she is unfit because I don't think that the evidence clearly shows that she is unfit, but she has made some decisions in her life that [have] come very close to that, which would affect the safety and welfare of each of

> these children, and in particular the one that is Jordan in this case.

After the hearing, the court entered a formal order concerning its findings. In the order, the court indicated its finding that "[c]lear and convincing evidence established that the minor child, Jordan . . . , would be in danger if she were allowed to return to her natural mother . . . ." The court then cited to evidence that Mattice "has engaged in dangerous behavior by recklessly becoming involved with dangerous felons" and that, as a result of this behavior, Mattice is now a convicted felon on probation. The court also cited to evidence that Mattice does not currently have stable housing or employment and that she does not have a strong family support system to help her. Finally, the court pointed to evidence that Jordan had a "burn-like" injury to her wrist and evidence that Jordan has been exposed to cigarette smoke which has exacerbated certain health problems. The court concluded by finding that Mattice's

> reckless behavior causes the court to find that at this time the natural mother, Mattice[']s decision making ability is personally deficient and that she lacks the capacity to parent the child, Jordan . . . , and that her rights to the custody to Jordan . . . have been suspended by circumstances, thereby necessitating the appointment of the paternal grandmother, Kaaren . . . , as Guardian of Jordan.

Mattice appeals from the court's order.

III. ASSIGNMENTS OF ERROR

On appeal, Mattice generally asserts that the county court erred in granting Kaaren's petition for guardianship of Jordan. Specifically, Mattice asserts, restated and consolidated, that the county court erred in failing to properly apply the parental preference principle and in finding sufficient evidence to warrant granting the petition for guardianship.

IV. STANDARD OF REVIEW

[1] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue

2008 & Cum. Supp. 2010), are reviewed for error on the record. See, *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004); *In re Guardianship of Elizabeth H.*, 17 Neb. App. 752, 771 N.W.2d 185 (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 Guardianship of D.J., supra*; *In re Guardianship of Elizabeth H., supra*. An appellate court, in reviewing a judgment for errors appearing on the record, will not substitute its factual findings for those of the lower court where competent evidence supports those findings. *In re Guardianship of Elizabeth H., supra*.

On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Id*.

V. ANALYSIS

On appeal, Mattice asserts that the county court erred in granting Kaaren's petition for guardianship of Jordan. Before we address Mattice's specific assignments of error, we detail the relevant statutory and case law concerning the appointment of a guardian for a minor child.

[2,3] Section 30-2608(a) provides, in relevant part, "The father and mother are the natural guardians of their minor children and are duly entitled to their custody . . . , being themselves . . . not otherwise unsuitable." Section 30-2608(d) goes on to provide that "[t]he court may appoint a guardian for a minor if all parental rights of custody have been terminated or suspended by prior or current circumstances or prior court order."

Section 30-2611(b) lists the specific criteria that must be met before a court can appoint a guardian for a minor child:

> Upon hearing, if the court finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the requirements of section 30-2608 have been met, and the welfare and best interests of the minor will be served by the requested appointment, it shall make the appointment.

[4,5] This court has previously recognized that the appointment of a guardian for a minor child does not result in a de facto termination of parental rights. See *In re Guardianship of Elizabeth H., supra*. Rather, a guardianship is no more than a temporary custody arrangement established for the well-being of a child. *Id*. Granting one legal custody of a child confers neither parenthood nor adoption; a guardian is subject to removal at any time. *Id*.

A guardianship gives parents the opportunity to temporarily relieve themselves of the burdens involved in raising a child, thereby enabling parents to take those steps necessary to better their situation so they can resume custody of their child in the future. *Id*.

With these guidelines concerning guardianships in mind, we now address Mattice's specific assigned errors.

1. Parental Preference Principle

In her brief on appeal, Mattice argues that the county court erred in granting Kaaren's request for guardianship, because the court did not first find that Mattice is an unfit parent or has in some manner forfeited her right to custody of Jordan. Mattice argues that the court instead relied solely on its findings concerning Jordan's best interests, which is contrary to the parental preference principle. Upon our review of the record, we find that Mattice's assertion has no merit. A careful reading of the county court's order reveals that it did, in fact, find that Mattice is currently unfit and that she has temporarily forfeited her right to custody of Jordan. As such, it is clear that the court correctly applied the parental preference principle.

[6] The Nebraska Supreme Court held in *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004), that the parental preference principle applies in guardianship proceedings that affect child custody. The parental preference principle establishes a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent. See *id*. The principle provides that a parent has a natural right to the custody of his or her child which trumps the interest of strangers to the parent-child relationship and the preferences of the child. See *id*.

[7] As a part of the parental preference principle, an individual who seeks appointment as guardian of a minor child over the objection of a biological or adoptive parent bears the burden of proving by clear and convincing evidence that the biological or adoptive parent is unfit or has forfeited his or her right to custody. See *In re Guardianship of Elizabeth H.*, 17 Neb. App. 752, 771 N.W.2d 185 (2009). Absent such proof, the constitutional dimensions of the relationship between parent and child require a court to deny the request for a guardianship. *Id.*

[8] Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being. *Id.* The "fitness" standard applied in guardianship appointment under § 30-2608 is analogous to a juvenile court finding that it would be contrary to a juvenile's welfare to return home. *In re Guardianship of Elizabeth H., supra.*

In the county court's order, it did not explicitly state that it found Mattice to be an unfit parent. However, it did state that it found Mattice's "decision making ability [to be] personally deficient" and that Mattice "lacks the capacity to parent" Jordan. The court also found that as a result of Mattice's personal deficiencies and incapacity to parent, Jordan would be in danger if she were placed back in Mattice's custody.

These findings clearly demonstrate an implicit conclusion that Mattice is currently unfit to parent Jordan. The language in the court's order parallels the established definition of unfitness, which, as we stated above, is "a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being." *In re Guardianship of Elizabeth H.*, 17 Neb. App. at 762, 771 N.W.2d at 193-94.

In addition to the court's findings regarding Mattice's unfitness to parent Jordan, the court specifically found that Mattice's parental rights to Jordan "have been suspended by circumstances," which appears to indicate the court's conclusion

that Mattice has temporarily forfeited her parental rights to Jordan. And, as we discussed above, the parental preference principle requires a finding that a parent is either unfit or has forfeited his or her right to custody before a guardianship can be granted.

A careful reading of the county court's order reveals that it found that Mattice is currently unfit to parent Jordan and that she has forfeited her right to custody at this time. Accordingly, we find that the county court properly applied the parental preference principle in granting Kaaren's request for guardianship. The principle provides that a court must find that a parent is unfit or has forfeited his or her parental rights before the court can grant a request for guardianship over the parent's objections. We find Mattice's assertion that the court improperly applied the parental preference principle to be without merit.

We do, however, note that in her brief on appeal, Mattice points to certain comments made by the county court at the guardianship trial which could indicate the court's belief that Mattice is currently a fit parent for Jordan. These comments include the court's statement that it did not "want to say that [Mattice] is unfit because [the court did not] think that the evidence clearly shows that she is unfit, but she has made some decisions in her life that [have] come very close to that."

We agree that the court's comments indicate some equivocation about whether the evidence clearly and convincingly demonstrated that Mattice is currently an unfit parent for Jordan. When we read these comments in conjunction with the court's formal order, however, we find that the language in the formal order resolves any ambiguity in the court's findings, in that, in the court's order, it expresses a clear finding that Mattice is currently unfit. Moreover, we cannot disregard the court's additional finding that the evidence presented at the guardianship trial demonstrated that Mattice has temporarily forfeited her parental rights to Jordan. Such finding is another factor to consider in applying the parental preference principle.

Upon our review of the record in its entirety, we conclude that the county court properly applied the parental

preference principle, because the court made specific findings that Mattice is currently unfit and has temporarily forfeited her parental rights to Jordan prior to granting Kaaren's request for guardianship. As such, we next turn to a discussion of whether there was sufficient evidence to support the county court's findings.

2. Sufficiency of Evidence

On appeal, Mattice argues that the county court erred in finding sufficient evidence to warrant granting Kaaren's motion for guardianship of Jordan. Mattice asserts that the court did not properly consider her present circumstances, including the progress she has made since being released from jail in June 2011, and that the court erred in considering evidence that Jordan had been burned by a cigarette when she was very young. Upon our review, we cannot say that the county court erred in finding sufficient evidence to warrant granting Kaaren's request for guardianship. The totality of the evidence presented at the guardianship hearing supports the court's decision, and as such, we affirm.

As we discussed above, the county court granted Kaaren's request for guardianship of Jordan after finding that Mattice is currently unfit to parent Jordan and has temporarily forfeited her parental rights. In its order, the court explained that its findings were based on numerous factors.

First, the court found that the evidence presented at trial revealed that Mattice failed to protect Jordan from a "smoking environment" even though cigarette smoke exacerbated Jordan's upper respiratory problems and even though Jordan suffered a "burn-like injury," presumably from a cigarette, while in Mattice's custody. The court's factual findings are supported by evidence in the record. Kaaren testified that she observed a small burn on Jordan's wrist when she was only 3 weeks old. Kaaren indicated that the burn appeared to be from a cigarette and that she knew that Tricia smoked cigarettes. Other evidence revealed that at the time the burn appeared on Jordan, she was living with Mattice at Tricia's home. In addition, there was evidence to demonstrate that Jordan suffers from upper respiratory problems, including asthma, and

that her condition is worsened when she is around smoke. When Mattice was arrested, she left Jordan in Tricia's care and exposed to secondhand smoke.

The court also found that the evidence presented at trial revealed that in the recent past, Mattice had exhibited extremely poor judgment when she befriended and regularly communicated with an inmate in a Texas prison who was a registered sex offender. Mattice then sent money to this person and permitted him to come into her home after he traveled to Nebraska and appeared on her doorstep. As a result of Mattice's error in judgment, she was arrested and is now a convicted felon on probation. In addition, she permitted her children to be exposed to a dangerous situation. The court's factual findings are supported by evidence in the record. Mattice admitted that she had made a mistake by communicating with a man who was in prison and by allowing him to come into her home. She also admitted that she pled guilty to a felony charge of hindering the apprehension of a fugitive from justice and that at the time of the guardianship trial, she had recently been released from jail and was on probation for the next 5 years.

The court also found that the evidence presented at trial revealed that at the time of trial, Mattice did not have stable housing and was unemployed. These findings are supported by evidence in the record. Mattice testified that she was currently living in a domestic violence shelter, but that she was planning on moving into transitional housing very soon. Mattice appeared to have very little knowledge about her transitional housing and could not explain to the court the requirements for acquiring and retaining such transitional housing. Mattice also did not have a specific date for her move, nor did she know exactly where she would be living. Mattice indicated that she was unemployed and that her only source of income was government assistance.

Finally, the court found that Mattice did not have any family support to help her obtain more stability. These findings are also supported by evidence in the record. Evidence presented at the hearing revealed that Mattice's mother, Tricia, is responsible for at least seven young children, including Mattice's son. Other evidence revealed that Tricia simply does not have the

resources to adequately provide for Mattice and her daughters in addition to all of the other children she is caring for. Furthermore, there was evidence that Mattice and Tricia have a tumultuous relationship which often results in arguments and Tricia's asking Mattice to leave her home.

Viewed as a whole, the evidence presented at trial demonstrates that because of Mattice's decision to involve herself with a convicted felon, she is currently unable to provide Jordan with a stable home environment. In addition, the evidence demonstrates that Mattice has repeatedly placed Jordan in dangerous situations, without regard for her safety or physical well-being. Essentially, the evidence reveals that Mattice has shown she is deficient in making proper choices in her life and that her choices have had a negative effect on Jordan's well-being and will continue to have such an effect should she regain custody of Jordan at this point in time.

We acknowledge that there is conflicting evidence in the record concerning Mattice's parenting abilities and her decisionmaking skills; however, where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. See *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004). And, as we stated above, the county court's factual findings are clearly supported by evidence in the record.

In addition, the court's factual findings support its ultimate conclusion that Mattice is currently unfit to parent Jordan and that she has temporarily forfeited her parental rights to Jordan. Because the county court's decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable, we affirm the order of the county court granting Kaaren's request for guardianship of Jordan.

We must note, however, that as we explained above, a guardianship is temporary in nature, and that Mattice has the right, should she so choose, to file a motion to terminate the guardianship once she is able to demonstrate improvement in her parenting abilities and her decisionmaking skills.

VI. CONCLUSION

We find that the county court did not err when it granted Kaaren's petition for guardianship of Jordan, and accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
JOSHUA E. FLOREA, APPELLEE.
820 N.W.2d 649

Filed September 18, 2012. No. A-12-067.

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. **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. **Speedy Trial.** Neb. Rev. Stat. § 29-1207 (Cum. Supp. 2010) requires that a defendant be tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial.
4. ____. If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to an absolute discharge from the offense charged.
5. **Speedy Trial: Indictments and Informations.** During the period between dismissal of a first information and the filing of a second information which alleges the same charges, the speedy trial time is tolled and the time resumes upon the filing of the second information, including the day of its filing.
6. **Double Jeopardy.** The application of Neb. Rev. Stat. § 29-2316 (Reissue 2008) turns on whether the defendant has been placed in jeopardy by the trial court.
7. **Double Jeopardy: Juries: Pleas.** Jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea.

Appeal from the District Court for Saline County: VICKY L. JOHNSON, Judge. Exception sustained, and case remanded for further proceedings.

Tad D. Eickman, Saline County Attorney, for appellant.

Jeremy C. Jorgenson for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

The State of Nebraska filed an application for leave to docket an appeal, pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 2008), in connection with the order of the district court which granted Joshua E. Florea's motion for absolute discharge on speedy trial grounds. We granted leave to the State to docket the appeal. On appeal, the State asserts that the district court erred in concluding that Florea's statutory right to a speedy trial had been violated and in granting his motion for discharge. Because we find that the district court's decision was clearly erroneous, we sustain the State's exception and remand the case back to the district court for further proceedings.

II. BACKGROUND

The relevant factual matters in this appeal concern the dates of various filings, motions, and rulings thereon. As such, we confine our recitation of the background to a brief description of the pertinent procedural history surrounding the case.

On April 5, 2011, the State filed an information in the district court charging Florea with (1) driving under the influence, fourth offense; (2) refusal to submit to a preliminary breath test; (3) refusal to submit to a chemical test; (4) crossing over the centerline; and (5) driving on a highway shoulder.

On July 25, 2011, the State filed a motion to dismiss the April information without prejudice. That same day, the district court entered an order granting the State's motion.

On October 13, 2011, the State filed a second information charging Florea with (1) driving under the influence, fourth offense; (2) refusal to submit to a preliminary breath test; (3) refusal to submit to a chemical test; (4) crossing over the centerline; and (5) driving on a highway shoulder. The October information appears to be a refiling of the charges contained in the April information—except that in the October information, refusal to submit to a chemical test was charged as a Class III

felony, and in the April information, refusal to submit to a chemical test was charged as a Class W misdemeanor.

On November 2, 2011, Florea was arraigned on the charges contained in the October information and pled not guilty to each charge.

On November 10, 2011, Florea filed a motion for absolute discharge. In the motion, he alleged that his right to a speedy trial had been violated because he had "undergone prosecution for an alleged incident that was originally charged" more than 6 months prior to his filing of the motion for discharge. Florea requested that the district court dismiss the charges against him with prejudice.

A hearing was held on Florea's motion for discharge. After the hearing, the district court entered an order granting Florea's motion and dismissing the October information with prejudice. In granting the motion, the district court relied on the Nebraska Supreme Court's decision in *State v. Sumstine*, 239 Neb. 707, 478 N.W.2d 240 (1991). The district court stated:

> The Information that starts the running of [Florea's] speedy trial rights [was filed on] April 5, 2011. Although the charges were originally dismissed in July, this does not toll the running of the clock, as *Sumstine* clearly indicates. The charges [contained in the October information] are the same, or in the case of [the charge of refusal to submit to a chemical test], an offense committed simultaneously with a lesser included offense charged in the [April] Information.
>
> Excluding the date of April 5, and counting forward six months, and backing up one day, the last date on which [Florea] could have been brought to trial was October 5 . . . . There is no time excluded under Neb. Rev. Stat. §29-1207(4). As a consequence, [Florea's] statutory speedy trial rights have been violated. The [October] Information is dismissed with prejudice, at the State's costs.

Subsequent to the entry of the district court's order, the State filed an application for leave to docket an appeal. We granted the State's request.

III. ASSIGNMENTS OF ERROR

On appeal, the State generally argues that the district court erred in concluding that Florea's statutory right to a speedy trial had been violated and in granting his motion for absolute discharge. Specifically, the State argues that the district court misinterpreted the Nebraska Supreme Court's holding in *State v. Sumstine, supra*, and that, but for the district court's misinterpretation, there was still sufficient time left on the speedy trial clock to bring Florea to trial.

IV. 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. Vasquez*, 16 Neb. App. 406, 744 N.W.2d 500 (2008). See, also, *State v. Karch*, 263 Neb. 230, 639 N.W.2d 118 (2002).

[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. *State v. Karch, supra*; *State v. Vasquez, supra*.

V. ANALYSIS

[3,4] Neb. Rev. Stat. § 29-1207 (Cum. Supp. 2010) requires that a defendant be tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial. *State v. Vasquez, supra*. If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to an absolute discharge from the offense charged. *Id*. 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. Vasquez, supra*.

The information against Florea was initially filed on April 5, 2011. That information was dismissed by the State on July 25. On October 13, a second information was filed in the case. The

second information was essentially a refiling of the charges contained in the initial information.

After Florea pled not guilty to the charges contained in the second information, he filed a motion for absolute discharge. In the motion, he argued that the charges must be dismissed because the original information was filed more than 6 months earlier and there were no excludable periods to extend the 6-month statutory period.

The district court agreed with Florea's argument and granted his motion for absolute discharge. The court relied on its interpretation of *State v. Sumstine*, 239 Neb. 707, 478 N.W.2d 240 (1991), in calculating the last day that Florea could be brought to trial. First, the district court found that the speedy trial time must be calculated by adding together the time periods when the two informations against Florea were pending, because the charges contained in the second information were the same as those in the initial information or, in the case of the charge of refusal to submit to a chemical test, an offense committed simultaneously with a lesser-included offense charged in the initial information. See *State v. Sumstine, supra*. Additionally, the court interpreted the Supreme Court's holding in *State v. Sumstine* to require that the time after the dismissal of the initial information and before the filing of the second information be included in the speedy trial calculation.

As a result of its interpretation of *State v. Sumstine, supra*, the district court concluded that there were no excludable periods since the filing of the initial information on April 5, 2011, and that the last day Florea could have been brought to trial on the charges was October 5, a few days prior to the day the State filed the second information. The court then determined that because more than 6 months had passed since the filing of the initial information, the charges against Florea must be dismissed with prejudice.

The State takes exception to the district court's finding that there were no excludable periods since the filing of the initial information on April 5, 2011. While the State agrees that the periods when the two informations were pending must be combined in determining the last day for commencement of trial under the speedy trial act, the State disagrees that the time after

the dismissal of the initial information and before the filing of the second information must also be included in the speedy trial calculation.

[5] A careful reading of the Nebraska Supreme Court's holding in *State v. Sumstine, supra*, reveals that the State's assertion has merit. In *State v. Sumstine*, the court specifically stated that during the period between dismissal of the first information and the filing of the second information, the speedy trial time is tolled:

> [W]hile time chargeable against the State under the speedy trial act commences with the filing of an initial information against a defendant, the time chargeable to the State ceases, or is tolled, during the interval between the State's dismissal of the initial information and refiling of an information charging the defendant with the same crime alleged in the previous, but dismissed, information.

239 Neb. at 714, 478 N.W.2d at 245. See, also, *State v. French*, 262 Neb. 664, 633 N.W.2d 908 (2001); *State v. Trammell*, 240 Neb. 724, 484 N.W.2d 263 (1992); *State v. Vasquez*, 16 Neb. App. 406, 744 N.W.2d 500 (2008). The time resumes upon the filing of the second information, including the day of its filing. *State v. Sumstine, supra*.

In its calculations, the district court erroneously included the time that passed between the State's dismissal of the initial information on July 25, 2011, and its filing of the second information on October 13. When we recalculate the speedy trial time, taking into account that the time was tolled from July 25 to October 13, we conclude that when Florea filed his motion for absolute discharge on November 10, the State still had time to bring him to trial.

The initial information against Florea was filed on April 5, 2011. Assuming there were no excludable time periods and disregarding the time tolled during the dismissal, the last day the State could have brought Florea to trial would have been October 5. However, the time chargeable to the State ceased during the interval between the State's dismissal of the initial information on July 25 and the filing of the second information on October 13. The period excluded by this tolling is 79 days.

Considering the time the speedy trial clock was tolled, the last date for commencement of trial was extended to December 23. As such, when Florea filed his motion for absolute discharge on November 10, the State still had over a month to bring Florea to trial. The district court erred in granting Florea's motion and dismissing the charges pending against him.

[6,7] For the reasons stated above, we find merit in the State's exception to the district court's ruling. Disposition of the case is therefore governed by Neb. Rev. Stat. § 29-2316 (Reissue 2008). It provides:

> The judgment of the court in any action taken pursuant to section 29-2315.01 shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy, but in such cases the decision of the appellate court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered or which may thereafter arise in the state. When the decision of the appellate court establishes that the final order of the trial court was erroneous and the defendant had not been placed legally in jeopardy prior to the entry of such erroneous order, the trial court may upon application of the prosecuting attorney issue its warrant for the rearrest of the defendant and the cause against him or her shall thereupon proceed in accordance with the law as determined by the decision of the appellate court.

The application of § 29-2316 turns on whether the defendant has been placed in jeopardy by the trial court. Jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea. *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

Here, Florea filed his motion for absolute discharge almost immediately after pleading not guilty to the charges contained in the second information and before any further proceedings. Thus, it is clear that jeopardy has not attached. Because jeopardy did not attach, the case is remanded to the district court for further proceedings pursuant to § 29-2316.

VI. CONCLUSION

The district court's order sustaining Florea's motion to discharge based upon a violation of his statutory right to a speedy trial was clearly erroneous. Accordingly, we sustain the State's exception and, because jeopardy did not attach, we remand the case to the district court for further proceedings.

EXCEPTION SUSTAINED, AND CASE REMANDED FOR FURTHER PROCEEDINGS.

JANET FAE SMITH, APPELLANT, V.
ROBERT BYRON SMITH, APPELLEE.
823 N.W.2d 198

Filed October 9, 2012. No. A-12-075.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In an action for dissolution of marriage, an appellate court reviews de novo on the record the trial court's determination of alimony; a determination regarding alimony, however, is initially entrusted to the trial court's discretion and will normally be affirmed in the absence of an abuse of that discretion.
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. **Alimony.** In considering alimony upon a dissolution of marriage, a court is to consider the income and earning capacity of each party, as well as the general equities of each situation.
4. ____. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties.
5. ____. In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
6. ____. 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.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed.

Terrance A. Poppe and Benjamin D. Kramer, of Morrow, Poppe, Watermeier & Lonowski, P.C., L.L.O., for appellant.

Sheri Burkholder and Zachary L. Blackman, Senior Certified Law Student, of McHenry, Haszard, Roth, Hupp, Burkholder & Blomenberg, P.C., L.L.O., for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Janet Fae Smith appeals an order of the district court for Lancaster County, Nebraska, dissolving her marriage to Robert Byron Smith, distributing the marital estate, and ordering her to pay alimony to Robert. On appeal, Janet challenges only the court's order of alimony. We do not find an abuse of discretion, and we affirm.

II. BACKGROUND

Janet and Robert were married on May 2, 1981. There was one child born of the marriage, but she had reached adulthood before the dissolution of marriage proceedings. At the time of the trial in this matter, Janet was 54 years of age and Robert was 63 years of age.

At trial, the parties agreed on the resolution of most issues. The issues left for the court to decide included Robert's request for alimony, determination of who should pay attorney fees, and disposition of the marital estate.

There was evidence adduced at trial demonstrating that Janet had been employed at her then place of employment for approximately 13 years, and the tax documents presented to the court established that her average annual income was approximately $70,000 per year, which amounts to approximately $5,833 per month. Janet presented an exhibit to the court in which she calculated her average monthly expenses to be approximately $3,322 per month.

There was evidence adduced at trial demonstrating that Robert had been employed at his then place of employment for approximately 6 years, and he testified that he worked 40 hours per week and was paid $10.68 per hour; this amounts to approximately $22,214 per year or $1,851 per month. Robert presented an exhibit to the court in which he calculated his average monthly expenses to be approximately $4,190 per month; of this amount, approximately $1,170 per month was attributed to prescription medication and medical expenses that were not covered by insurance.

Robert also testified that he suffers from a variety of medical conditions, including anxiety disorder, chronic back pain, diabetes, sinusitis, and complications related to a stroke suffered several years prior to trial. Robert testified that health insurance available through his employer was increasing in cost dramatically at the time of trial. Robert acknowledged that he would be eligible for Social Security and Medicare at some point within the next few years, and he also testified that he loved his job and did not intend to retire until he had to.

The parties owned a marital home, a car, a truck, and a variety of bank and retirement accounts. With respect to the marital home, Janet presented evidence valuing the home at approximately $160,000. The evidence indicated that approximately $32,700 of that amount was appropriately set aside to Robert as a premarital asset and that there remained an outstanding mortgage in the amount of approximately $34,662. Robert testified that the monthly mortgage payment on the house was approximately $890 per month.

At trial, Janet testified that she proposed the sale of the marital home and then an equal distribution of the resulting equity. Janet had moved out of the marital home and was living elsewhere at the time of trial, while Robert remained in the home. Robert testified that he wanted to remain in the home, rather than sell it, and that his anxiety disorder was a consideration in that preference. He also testified that he had looked into apartments in the area, but that the monthly rent for an apartment would be as much or more than the monthly mortgage payment on the home.

Robert requested an alimony award of $2,600 per month for 15 years. He testified that such an award would allow him to meet his basic monthly needs and that he is dependent on Janet's income to meet his basic needs. Janet testified that she did not believe an alimony award to Robert was justified in this case. She testified that she believed such an award was not justified because she helped to raise Robert's son from a prior relationship without support from the child's mother and had helped to pay for drug and alcohol counseling for the son, because Robert had been periodically unemployed during the marriage, and because Robert had been physically and verbally

abusive toward her during the marriage. Robert acknowledged having used "filthy" language toward Janet during the marriage and admitted to having been intimidating, but denied physically assaulting her.

In the decree, the court dissolved the parties' marriage, divided the marital estate, ordered each party to pay his or her own attorney fees, and awarded Robert alimony of $1,500 per month for a period of 10 years. With respect to the property division, the court divided the marital estate roughly in half; the court awarded Robert the marital home, as part of his half of the estate, rather than ordering it sold.

With respect to the alimony award, the court specifically found that the alimony award was based on a finding that Janet's annual income is approximately $70,000 and that Robert's annual income is approximately $22,200. The court noted that the parties had been married for 30 years, that there was a significant disparity in the incomes of the parties, that Robert had a need for alimony, and that Janet had the ability to pay.

This appeal followed.

III. ASSIGNMENT OF ERROR

On appeal, Janet's sole assignment of error is that the court erred in ordering her to pay Robert alimony of $1,500 per month for a period of 10 years.

IV. ANALYSIS

Janet's sole assignment of error on appeal is that the district court erred in ordering her to pay Robert alimony of $1,500 per month for a period of 10 years. She argues that the circumstances of the parties and the evidence adduced at trial do not support the amount of alimony or its duration. Upon our review of the record, we cannot say that the court abused its discretion.

[1,2] In an action for dissolution of marriage, an appellate court reviews de novo on the record the trial court's determination of alimony; a determination regarding alimony, however, is initially entrusted to the trial court's discretion and will normally be affirmed in the absence of an abuse of that

discretion. See, *Titus v. Titus*, 19 Neb. App. 751, 811 N.W.2d 318 (2012); *Thompson v. Thompson*, 18 Neb. App. 363, 782 N.W.2d 607 (2010). 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. *Zoubenko v. Zoubenko*, 19 Neb. App. 582, 813 N.W.2d 506 (2012).

[3,4] Neb. Rev. Stat. § 42-365 (Reissue 2008) provides:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other . . . as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

In addition to the criteria listed in § 42-365, in considering alimony upon a dissolution of marriage, a court is to consider the income and earning capacity of each party, as well as the general equities of each situation. *Titus v. Titus, supra*. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties. *Zoubenko v. Zoubenko, supra*.

[5,6] In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Id*. 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. *Id*.

In the present case, Janet argues that the factors to be considered in assessing alimony weigh in favor of no alimony award and that even if some award is appropriate, the duration of the award entered by the district court is an abuse of discretion. She argues that she was the primary contributor during the course of the marriage, that she helped to care for Robert's child from a previous relationship, and that Robert did not give up any career or educational opportunities during the marriage.

She also argues that Robert will be eligible to receive Social Security and Medicare benefits within a few years.

Janet also argues that the alimony award was improper because there was evidence that she "had to endure physical and verbal abuse at his hands." Brief for appellant at 11. She acknowledges that "the testimony regarding this issue is limited." *Id*. We do not find this a basis for overturning the alimony award. See *Else v. Else*, 219 Neb. 878, 367 N.W.2d 701 (1985) (in system of no-fault divorce, misconduct does not determine entitlement to alimony).

Based upon our review of the record, we cannot say that the district court abused its discretion in making its alimony award. The parties were married for 30 years, and the record does not indicate that either party forewent career or educational opportunities during the marriage. The parties' only child is no longer a minor, so custody is not a factor.

The record indicates that Robert is gainfully employed and that he was employed throughout the marriage. However, the record also clearly indicates a significant disparity in the parties' incomes and earning capacities. While Janet is employed in a position where she earns approximately $70,000 per year, Robert is paid an hourly wage and earns approximately $22,200 per year.

The record indicates that Janet's monthly income of approximately $5,800 exceeds her monthly expenses of approximately $3,320 by approximately $2,480. The record indicates that Robert, on the other hand, suffers from a variety of health-related issues that contribute to his monthly expenses of approximately $4,190—exceeding his monthly income of approximately $1,850 by approximately $2,340. The record indicates that Robert has a need for continued support to meet his expenses and that Janet has the ability to provide support while still being able to meet her expenses.

Janet argues that the costs Robert will incur to pay for medical insurance from his employer, prescription costs, and other medical costs that are not covered by insurance should be discounted because she agreed to provide insurance for Robert for 6 months and because he will be eligible for Medicare within a few years. Although Janet is certainly correct in noting that

she agreed to provide insurance coverage for 6 months and that there was testimony Robert believed he would be eligible for Medicare within a few years, it was not an abuse of discretion by the district court to consider those costs in assessing Robert's need for alimony. Robert presented evidence concerning what he expected his insurance costs would be when the 6-month period expired and Janet was no longer providing insurance coverage. There was no evidence adduced to indicate when exactly Robert would be eligible for Medicare or how or to what extent Medicare would cover any of Robert's current medical needs.

Because of the ages of the parties, with Robert's being 63 years of age at the time of trial, it is clear his circumstances may change within the next few years. As he testified, he will likely be eligible to start receiving Social Security benefits and he will likely be eligible to start receiving Medicare benefits. However, there is nothing in the record to indicate that the parties contemplated or had any idea how those circumstances might impact his situation. There is nothing in the record to indicate that the parties contemplated what his Social Security benefits might be or how eligibility for Social Security benefits might impact his earnings. There is nothing in the record to indicate that the parties contemplated how Medicare benefits might impact his monthly health-related expenses, including personal health insurance premiums, prescriptions, or other expenses not covered by his personal insurance.

On the record provided, we disagree with Janet's assertion that it was not reasonable to base the alimony award on Robert's known income and known expenses instead of concluding that his income "will increase when he receives Social Security payments" or concluding that "he will only have to cover himself for health insurance purposes for a short period of time." Brief for appellant at 8, 9.

Janet also argues that Robert's expenses should be discounted because he is choosing to remain in the marital home with a monthly mortgage of $890. However, Robert testified that he had looked into other places to live but that rental costs for an apartment would be as much as or more than the mortgage payment on the home. There was no evidence presented

to contradict this, and on the record provided, we cannot conclude, as Janet argues, that there are "surely less expensive options." Brief for appellant at 9. We also do not find merit to Janet's assertion that we should discount Robert's monthly expenses because they could "be reduced further if [Robert] were willing to live in a more modest environment that did not include things like $196.14 monthly bills for a home phone, internet and cable or approximately $236.54 for water, electricity, gas and garbage." *Id.*

The record in this case supports the district court's conclusion that Janet's average earnings over the past several years were approximately $70,000 per year, or approximately $5,800 per month. The record supports a finding that her monthly expenses are approximately $3,320 per month. Thus, the record supports a finding that Janet has approximately $2,480 per month income over and above her monthly expenses. The record supports a finding that Robert's earnings are approximately $22,200 per year, or approximately $1,850 per month. The record supports a finding that his monthly expenses are approximately $4,190 per month. Thus, the record supports a finding that Robert's monthly needs, including medical needs related to his health issues, exceed his income by approximately $2,340.

Based on the circumstances of the parties, including the length of the marriage, the relative economic situation of the parties, Robert's need for additional support, and Janet's ability to provide additional support, the award of alimony was not an abuse of discretion. An award of alimony for 10 years is not an abuse of discretion, given the 30-year length of the marriage. The award did not serve to equalize the parties' incomes, and after paying alimony of $1,500 per month, Janet will still have nearly $1,000 per month income over and above her other monthly expenses; Robert will still be nearly $1,000 short of having enough income to cover all of his expenses. We find no merit to Janet's assertions on appeal.

V. CONCLUSION

We find no abuse of discretion in the alimony award. We affirm.

AFFIRMED.

REBECCA HRONEK, APPELLEE, V.
MICHAEL BROSNAN, APPELLANT.
823 N.W.2d 204

Filed October 16, 2012. No. A-11-897.

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. In such de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court.
3. ____: ____. Where the credible evidence is in conflict on a material issue of fact, an 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.
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. **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. A judge must be careful not to appear to act in the dual capacity of judge and advocate.
6. **Judges: Witnesses: Due Process.** Neb. Rev. Stat. § 27-614(1) (Reissue 2008), the statute governing calling and interrogation of witnesses by a judge, gives judges the right to call witnesses, but it also gives the parties the right to cross-examine such witnesses.
7. **Trial: Appeal and Error.** A ruling regarding the extent, scope, and course of the cross-examination rests within the discretion of the trial court and will not be disturbed absent an abuse of discretion.
8. **Trial: Witnesses: Due Process.** A trial court may not enforce a blanket policy denying a party the right to call nonparty witnesses, because such affects the requirements of procedural due process.

Appeal from the District Court for Douglas County: MARCELA A. KEIM and JEFFREY MARCUZZO, County Judges. Reversed and remanded with directions.

John J. Heieck and Matthew Stuart Higgins, of Higgins Law, for appellant.

Vicky L. Amen and Matthew S. McKeever, of Copple, Rockey, McKeever & Schlecht, P.C., L.L.O., for appellee.

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

MOORE, Judge.

INTRODUCTION

Rebecca Hronek applied for a domestic abuse protection order against her ex-husband, Michael Brosnan, and an ex parte protection order was issued. A show cause hearing was subsequently held, after which the district court for Douglas County extended the protection order for 1 year. Michael appeals, asserting that the trial court denied him his due process rights to a fair hearing and erred in continuing the ex parte protection order. Because we find that the district court erred in denying Michael's counsel the right to examine Michael and cross-examine Rebecca, we reverse, and remand the cause with directions to set aside the protection order and dismiss the protection order proceedings.

BACKGROUND

On September 19, 2011, Rebecca, acting pro se, applied for a domestic abuse protection order against Michael. The Protection from Domestic Abuse Act, Neb. Rev. Stat. § 42-901 et seq. (Reissue 2008 & Cum. Supp. 2010), 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 application, Rebecca described three incidents in which Michael allegedly forced her "to p[er]form sexual[l]y to see [their] children" and repeatedly contacted her "asking for sex," which she claimed justified issuance of a protection order. The trial court issued an ex parte protection order that same day. Michael was served with a copy of the order and informed that he had the right to appear and show cause why the order should not remain in effect.

At the show cause hearing, Michael appeared with counsel and Rebecca was present pro se. At the start of the hearing, the trial judge asked each party if he or she was going to testify and each responded affirmatively. The judge then administered the oath to both parties. Michael's counsel asked the court for a 30-day continuance due to a pending criminal investigation, which request was denied. The trial court proceeded to address Rebecca as follows:

> THE COURT: [Rebecca], you filed an affidavit in this matter. I've marked a copy of that affidavit as Exhibit 1. It's a four-page document wherein you allege, on August 17th that [Michael] forced you to perform sexually in order for you to see his children, your children. And you allege that he threatened to withhold the children from you unless you p[er]formed for him sexually. Again, on September 13th, you say he repeatedly contacted you text messaging asking for sex and you refused. And you asked him not to contact you and he still persisted in contacting you. And you ended up having to call the police. And again on September 18th, he again asked you for sexual favors. He referred to you as a bitch. Is that about correct?
>
> [Rebecca]: Yes.
>
> THE COURT: Are you asking that I receive a copy of your affidavit into evidence as Exhibit 1?
>
> [Rebecca]: Yes.

At this point, Michael's counsel objected to the receipt of the affidavit as containing hearsay. The court overruled Michael's objection and received the exhibit into evidence.

The trial judge then asked Rebecca if she had anything else to say. Rebecca responded that she had some police reports and text messages between the parties. The judge asked Rebecca if she wanted to offer the documents as exhibits, and Rebecca said, "Yes." Michael objected to all of these exhibits as containing hearsay and lacking foundation. In overruling the objection, the judge stated, "There is some hearsay in these matters, in these exhibits, but for the purposes of this hearing, those exhibits will be received."

The trial judge next asked Michael whether there was anything he would like to say regarding the affidavit, to which Michael replied that he did not. The judge also asked whether Michael had "anything else," to which Michael replied, "No." The trial judge did not ask Michael or his counsel whether they had any questions of Rebecca.

The trial judge indicated that he was going to affirm the protection order based upon the testimony and exhibits presented. Michael's counsel interjected, asking whether he would have an opportunity to call a witness or enter evidence, to which the judge responded, "Sure." Counsel asked if he could call Michael, and the judge again responded, "Sure . . . ." Michael's counsel then offered four exhibits, more text messages between the parties and a handwritten note from Rebecca, which were received into evidence by the court. The following conversation was then had on the record.

> [Michael's counsel]: A few questions for [Michael] and that will be it, if I may, Judge.
>
> THE COURT: Well, I'll allow you to call someone. Is there anything — I asked him if there was anything he wanted to say.
>
> [Michael's counsel]: Your Honor, perhaps it's a defect in my knowledge of the Court's procedures. I didn't understand that that was my moment to speak up and say I need to question [Michael].
>
> THE COURT: Well, you can allow him to say whatever he would like to say. I'm not going to have you examine or cross-examine any of the witnesses.

Again, Michael did not make any statement. Rather, Michael's counsel requested permission to make an offer of proof as to what examination of Michael would yield, which offer of proof the court allowed. The offer of proof referenced the text messages offered by Michael and essentially indicated that Michael would testify that the sexual relationship between the parties was consensual.

The court then questioned Rebecca about the exhibits offered by Michael. Rebecca confirmed that she authored exhibits 8 and 11, two of the text messages, and was allowed

to make a statement to explain them. Rebecca testified that she and Michael had tried to get back together and that her messages to him "were to try to encourage him to get into more of [a] monogamous relationship instead of having me on the side with a girlfriend." Rebecca stated that when Michael does not like what she has to say, he becomes forceful, and that if she does not have sex with him, she does not get to see her children.

After this testimony, the trial judge asked Michael's counsel whether he had anything else, to which he responded, "No, sir." At that time, the court affirmed the protection order for 1 year. An order was entered to that effect by the court on October 20, 2011. Michael timely appeals.

ASSIGNMENTS OF ERROR

Michael asserts, restated, that he was denied due process of law because (1) he was denied a hearing before an impartial decisionmaker, (2) he was not permitted to confront and cross-examine the adverse witness, and (3) he was denied a meaningful opportunity to be heard. Michael also alleges that the trial court erred (4) in admitting hearsay evidence and (5) in affirming the protection order based upon insufficient evidence.

STANDARD OF REVIEW

[1-3] A protection order pursuant to § 42-924 is analogous to an injunction. See *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*. In such 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, an 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. *Elstun v. Elstun*, 257 Neb. 820, 600 N.W.2d 835 (1999).

ANALYSIS

Michael asserts that he was denied due process of law at the show cause hearing because he was not permitted a reasonable

opportunity to confront and cross-examine witnesses or to present evidence. Michael also asserts that he was denied a hearing before an impartial decisionmaker.

[4] 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. *Mahmood v. Mahmud, supra*. In *Mahmood v. Mahmud*, the show cause hearing involved whether a harassment protection order should be continued. Because there was no sworn testimony or exhibits offered and accepted at the hearing, but, rather, only an informal discussion, the Supreme Court held that the record did not support issuance of the protection order, and reversed, and remanded with directions to dismiss the protection order. The court noted that while the intrusion on the respondent's liberty interests is limited and "the procedural due process afforded in a harassment protection hearing is likewise limited," nevertheless, some evidence must be presented. *Id*. at 397, 778 N.W.2d at 432.

Michael argues that the foregoing proposition regarding limited due process should not apply in a domestic abuse protection order because the intrusion on the respondent's liberty interests is greater than in a harassment protection order. However, Michael does not provide any authority for this assertion, and we have found none. The relief provided by each type of protection order is similar in many respects. See Neb. Rev. Stat. §§ 28-311.09(1) (Reissue 2008) and 42-924(1). We see no reason why the same rule regarding limited due process should not apply to a hearing concerning a domestic abuse protection order. We now turn to the question on whether due process violations occurred in this case as argued by Michael.

[5] We first address Michael's argument that he was denied a hearing before an impartial decisionmaker by virtue of the trial judge's actions in assisting Rebecca in the presentation of evidence. In *Sherman v. Sherman*, 18 Neb. App. 342, 781 N.W.2d 615 (2010), this court discussed the trial judge's actions in connection with a pro se petitioner. In that case, the petitioner filed a petition and affidavit to obtain a domestic abuse protection order against her ex-husband. At the hearing, the petitioner

appeared pro se and the ex-husband appeared with counsel. Counsel moved to dismiss the ex parte domestic abuse protection order, and in response, the court, sua sponte, requested that the bailiff retrieve a harassment protection order, stating that the petitioner "'want[ed] to amend it to that.'" *Id.* at 344, 781 N.W.2d at 618. After taking judicial notice of the allegations in the petition and affidavit to obtain the domestic abuse protection order and considering letters corroborating the affidavit, but which were not received in evidence, the court entered a harassment protection order. Because the trial court erroneously took judicial notice of disputed facts and did not receive the exhibits into evidence, we found the evidence insufficient to support the harassment protection order and, accordingly, reversed, and remanded with directions to vacate the protection order. We noted also that the judge, in making the determination of which type of protection order to pursue, rather than allowing the petitioner to make that choice herself, crossed the line into advocacy. We stated:

> "'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. . . .'"

Id. at 347, 781 N.W.2d at 620.

In *State v. Fix*, 219 Neb. 674, 365 N.W.2d 471 (1985), the Nebraska Supreme Court recognized that the statutory authority for a trial court to ask questions is contained in Neb. Rev. Stat. § 27-614 (Reissue 2008) and that in certain instances, it may be necessary for the trial judge to interrogate the witness in order to develop the truth. We conclude that the trial judge's actions in the present case did not cross the line into advocacy. While the judge asked Rebecca whether she wanted to offer exhibits into evidence and conducted some questioning of Rebecca, these actions did not unduly interfere with the hearing. The judge gave Michael the same opportunity to offer exhibits and give testimony, albeit without examination by counsel. Michael's argument that he was deprived of an impartial decisionmaker is without merit.

We next turn to the question of whether Michael was denied due process by the trial court's denial of his counsel's right to examine Michael and cross-examine Rebecca. A similar issue was addressed by the Nebraska Supreme Court in *Elstun v. Elstun*, 257 Neb. 820, 600 N.W.2d 835 (1999). In that case, the petitioner applied for and received an ex parte protection order against her husband. At the show cause hearing, the petitioner appeared with counsel and her husband appeared pro se. The trial court asked the petitioner whether the affidavit and application were correct, to which she responded that they were. The trial court then had the husband sworn and questioned him about the incidents described in the application. Thereafter, the petitioner's attorney asked leave to question the husband, but the request was denied. The trial court then called the petitioner, had her sworn, and questioned her about the incidents described in the application and affidavit. The petitioner's counsel requested an opportunity to ask questions and was again denied. The court then stated that it was extending the protection order for 1 year. The petitioner's attorney again requested leave to ask a few questions, but that request was denied, and the parties were excused.

[6,7] On appeal, although the case was moot because the protection order expired before the appeal was decided, the court in *Elstun v. Elstun, supra*, addressed the husband's claim that he was denied due process of law when he was not permitted a reasonable opportunity to refute or defend against the action, to confront and cross-examine adverse witnesses, and to present evidence, under the public interest exception. The court recognized that § 27-614(1) provides that "'[t]he judge may, on his own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.'" 257 Neb. at 825, 600 N.W.2d at 839. The court noted that although the husband did not request to offer additional evidence or to cross-examine the petitioner, the trial court's repeated denial of the petitioner's counsel's request to examine and cross-examine the parties "certainly chilled any thoughts [the husband] may have had, as pro se, to cross-examine [the petitioner]." *Id.* As such, the court found that the husband's rights to cross-examine the petitioner under

§ 27-614 were violated. The court went on to note, however, that a ruling regarding the extent, scope, and course of the cross-examination rests within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *Elstun v. Elstun, supra*.

[8] This court also recognized a trial court's right to take an active role in controlling the procedure in a protection order hearing in *Zuco v. Tucker*, 9 Neb. App. 155, 609 N.W.2d 59 (2000). However, we found that a trial court may not enforce a blanket policy denying a party the right to call nonparty witnesses, because such affects the requirements of procedural due process. Because the respondent did not make the substance of the excluded witnesses' testimony apparent to the trial court through an offer of proof, we found no error and affirmed the extension of the protection order.

In the case at hand, Michael's counsel requested to examine Michael, which request was ultimately denied. In denying this request, the court stated that it was not going to allow counsel to examine or cross-examine any witnesses. Although counsel did not specifically ask to cross-examine Rebecca after her subsequent testimony, the trial court's blanket statement effectively shut the door to this possibility, making any such request futile. We conclude that Michael's due process rights were violated when his counsel was not allowed to examine Michael or cross-examine Rebecca. In reaching this conclusion, we note that the trial court did not ask Michael or his counsel whether they had any questions for the court to ask Rebecca.

Because we conclude that the trial court's procedure at the show cause hearing deprived Michael of his due process rights, we need not address Michael's remaining assignments of error. The protection order will expire on October 20, 2012. See § 42-924. We reverse the district court's entry of the protection order and remand the cause with directions to set aside the protection order and to dismiss the protection order proceedings.

CONCLUSION

We find that the district court denied Michael his right to procedural due process at the show cause hearing on Rebecca's

application for a domestic abuse protection order by denying Michael's counsel the opportunity to examine Michael or cross-examine Rebecca. We reverse the order of the district court which extended the protection order for 1 year, and we remand the cause with directions to set aside the protection order and to dismiss the protection order proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
WILLIAM J. MOSER, JR., APPELLANT.
822 N.W.2d 424

Filed October 16, 2012. No. A-11-951.

1. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. Determinations regarding whether counsel was deficient and whether this deficiency prejudiced the defendant are questions of law that an appellate court reviews independently of the lower court's decision. An appellate court reviews factual findings for clear error.
2. **Postconviction: Pleas: Effectiveness of Counsel.** In a postconviction proceeding brought by a defendant convicted on a plea of guilty or no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
3. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient and 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.
4. **Postconviction: Pleas: Waiver: Effectiveness of Counsel.** Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
5. **Effectiveness of Counsel: Pleas: Proof.** Within the plea context, in order to satisfy the prejudice requirement to establish an ineffective assistance of counsel claim, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial.
6. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffectiveness 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.

7. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs: Evidence.** If the initial stop was unconstitutional, any subsequent search and evidence obtained through the search are constitutionally inadmissible as the "fruit of the poisonous tree."
8. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
9. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** An officer's stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred.
10. **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 is irrelevant.
11. **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.
12. **Constitutional Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** In determining whether the community caretaking exception to the Fourth Amendment applies, a court should assess the totality of the circumstances surrounding the stop, including all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction.
13. ____: ____: ____: ____. A community caretaking exception to the Fourth Amendment should be narrowly and carefully applied in order to prevent its abuse.
14. **Effectiveness of Counsel: Pleas: Proof.** In a claim for ineffective assistance of counsel in a plea setting, factors to be considered include the likely penalties the defendant would face if convicted at trial, the relative benefit of the plea bargain, and the strength of the State's case. Self-serving declarations that the defendant would have gone to trial will not be enough; the defendant must present objective evidence showing a reasonable probability that he or she would have insisted on going to trial.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Reversed and remanded with directions.

Jerod L. Trouba, of Knoepfle & Trouba, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

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

MOORE, Judge.

INTRODUCTION

Pursuant to a plea agreement, William J. Moser, Jr., was convicted of manufacture of a controlled substance, which conviction was affirmed following his direct appeal. Moser filed a motion for postconviction relief, claiming that he received ineffective assistance of counsel for counsel's failure to file a motion to suppress evidence seized following a traffic stop and failure to advise Moser regarding such procedure. After an evidentiary hearing, that motion was denied. Because we find that a reasonable probability exists that Moser would not have pled guilty to the charge, but would have insisted on seeking suppression of the evidence, we reverse the order of the district court and remand the cause with directions to set aside the conviction, to allow Moser to withdraw his plea, and for further proceedings.

BACKGROUND

On August 19, 2009, Moser was charged with manufacture of a controlled substance and possession of a firearm during the manufacture of a controlled substance, both of which are Class IB felonies. On November 10, Moser pled guilty to the charge of manufacture of a controlled substance, pursuant to a plea agreement with the State. In exchange for Moser's plea, the State dismissed the remaining charge.

The factual basis provided by the State established that during a traffic stop of Moser's vehicle in Madison County, Nebraska, Trooper David Ramsey determined that Moser was driving under suspension. Moser was arrested, and during an inventory search of his vehicle, Ramsey found "a coffee filter containing an off-white powdery substance, two syringes, a straw, and a cotton swab." An investigator with the Nebraska State Patrol learned of the arrest and recognized Moser's name as matching that of an individual who had been purchasing an unusual amount of pseudoephedrine. Moser was interviewed at the detention facility after waiving his *Miranda* rights and admitted that he had been manufacturing methamphetamine at his residence in Platte County, Nebraska. As a result, a search

warrant was obtained for Moser's residence, which search uncovered 374.42 grams of methamphetamine and numerous items used to manufacture methamphetamine.

The court found that Moser entered his plea freely, voluntarily, knowingly, and intelligently and that a factual basis existed for the same. The court found Moser guilty beyond a reasonable doubt, and on December 4, 2009, Moser was sentenced to a term of 20 years' imprisonment.

Moser, who was represented by counsel different from his trial counsel, filed a direct appeal. Among other things, Moser alleged numerous claims of ineffective assistance of trial counsel, including a claim that counsel was ineffective for failing to advise him regarding a motion to suppress the evidence derived from the search of his vehicle and residence pursuant to the Fourth Amendment and failing to ultimately file said motion. On April 23, 2010, in case No. A-09-1284, this court affirmed the judgment of the district court, finding that the record was insufficient to review Moser's claims of ineffective assistance of trial counsel.

On June 16, 2010, Moser filed a pro se motion for postconviction relief alleging that he received ineffective assistance of counsel in that (1) trial counsel failed to file a motion to suppress the evidence derived from the search of Moser's vehicle and house, (2) trial counsel failed to file a motion to suppress the statements made by Moser to law enforcement, (3) trial counsel failed to advise Moser about his right to challenge the search of his vehicle, and (4) trial counsel failed to advise Moser about his right to challenge the admissibility of the statements made to law enforcement. On April 12, 2011, Moser, with new counsel, filed a second amended motion for postconviction relief. Moser made the same allegations regarding trial counsel's ineffective assistance.

On June 28, 2011, an evidentiary hearing was held on Moser's second amended motion for postconviction relief. During the evidentiary hearing, Moser proceeded only with respect to the claim that trial counsel was ineffective for failing to seek the suppression of all evidence obtained as a result of the allegedly unconstitutional traffic stop of his vehicle and

for failing to advise him regarding possible suppression of such evidence.

At the evidentiary hearing, Ramsey testified that on April 17, 2009, he was monitoring traffic near an intersection where there had been a number of traffic accidents. Ramsey observed Moser's vehicle traveling northbound on the highway, and he noticed that the upper portion of the passenger side of the windshield was shattered and thought that it could have been recently involved in a crash. Ramsey stopped Moser's vehicle because of the shattered windshield. The damage to the windshield was roughly the size of a basketball with a few "spider" cracks coming off of it. Ramsey thought that Moser would have difficulty seeing cross-traffic to his right and that oncoming motorists might have difficulty looking through the area. Moser testified that it was conceivable that he could not see through the shattered portion if he was trying to look directly through it. However, he testified that the area was outside of his line of vision and that he could see underneath it.

Ramsey testified that this was the first traffic stop that he had made for a shattered windshield. Ramsey first indicated that if he had issued Moser a ticket, he would have cited either Neb. Rev. Stat. § 60-6,256 (Reissue 2010) (obstruction of view through windshield) or Neb. Rev. Stat. § 60-6,255 (Reissue 2010) (windshield transparency), but he also testified that he was not sure which statute he would cite for a shattered windshield. Ramsey was later asked by the county attorney about concerns surrounding the safety of the windshield. Ramsey indicated that whether the integrity of the glass was compromised by the shatter or whether it would be more susceptible to breaking and possibly injuring people inside the vehicle was also a concern. Ramsey was aware of Neb. Rev. Stat. § 60-6,263 (Reissue 2010), which requires vehicles to be equipped with safety glass. Ramsey did not believe that Moser's windshield would have had the kind of strength that the safety glass statute required due to the damage. Ramsey did not issue Moser a ticket for the view obstruction to his windshield and testified that he would not have given him

a citation, but, rather, that a "[f]ix-it ticket" would have been issued.

Ramsey testified that through his training, he believed that he had authority to stop vehicles if he perceived safety concerns. He testified to examples of "safety" stops, including observing a pickup pulling a trailer where the safety chain has fallen off and is dragging on the road, as well as observing a vehicle with a partially raised hood. Ramsey testified that he had not received any reports of accidents in the area of the stop on the day in question. However, Ramsey thought that the shatter pattern of Moser's windshield could cause a wreck and was a safety concern.

Photographs of Moser's vehicle were taken approximately 1½ years after the traffic stop and were entered into evidence at the hearing. According to Ramsey, the damage to the windshield shown in the photographs looked worse than it did when he stopped Moser's vehicle. Ramsey indicated that the pattern of the shattered windshield was a similar size and location, but that the windshield was "caved in" and the cracks were longer in the photographs.

A videotape of the traffic stop was entered into evidence. In it, Ramsey can be heard before the stop indicating that he was stopping Moser's vehicle for view obstruction, because the windshield was shattered. After the stop, Ramsey mentioned the shattered windshield and indicated that he wanted to know if Moser could see out of it. Additionally, Ramsey's report from the incident indicated the reasons for the stop were his belief that Moser's vehicle had recently been involved in a crash and that the windshield of Moser's vehicle caused a view obstruction.

Testimony was given by Moser and his trial counsel about their meetings and discussions of the case. Moser testified that at their initial meeting, Moser told his counsel that he was stopped because he had a cracked windshield and Moser drew a picture of the windshield for trial counsel.

Moser's trial counsel testified that, although he did not specifically remember saying anything to Moser about the legality of the stop for a cracked windshield, he probably would have told Moser that he would look into it. Trial counsel was

not able to recall whether he ever specifically used the term "motion to suppress," whether he explained to Moser what a motion to suppress was, or whether he explained what would happen if he was successful at a motion to suppress hearing.

By their next meeting, trial counsel was of the opinion that Moser had no real defenses and that the proper strategy at the time was to try to get the best plea offer possible. Trial counsel also testified:

> I think I remember telling him that my opinion of the windshield situation was that he did not have a colorful argument for a motion to suppress and it would have been a very short conversation about the windshield. At that time I did not believe that there was any kind of argument to be made on that issue.

On October 22, 2009, trial counsel received a plea offer from the prosecutor, which offer was set to expire on November 6. Trial counsel advised Moser that he should take the plea. Trial counsel believed that Moser exhibited a sense of urgency to get his case over with and that he had a desire to get the best plea possible. Trial counsel's strategy was to make a case at sentencing for "an extended period of intensive supervised probation."

Moser testified that counsel told him that there was probable cause for the stop because the windshield cracks went through his field of vision. Moser testified that there was never any mention of filing a motion to suppress, nor did he know what one was, and that the first time he heard the term was from his appellate counsel on direct appeal. Moser testified that he would not have voluntarily entered a guilty plea if he had known what a motion to suppress could do. Even knowing that counsel could not guarantee that it would be successful, Moser would have wanted him to file a motion to suppress.

Moser testified that his counsel advised him he had a "shot at probation" if he pled to the Class IB felony charge and that he wanted to "tak[e] a shot at probation." Moser believed that it was in his best interests to accept the plea because trial counsel told him that it could be withdrawn.

On October 7, 2011, the district court entered an order denying Moser's request for postconviction relief. The district

court concluded that Ramsey possessed a reasonable suspicion that the condition of Moser's windshield may have been in violation of the prohibition of nontransparent material upon the windshield or the safety glass requirement. The court also concluded that Ramsey's concern that Moser's vehicle may have been recently involved in a collision fell under the community caretaking exception to the Fourth Amendment. Based on these considerations, the court determined that a motion to suppress would have been unsuccessful, so Moser suffered no prejudice from the failure of his trial counsel to file such a motion.

ASSIGNMENT OF ERROR

Moser asserts, consolidated and restated, that the district court erred in denying his motion for postconviction relief.

STANDARD OF REVIEW

[1] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011). Determinations regarding whether counsel was deficient and whether this deficiency prejudiced the defendant are questions of law that an appellate court reviews independently of the lower court's decision. *Id*. An appellate court reviews factual findings for clear error. *Id*.

ANALYSIS

[2,3] In a postconviction proceeding brought by a defendant convicted on a plea of guilty or no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012). In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case. *State v. Dunkin, supra*. The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *Id*.

[4-6] Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007). Within the plea context, in order to satisfy the prejudice requirement to establish an ineffective assistance of counsel claim, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. *State v. Dunkin, supra*. The entire ineffectiveness 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. *Id*.

Moser asserts that his trial counsel was ineffective in failing to file a motion to suppress the evidence obtained as a result of the allegedly unconstitutional traffic stop of his vehicle and in failing to inform him of this procedure. Moser argues that, but for these deficiencies, he would not have pled guilty but would have insisted on pursuing suppression of the evidence.

[7-10] Moser's claim is premised upon the argument that Ramsey did not have probable cause to stop his vehicle; therefore, all of the evidence obtained after the traffic stop could have been suppressed. If the initial stop was unconstitutional, any subsequent search and evidence obtained through the search are constitutionally inadmissible as the "fruit of the poisonous tree." *State v. Runge*, 8 Neb. App. 715, 601 N.W.2d 554 (1999), citing *State v. Vermuele*, 241 Neb. 923, 492 N.W.2d 24 (1992). It is well established that a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012). 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, 755 N.W.2d 57 (2008). If an officer has probable cause to stop a violator, the

stop is objectively reasonable and any ulterior motivation is irrelevant. *Id.*

Moser argues that the sole reason for the stop of his vehicle—the shattered windshield—does not amount to a traffic violation. Ramsey mentioned two statutes that he would have cited had he issued a ticket to Moser for a traffic violation: §§ 60-6,256 and 60-6,255. We first discuss § 60-6,256, which provides:

> It shall be unlawful for any person to operate a motor vehicle with any object placed or hung in or upon such vehicle, except required or permitted equipment of the vehicle, in such a manner as to obstruct or interfere with the view of the operator through the windshield or to prevent the operator from having a clear and full view of the road and condition of traffic behind such vehicle. Any sticker or identification authorized or required by the federal government or any agency thereof or the State of Nebraska or any political subdivision thereof may be placed upon the windshield without violating the provisions of this section. Any person violating the provisions of this section shall be guilty of a Class V misdemeanor.

Moser relies upon the case of *United States v. Washington*, 455 F.3d 824 (8th Cir. 2006), in support of his argument that § 60-6,256 does not apply to a shattered windshield. The vehicle in *Washington* had a horizontal crack that "'went all the way across the windshield at about eye level with little spider veins that come off the main crack.'" 455 F.3d at 825. Officers stopped the car on the basis of the "'vision obstruction'" caused by the crack. *Id.* A data check was run on the driver which revealed that his license was suspended, so the driver was arrested and Timothy Washington, a passenger, was escorted out of the car. A search of the vehicle revealed a .22-caliber revolver under the passenger seat; upon questioning, Washington blurted out, "'[I]t's mine and I carry it for protection.'" *Id.*

Washington moved to suppress the firearm and his statement, arguing that they were the fruit of an unconstitutional stop, as no state statute or local ordinance prohibited driving

with a cracked windshield. The officer explained that the cracked windshield was the only basis he had for stopping the vehicle, and the government conceded to the magistrate judge that the officer made a mistake of law in believing that a cracked windshield violated § 60-6,256. The magistrate judge concluded that although the officer was mistaken, his mistake of law was objectively reasonable given his training and past experience. The district court adopted the report of the magistrate judge and denied Washington's motion to suppress, finding that the officer's misunderstanding was reasonable in light of the vision obstruction statute, § 60-6,256, as well as the statute requiring a "view of the highway to the rear," Neb. Rev. Stat. § 60-6,254 (Reissue 2010).

On appeal, the Eighth Circuit Court of Appeals disagreed and found that there was no legal justification for the stop grounded in Nebraska law, that the stop was unconstitutional, and that the firearm and Washington's statements to the police should have been suppressed. The court also found that there was not an objectively reasonable basis for the traffic stop, noting that the government did not present any evidence of police manuals or training materials, testimony that the officer was trained to make stops on the basis of cracked windshields, state case law, legislative history, or any other state custom or practice that would support finding a reasonable basis for the stop. Accordingly, Washington's conviction and sentence were vacated.

The next statute relied upon by Ramsey is § 60-6,255, which provides:

> (1) Every motor vehicle registered pursuant to the Motor Vehicle Registration Act, except motorcycles, shall be equipped with a front windshield.
>
> (2) It shall be unlawful for any person to drive any vehicle upon a highway with any sign, poster, or other nontransparent material upon the front windshield, side wing vents, or side or rear windows of such motor vehicle other than a certificate or other paper required to be so displayed by law. The front windshield, side wing vents, and side or rear windows may have a visor or other shade device which is easily moved aside or removable,

> is normally used by a motor vehicle operator during daylight hours, and does not impair the driver's field of vision.
>
> (3) Every windshield on a motor vehicle, other than a motorcycle, shall be equipped with a device for cleaning rain, snow, or other moisture from the windshield, which device shall be so constructed as to be controlled or operated by the driver of the vehicle.

The officer also indicated, in response to questions from the county attorney, that he was familiar with the statute regarding safety glass, § 60-6,263, which provides:

> It shall be unlawful to operate on any highway in this state any motor vehicle, other than a motorcycle, manufactured or assembled, whether from a kit or otherwise, after January 1, 1935, which is designed or used for the purpose of carrying passengers unless such vehicle is equipped in all doors, windows, and windshields with safety glass. Any windshield attached to a motorcycle shall be manufactured of products which will successfully withstand discoloration due to exposure to sunlight or abnormal temperatures over an extended period of time.
>
> The owner or operator of any motor vehicle operated in violation of this section shall be guilty of a Class III misdemeanor.

Safety glass is defined as

> any product composed of glass or such other or similar products as will successfully withstand discoloration due to exposure to sunlight or abnormal temperatures over an extended period of time and is so manufactured, fabricated, or treated as substantially to prevent or reduce in comparison with ordinary sheet glass or plate glass, when struck or broken, the likelihood of injury to persons.

Neb. Rev. Stat. § 60-6,262 (Reissue 2010).

The district court, in its order denying Moser's postconviction action, discussed and distinguished *United States v. Washington*, 455 F.3d 824 (8th Cir. 2006). The district court noted that the sole basis for the stop of Washington's vehicle was a cracked windshield, whereas in this case, Moser's

windshield was "substantially shattered" with "spider" cracks extending from it in all directions. The court found Ramsey had additional reasons for stopping Moser's vehicle, including Ramsey's belief that the vehicle may have been involved in a collision and that the shattered windshield presented a safety concern because it would obstruct the driver's view.

It is clear from the record that Ramsey initially stopped Moser's vehicle due to the shattered windshield, which Ramsey believed would obstruct Moser's visibility. However, this stated reason is not necessarily indicative of a traffic violation. As similarly noted by the Eighth Circuit Court of Appeals in *United States v. Washington, supra*, the statute which Ramsey believed was violated by Moser, § 60-6,256, does not apply to a cracked windshield. See, also, *In re Interest of Frederick C.*, 8 Neb. App. 343, 594 N.W.2d 294 (1999) (Nebraska statutes do not specifically prohibit driving vehicle with shattered windshield).

Although Ramsey and the district court also rely upon § 60-6,255 as support for an alleged traffic violation, this reliance is arguably misplaced. This statute makes it unlawful to have any material, such as a sign or poster, on the windshield and is arguably not referring to the windshield itself. Thus, an argument could be made that the traffic stop was not justified solely on the basis that Moser's windshield was shattered and caused an obstruction to Moser's visibility.

Finally, it is not clear that the safety glass statute, § 60-6,263, supports the stop as a traffic violation in this case, keeping in mind that Ramsey did not assert the safety glass concern as the initial basis for his stop of Moser's vehicle.

[11] We next address Ramsey's concern that Moser's vehicle had recently been in an accident. Again, this stated reason does not necessarily indicate that a traffic violation had occurred. Clearly, Ramsey did not witness an accident involving Moser's vehicle prior to the stop. And, Ramsey admitted that he had not received any reports of accidents in the vicinity at the time of Moser's stop. Rather, the facts known to Ramsey were that Moser's windshield was shattered in the upper corner of the passenger side. Ramsey was arguably speculating that the vehicle may have been involved in an accident, at some unknown

time, due to the location and size of the shattered area of the windshield. 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. *State v. Carnicle*, 18 Neb. App. 761, 792 N.W.2d 893 (2010) (reversed conviction with directions to sustain motion to suppress where no probable cause to stop vehicle existed because no traffic law was violated). We conclude both that there was a reasonable argument that no traffic violation supported the stop of Moser's vehicle and that there was a reasonable likelihood that the evidence obtained through subsequent searches could have been suppressed had Moser's counsel pursued suppression.

We next address the viability of the community caretaking exception to the Fourth Amendment in this case. The district court found that the exception applied as it related to Ramsey's reasonable belief that Moser's vehicle had recently been involved in a collision.

The Nebraska Supreme Court adopted the community caretaking exception to the Fourth Amendment in *State v. Bakewell*, 273 Neb. 372, 730 N.W.2d 335 (2007). The exception recognizes that

> "[l]ocal police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."

Id. at 376, 730 N.W.2d at 338, quoting *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973).

In *State v. Bakewell, supra*, the officer observed Saul L. Bakewell's vehicle traveling on a highway at 3:15 a.m. The vehicle stopped or slowed considerably five times within approximately 90 seconds while traveling down the highway, with the vehicle eventually pulling off onto the shoulder of the road. The officer pulled off the highway "'to conduct a safety check of the vehicle, make sure that everything was okay and there was [sic] no problems.'" *Id.* at 374, 730

N.W.2d at 337. The first question posed by the officer was whether Bakewell was all right, to which Bakewell responded that he was lost.

The court in *State v. Bakewell, supra*, determined that the officer's actions fell within the community caretaking exception. In reaching this conclusion, the court adopted the standard applied by this court in *State v. Smith*, 4 Neb. App. 219, 540 N.W.2d 374 (1995), wherein we applied the community caretaking exception in a case where an officer observed a pickup in an intersection, which pickup had not moved for several minutes. The officer pulled up behind the pickup, observed that the brake lights were on and that there was no activity in the pickup. We found that the officer was justified in believing that an exigent circumstance might exist and had good reason to make contact with the driver and to provide him aid, if necessary.

[12,13] In determining whether the community caretaking exception to the Fourth Amendment applies, a court should assess the totality of the circumstances surrounding the stop, including all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction. *State v. Bakewell, supra*. The court found that it was reasonable for the officer to conclude that Bakewell was lost or that something was wrong with Bakewell, with his vehicle, or inside the vehicle. Further, because it was approximately 3:15 a.m., it was reasonable for the officer to assume that his assistance might be welcomed. The court noted that this exception should be "narrowly and carefully" applied in order to prevent its abuse. *Id*. at 377, 730 N.W.2d at 338.

The record before us in this postconviction proceeding does not show that Moser's vehicle was traveling in an erratic manner, such as the vehicle in *State v. Bakewell, supra*, or was stopped in traffic, such as the vehicle in *State v. Smith, supra*. There was no evidence that the vehicle had recently been involved in an accident such that it was necessary to check on the status of the vehicle or its occupants. In short, there was no sense of urgency to check on the welfare of the driver in this case, as was present in *Bakewell* or *Smith*. Based

upon this record, it is possible that the community caretaking exception would not have provided a viable justification for the stop of Moser's vehicle had counsel pursued a motion to suppress.

[14] In a claim for ineffective assistance of counsel in a plea setting, factors to be considered include the likely penalties the defendant would face if convicted at trial, the relative benefit of the plea bargain, and the strength of the State's case. Self-serving declarations that the defendant would have gone to trial will not be enough; the defendant must present objective evidence showing a reasonable probability that he or she would have insisted on going to trial. See *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011). The State argues that regardless of any failure by counsel to file a motion to suppress or advise Moser of this procedure, Moser has not shown any prejudice because of his desire to accept the plea offer before it was withdrawn and because he received the benefit of the dismissal of the charge of possession of a firearm during the manufacture of a controlled substance, a Class IB felony. The weakness of this argument by the State, however, is that Moser arguably was interested in the plea only after being advised that he did not have a defense to the stop of his vehicle.

Based upon our independent review of this record, we conclude that Moser has established a reasonable probability that he would not have entered a plea but would have insisted on pursuing suppression of evidence had he been adequately advised of the possible defense that probable cause was lacking for the traffic stop. In reaching this conclusion, we do not make any determination whether a motion to suppress would ultimately be successful, only that an argument could be made for suppression, and we leave such a determination to the trial court on remand. Because Moser has established prejudice from his trial counsel's failure to file a motion to suppress and failure to advise him of this procedure, we must reverse the decision of the district court and remand the cause with directions to set aside Moser's conviction, to allow Moser to withdraw his plea, and for further proceedings.

CONCLUSION

Moser has established the existence of a reasonable probability that had he been adequately advised about the possibility of pursuing suppression of the evidence following the traffic stop of his vehicle, he would not have pled guilty, but would have insisted on filing a motion to suppress and going to trial. Having established prejudice from the ineffective assistance of trial counsel, we reverse the decision of the district court and remand the cause with directions to set aside Moser's conviction, to allow him to withdraw his plea, and for further proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. RODNEY E. SEEGER, APPELLANT.

822 N.W.2d 436

Filed October 23, 2012. No. A-11-804.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. Determinations regarding whether counsel was deficient and whether this deficiency prejudiced the defendant are questions of law that an appellate court reviews independently of the lower court's decision. An appellate court reviews factual findings for clear error.
3. **Postconviction: Constitutional Law: Proof.** A court must grant an evidentiary hearing on a postconviction motion when the motion contains factual allegations which, if proven, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.
4. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law—or if the records and files in the case affirmatively show that the movant is entitled to no relief—no evidentiary hearing is required.
5. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient and 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.

6. **Postconviction: Pleas: Effectiveness of Counsel.** In a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
7. **Effectiveness of Counsel: Pleas: Proof.** Within the plea context, in order to satisfy the prejudice requirement to establish an ineffective assistance of counsel claim, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial.
8. ____: ____: ____. Self-serving declarations that a defendant would have gone to trial will not be enough; a defendant must present objective evidence showing a reasonable probability that he or she would have insisted on going to trial.
9. **Effectiveness of Counsel: Pleas.** In a claim of ineffective assistance of counsel regarding the entry of a guilty plea, the likelihood of the defense's success should be considered with other factors such as the likely penalties the defendant would face if convicted at trial, the relative benefit of the plea bargain, and the strength of the State's case.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Affirmed.

Gregory A. Pivovar for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

MOORE, Judge.

INTRODUCTION

Following his plea-based convictions in the district court for Sarpy County for two counts of incest, Rodney E. Seeger filed a pro se postconviction motion. The court granted an evidentiary hearing on the allegation that Seeger received ineffective assistance of trial counsel due to counsel's alleged failure to file a direct appeal after being requested to do so. The court denied Seeger's other postconviction claims without an evidentiary hearing. Because we find no error in the denial of the remaining postconviction claims without an evidentiary hearing, we affirm.

BACKGROUND

The State filed an information in the district court, charging Seeger with two counts of first degree sexual assault in

violation of Neb. Rev. Stat. § 28-319(1)(a) and (b) (Reissue 2008), both Class II felonies; two counts of incest in violation of Neb. Rev. Stat. § 28-703 (Reissue 2008), both Class III felonies; and two counts of child abuse in violation of Neb. Rev. Stat. § 28-707(4) (Reissue 2008), both Class IIIA felonies.

A plea hearing was held on April 19, 2010. Seeger agreed to enter guilty pleas to the two counts of incest. In exchange, the State agreed to dismiss the counts of first degree sexual assault and child abuse. The State also agreed to remain silent at sentencing and not seek a determination that these were aggravated offenses for purposes of the sex offender statutes. Seeger acknowledged the terms of the plea agreement. After the district court advised Seeger of his rights and explained the consequences of pleading guilty, Seeger entered his pleas.

The State provided a factual basis, which shows that the charges arose out of sexual contact by Seeger upon his daughters. When asked by the district court to comment upon the factual basis, Seeger's attorney replied, "Judge, my client did make a statement to police he did have contact in a sexual manner with these two girls, but he denies it was to the extent as described by the State. So this is a best interest plea." The court then recited what it believed a best interest plea to entail, and Seeger stated his agreement with and understanding of the court's recitation.

Seeger stated that he was entering his pleas freely and voluntarily and that no one threatened him or promised him anything other than the terms of the plea agreement to get him to enter his pleas. The district court then found that there was a factual basis to support Seeger's pleas and that the pleas were entered voluntarily, knowingly, and intelligently. After accepting Seeger's pleas, the court found him guilty of two counts of incest, dismissed the other counts of the information per the parties' plea agreement, and ordered a presentence investigation.

The district court entered an order on June 21, 2010, sentencing Seeger to consecutive terms of imprisonment for 15 to 20 years. No direct appeal was filed.

On July 5, 2011, Seeger filed a pro se motion for postconviction relief, alleging numerous claims of ineffective assistance of trial counsel, mostly concerning counsel's alleged failure to investigate the case in various ways and alleged failure to request independent testing of certain items of evidence. Seeger also alleged that his trial counsel failed to file a direct appeal after being requested to do so by Seeger.

On August 29, 2011, the district court entered an order ruling on Seeger's motion. The court granted an evidentiary hearing on the issue of whether Seeger's trial counsel failed to file a direct appeal after being requested to do so. As to Seeger's other claims, the court found that Seeger had not specifically set forth the additional evidence that might have been gathered through additional investigation or how that undetermined evidence would render a different result. Because Seeger had failed to allege more than just conclusions of fact or law, the court denied an evidentiary hearing on the balance of Seeger's claims and denied the balance of Seeger's claims for relief. Seeger subsequently perfected his appeal to this court.

ASSIGNMENTS OF ERROR

Seeger asserts, restated, that the district court erred in (1) ruling that he should not be granted an evidentiary hearing on his postconviction claims of ineffective assistance of counsel other than the failure to file a direct appeal and (2) failing to defer ruling on the remaining issues of ineffective assistance of counsel until after the evidentiary hearing and determination of whether Seeger is entitled to a new direct appeal.

STANDARD OF REVIEW

[1,2] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011). A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012). Determinations regarding whether counsel was deficient and whether this deficiency prejudiced the defendant are questions of law that an appellate court

reviews independently of the lower court's decision. *State v. Lee, supra*. An appellate court reviews factual findings for clear error. *Id*.

ANALYSIS

Seeger asserts that the district court erred in denying him an evidentiary hearing on the balance of his postconviction claims. Seeger also asserts that the court erred in deciding the balance of his postconviction claims rather than waiting for the outcome of the evidentiary hearing on the failure to file a direct appeal. Seeger argues that if he is granted a new direct appeal, it would then be appropriate to bring the ineffective assistance of trial counsel claims at that time. Seeger further argues that the district court should have simply taken the balance of the postconviction claims under advisement until after the matter of the direct appeal is decided. We will address Seeger's second argument first.

The Nebraska Supreme Court has addressed a somewhat similar issue but in a different factual situation. In *State v. Shelly*, 279 Neb. 728, 782 N.W.2d 12 (2010), Tyrus Shelly filed a postconviction motion alleging trial counsel's failure to file a direct appeal from his conviction for second degree murder, attempted second degree murder, and use of a firearm to commit a felony. The district court denied an evidentiary hearing, and on appeal, the Supreme Court vacated the order and remanded the cause to the district court with directions to conduct an evidentiary hearing on the issue of whether trial counsel failed to perfect a direct appeal. After the mandate was issued, Shelly filed another postconviction motion, alleging several claims for relief, including the denial of effective assistance of trial counsel. The district court "'overruled'" the motion, 279 Neb. at 731, 782 N.W.2d at 14, finding that because of the previous mandate, the court did not have authority to consider the additional issues in the new motion. The court also found that the new motion was procedurally barred as a successive motion.

On appeal from this decision, the Supreme Court agreed with the district court to the extent that it could not consider Shelly's second postconviction motion as part of the remand regarding the first postconviction motion as it was beyond

the terms of the mandate. However, the Supreme Court found error with the district court's overruling of the second motion and the finding that it was procedurally barred. The Supreme Court concluded that such a decision was a ruling on the merits and was outside the scope of the mandate. The Supreme Court also stated that it was premature for Shelly to file the second motion, noting that the evidentiary hearing on the first motion had not yet been held, and that "it is conceivable that following the evidentiary hearing in the first postconviction motion, the district court could grant relief in the form of a new direct appeal and that such appeal could encompass the claims Shelly set forth in the second postconviction motion." 279 Neb. at 733, 782 N.W.2d at 15.

The significant difference between *State v. Shelly, supra*, and the case at hand is that Seeger combined all of his claims of ineffective assistance of counsel in this postconviction action. Seeger has not provided any authority for the proposition that the district court was required to postpone ruling on the balance of his postconviction claims until after the evidentiary hearing on his entitlement to a new direct appeal is held. Our independent research has also not revealed any such authority. We conclude that the district court did not err in deciding the merits of the balance of the postconviction claims presented in Seeger's motion.

Although we find no error in the district court's determination of all of the postconviction claims, we note that judicial economy may have been served by deferring ruling on the balance of the postconviction claims. Under the procedure utilized by the district court in this case, Seeger was required to appeal from the denial of an evidentiary hearing on his remaining claims, as opposed to waiting until the outcome of the evidentiary hearing on whether he should be granted a new direct appeal. See *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011) (grant of evidentiary hearing on some issues and denial of hearing on others is final order as to claims denied without hearing). A better procedure would be to defer ruling on the balance of the postconviction claims until after the evidentiary hearing on the entitlement to a new direct appeal has been held. If a new direct appeal is granted, the remaining

postconviction claims could be dismissed as premature and thereafter raised in the direct appeal. If a new direct appeal is not granted, then the court could issue a final order addressing all of the claims and the appellant would be required to file only one appeal.

[3,4] We now turn to the question of whether the district court erred in denying Seeger an evidentiary hearing on the balance of his claims of ineffective assistance of counsel. A court must grant an evidentiary hearing on a postconviction motion when the motion contains factual allegations which, if proven, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. *State v. Seberger*, 284 Neb. 40, 815 N.W.2d 910 (2012). If a postconviction motion alleges only conclusions of fact or law—or if the records and files in the case affirmatively show that the movant is entitled to no relief—no evidentiary hearing is required. *Id.*

[5] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case. *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012). The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *Id.*

[6,7] In a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *State v. Dunkin, supra*. Within the plea context, in order to satisfy the prejudice requirement to establish an ineffective assistance of counsel claim, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial. *Id.*

[8] In his postconviction motion, Seeger alleged his trial counsel was ineffective for failing to investigate the facts of the case, consult with Seeger on strategy decisions for critical

aspects of the case, interview the victims, use an investigator, request independent forensic testing of physical evidence, find evidence to rebut the State's forensic evidence, request independent testing of the sexual assault kits, request independent DNA testing, raise the issue of whether the victims were competent to testify, obtain sexual assault examination reports, and obtain reports of the examination of a laptop computer and some memory cards. But, Seeger's postconviction motion did not allege any facts showing what additional evidence would have been gathered, how a different result would have been obtained, or why there was a reasonable probability that Seeger would have insisted on going to trial rather than accept a plea agreement that dismissed four felonies. Self-serving declarations that a defendant would have gone to trial will not be enough; a defendant must present objective evidence showing a reasonable probability that he or she would have insisted on going to trial. *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011). The district court did not err in failing to grant an evidentiary hearing on these issues.

In addition to the investigative failures Seeger alleged in his postconviction motion, he also alleged that his trial counsel was ineffective for not investigating his mental status or requesting a fitness hearing prior to Seeger's entry of his guilty pleas. Seeger did not allege that he was mentally unfit or incompetent to enter his guilty pleas or enter into the plea agreement. Additionally, the record from the plea hearing reflects Seeger's acknowledgment that he had had adequate time to discuss the case completely with his attorney, had discussed the facts of the case and any possible defenses with his attorney, was satisfied with the services of his attorney, was not under the influence of any type of drug or alcoholic beverage, and understood the district court's numerous advisories and inquiries. Seeger's statements were all responsive to and appropriate to the district court's advisories and inquiries.

Seeger's coherent answers during the plea hearing and his affirmative denial of being under the influence of any drugs affirmatively refute his claim of mental unfitness. As previously stated, if a postconviction motion alleges only conclusions of fact or law—or if the records and files in the case

affirmatively show that the movant is entitled to no relief—no evidentiary hearing is required. *State v. Seberger*, 284 Neb. 40, 815 N.W.2d 910 (2012).

> If the dialogue which is required between the court and the defendant whereat, as here, the court receives an affirmative answer as to whether the defendant understands the specified and full panoply of constitutional rights . . . is to be impugned by a mere recantation made after the doors of the prison clang shut, we are wasting our time and that of the trial judges, making a mockery out of the arraignment process.

State v. Scholl, 227 Neb. 572, 580, 419 N.W.2d 137, 142 (1988).

[9] In a claim of ineffective assistance of counsel regarding the entry of a guilty plea, the likelihood of the defense's success should be considered with other factors such as the likely penalties the defendant would face if convicted at trial, the relative benefit of the plea bargain, and the strength of the State's case. *State v. Yos-Chiguil, supra*. Seeger's postconviction claims are in the context of a plea agreement by which he procured the dismissal of two Class II felonies and two Class IIIA felonies, which carried the risk of aggregate penalties of an additional 110 years in prison. The record affirmatively shows that Seeger admitted to police, upon waiving his *Miranda* rights, that he had sexual contact with his daughters. Seeger's postconviction claims do not include any claim of ineffective assistance for failure to file a suppression motion. Seeger has not alleged sufficient facts to show any reasonable probability that he would have insisted on going to trial when he was exposed to significant additional penalties from the other crimes with which he was charged and avoided by taking the plea agreement.

The district court did not err by denying Seeger an evidentiary hearing on the balance of his ineffective assistance of counsel claims.

CONCLUSION

The district court did not err in denying Seeger an evidentiary hearing on his claims of ineffective assistance of counsel,

other than the alleged failure to file a direct appeal. We also find no error in the district court's dismissal of these remaining claims of ineffective assistance of counsel.

AFFIRMED.

TRACEY L. CURTIS, PERSONAL REPRESENTATIVE OF THE ESTATE OF PRESTON M. CURTIS, DECEASED, APPELLANT, V. STATES FAMILY PRACTICE, LLC, ET AL., APPELLEES.

823 N.W.2d 224

Filed October 30, 2012. No. A-11-637.

1. **Motions for New Trial: Appeal and Error.** A motion for a new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
2. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives the litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.
3. **Appeal and Error.** 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.
4. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
5. **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.
6. **Actions: Negligence: Liability: Parties: Words and Phrases.** The term "defendant" in Neb. Rev. Stat. § 25-21,185.10 (Reissue 2008), which governs joint and several liability and allocation of liability involving more than one defendant, also includes a third-party defendant brought into the action.
7. **Wrongful Death: Words and Phrases.** In the context of the wrongful death statutes, "next of kin" is defined as those persons nearest in degree of blood surviving the decedent, who ordinarily are those persons who take the personal estate of the deceased under the statutes of distribution.
8. **Trial: Expert Witnesses.** *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), require the trial court to act as a gatekeeper to ensure that expert testimony is scientifically valid and can be properly applied to the facts in issue and is therefore helpful to the trier of fact.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS, Judge. Affirmed.

James E. Schneider, of Schneider Law Office, P.C., and Terrence J. Salerno for appellant.

Mark A. Christensen and Shawn D. Renner, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees.

INBODY, Chief Judge, and PIRTLE, Judge.

INBODY, Chief Judge.

INTRODUCTION

Tracey L. Curtis, mother of Preston M. Curtis and personal representative of Preston's estate, appeals the judgment of the district court for Lincoln County in favor of the appellees.

STATEMENT OF FACTS

On April 13, 2011, Tracey, as personal representative of her son Preston's personal estate, brought a wrongful death action against Dr. Douglas J. States, Jill McAdam, and States Family Practice, LLC, by and through its employees, alleging that each was negligent and had committed medical malpractice in the death of Preston, who was then only 6 years old. The complaint requests general damages, $10,165.59 in medical and hospital expenses, and $1,173.50 for funeral and burial expenses.

On Friday, April 6, 2007, Preston fell and injured his left arm while swinging his legs, which he did by placing one arm on a table and the other on a freezer. On Sunday, Preston began to complain of his arm "burning like the sun," and Tracey made an appointment first thing on Monday morning at States Family Practice with McAdam, a physician's assistant for Dr. States. X rays were taken of Preston's elbow, and Tracey was told that the x rays appeared normal. McAdam prescribed a sling for Preston and also ordered that Preston take 600 milligrams of ibuprofen three times a day.

Preston continued to complain of pain in his elbow and began to experience difficulty sleeping. On Tuesday, Tracey took Preston back to States Family Practice, where he was seen

by McAdam and Dr. States. Preston experienced pain when he bent his elbow, and the elbow had started to swell. Dr. States ordered a CAT scan for Preston, and an appointment was also made with an orthopedic doctor for Preston for Friday of that week. On Wednesday, Preston continued to complain of pain and had difficulty sleeping. Tracey continued to administer the ibuprofen as directed, and at 1 a.m. on Friday, Tracey contacted Dr. States after Preston had become "cold and clammy" to the touch and had complained of pain all over his body. Preston's father, Michael Curtis, took Preston to the emergency room at 1:30 a.m. Preston quickly deteriorated and was pronounced dead at 5:35 a.m. The cause of Preston's death was streptococcus pyogenes sepsis.

The appellees filed an amended answer admitting that Preston had died on April 13, 2007, and denying the majority of the allegations contained within the amended complaint. The amended answer also alleged a contributory negligence defense asserting that Tracey and Preston's "next-of-kin" caused or contributed to Preston's death.

Trial on the matter was held over a period of 5 days. Tracey testified that she was Preston's mother and was married to his father, Michael. Tracey testified that in addition to Preston, they also had a 4-year-old daughter. Tracey testified that generally, Preston was a healthy child and was in good condition. Tracey testified that on Monday, April 2, 2007, Preston was sent home from school with a fever, which she treated with over-the-counter medication. On April 6, Tracey was home when Preston fell. Tracey testified that she examined Preston's arm immediately after the fall and that Preston could move his arm and had no apparent bruises. Tracey testified that the arm was tender and sore but that she thought that he had hit his "funny bone."

Over the weekend, Tracey applied ice to Preston's elbow, in addition to a homeopathic cream. On Saturday, Preston continued to show no symptoms, other than indicating that the elbow was sore. However, on Sunday, Preston complained that his arm was "burning like the sun." Tracey made an appointment for first thing Monday morning, since the doctor's office was closed on Sunday. Tracey requested an appointment

with Dr. States, but was instead given an appointment with McAdam because Dr. States was busy. Tracey explained that her family members had been patients with States Family Practice and went to that clinic if they were experiencing problems. On Monday, April 9, 2007, after a brief examination by McAdam, Tracey took Preston to get an x ray of the elbow, which was very tender by that time. The x ray indicated that everything was normal, and McAdam prescribed Preston ibuprofen and a sling. McAdam instructed that if Preston was not feeling better in 5 days, Tracey should bring him back to the clinic for a followup visit.

Tracey testified that she took Preston home and administered the ibuprofen as directed by McAdam. Tracey explained that Preston began to experience difficulty sleeping due to pain in his elbow and that on Tuesday morning, his elbow was swollen, discolored, and warm to the touch. Tracey made a second appointment for Preston and took him back to States Family Practice. McAdam again examined Preston and instructed Tracey that if Preston was not feeling better in 5 days, she should bring him back to the clinic for a followup visit. Tracey testified that Preston was becoming increasingly "fidgety." Tracey explained that Preston did not want to bend his elbow because of the pain and that he tried to keep his arm straightened as much as possible. At the appointment on Tuesday, Tracey requested that Dr. States provide her a second opinion, which request was granted. Dr. States examined Preston, and a CAT scan was ordered for Preston's elbow. Thereafter, McAdam indicated to Tracey that the scan of Preston's arm appeared normal. Tracey testified that she knew something was wrong and that she indicated to McAdam her disagreement that everything was normal. McAdam prescribed Tylenol with codeine for Preston and informed Tracey that an appointment had been made for Preston with an orthopedic doctor, but that Preston could not get an appointment with that doctor until Friday morning.

Tracey testified that she gave Preston the Tylenol with codeine for his pain, but that Preston immediately threw up that medication, so she went back to administering the ibuprofen prescribed on Monday. Tracey testified that Preston

began to sleep less and less, but continued to eat normally until Wednesday. On Wednesday evening, Preston did not want to eat much and was still complaining of pain, but did not have any further physical symptoms. Tracey testified that even though she did not have a working thermometer, she thought Preston was running a low-grade fever because he was warm to the touch.

Tracey testified that after she and Michael attempted to put Preston to bed on Thursday night, Preston took a turn for the worse. Preston began to moan, was cold and clammy, and refused to walk. Tracey contacted Dr. States at around 1 a.m. on Friday, and Michael took Preston to the emergency room. Michael arrived at the emergency room first, with Preston, as Tracey needed to make arrangements for someone to care for their daughter. Upon Michael and Preston's arrival at the emergency room, doctors began to administer Preston intravenous fluids and applied a warming blanket to bring up his body temperature. Tracey testified that Dr. States did not arrive at the hospital for several hours and that she could not remember his being in the room to examine Preston, but only that he was at the nurses' station. At some point, there was discussion that Preston would be taken to Children's Hospital in Omaha by "Life Flight" or ambulance, and Tracey went home to pack some personal belongings, during which time Michael called her to tell her, "I think we lost him." Tracey described watching the emergency room personnel attempt to resuscitate Preston for approximately 45 minutes.

Tracey explained that Dr. States spoke with her and Michael privately and explained that Preston may have been suffering from necrotizing fasciitis or from a blood clot. Tracey testified that on the next day, in another conversation with Dr. States, he indicated to Tracey that there had been a pool of blood evident in the elbow on the CAT scan which had not been previously mentioned to Tracey. Tracey further testified that in yet another conversation with Dr. States, he indicated the necrotizing fasciitis was due to a flesh-eating bacteria in the arm and told her "[Preston] would have possibly, had he lived, had his

arm amputated and a kidney transplant." She testified that he said, "[Y]ou wouldn't have wanted that."

Michael testified about much of the same information as did Tracey. Michael testified that he had no knowledge of Preston's fall on Friday, April 6, 2007, but became aware on the following Sunday, when Preston told him that "his arm was burning like the sun." Michael explained that on that Sunday morning, there did not appear to be anything physically wrong with Preston's arm, but that as the day progressed, Preston's arm began to swell and he had difficulty sleeping. Michael testified that on Monday evening, after he returned home from work, Preston's arm was more swollen and that Preston had even more difficulty sleeping on Monday night. Preston was restless and was experiencing more pain in his arm. Michael testified that on Tuesday, Preston's arm was discolored and Preston refused to bend the arm, insisting that it remain straight to avoid additional pain. Michael testified that he attended the CAT scan at the hospital with Preston and Tracey and that on Tuesday night, Preston could no longer play video games due to the pain it caused him in the arm. Again, Preston had difficulty sleeping.

On Wednesday, Michael testified, he was off from work and stayed home with Preston all day and Preston continued to struggle with sleeping that night. Michael explained that by Thursday, it seemed as if Preston did not even have the energy to be restless, but Michael indicated that he and Tracey believed it was because of the lack of sleep which the family had accumulated over the past four nights. Michael explained why he and Tracey did not consider taking Preston to the doctor on Wednesday:

> [W]e were at the doctor's office on Monday. We had an x-ray. [Preston's] condition got worse. We went back on Tuesday. We were told again that everything was fine. [Preston] went to the hospital and got a [CAT] scan. That's normal. That's what we know at this point in time. We asked for a second opinion. Dr. States comes in and sees him. We have had [McAdam] look at him and now Dr. States look at him. We have had two x-rays, and an

> appointment for Friday in hopes that we could hold on to some new information.

Michael explained that on Wednesday and Thursday, he and Tracey found that baths were soothing to Preston and gave him numerous baths, in addition to allowing him to eat whatever food he wanted because Preston was eating very little.

In the early morning hours of Friday, Michael got out of bed to check on Preston and found him lying on the floor in the living room. Michael recalled that Preston felt "cold and clammy" and that Tracey immediately contacted Dr. States. Michael did not hear the conversation between Tracey and Dr. States, but testified that he did not really care what was said because he had already determined that they were going to take Preston to the emergency room. Preston asked Michael to carry him because Preston did not want to walk, and Michael testified that he picked Preston up immediately and took him to the hospital. Michael testified that during Preston's treatment, "red splotches" began to develop on Preston's arm and eventually spread to his chest and down his legs. Michael testified that he focused on Preston, singing songs to him and asking Preston to say his "ABCs" to keep Preston's attention away from the doctors; however, while fluids were being administered, Preston indicated that he could no longer move his legs. Michael testified that Preston's legs were stiff, with muscles contracted, and would not bend. Michael testified that the room became very chaotic and that Tracey was sent home to get some personal belongings for the trip to Children's Hospital in Omaha. Michael testified that he asked the attending emergency room doctor if Preston's leg condition was normal, to which the doctor responded, "If you're a praying man, pray." Michael testified that this was the first indication given to him by the medical staff that Preston's condition was very serious. Michael testified that thereafter, Preston's eyes became dilated and the medical staff began attempts to resuscitate Preston.

Throughout the trial, depositions of medical professionals were received into evidence and read to the jury in addition to the live testimony of several experts.

Portions of McAdam's deposition, taken on October 21, 2009, were read to the jury, in addition to her live testimony given at trial, in which McAdam testified that she had a master's degree in physician's assistant studies and was nationally certified as a physician's assistant. McAdam began working at a family practice clinic as a physician's assistant in 1995 and worked at various clinics before working for Dr. States. McAdam explained that she was taught to document each examination and to ask thorough questions of the patient. McAdam also indicated that she utilized the differential diagnosis approach in her evaluation and treatment of patients. McAdam explained that a differential diagnosis is the process by which the physician or physician's assistant considers all of the possible causes for a patient's complaint and then proceeds with treatment from there.

McAdam testified that on April 9, 2007, she first examined Preston by assessing his alertness and examining his shoulder. McAdam checked for pain, tenderness, or swelling, and then assessed the shoulder's range of motion. McAdam did the same examination for Preston's elbow and indicated that he was not able to do the range of motion test of his elbow because of pain. McAdam testified that the elbow was "boggy" or swollen, but was not hot and was not red. McAdam did not do a review of Preston's bodily systems because the examination was part of a "problem-focused" visit based upon pain resulting from an injury and, typically, she did not engage in such a comprehensive review on a "one-problem complaint" visit. McAdam testified that Preston was then sent to undergo an x ray, which revealed no fracture. McAdam instructed Preston to take ibuprofen, wear a sling, and follow up in 5 days if there was no improvement in the elbow. McAdam explained that she did not feel that the elbow was infected on this day, because of a "lack of warmth" in Preston himself or in the joint.

McAdam indicated that on Preston's second visit, on April 10, 2007, she assessed Preston and also brought Dr. States into the examination room to assess Preston because Preston's pain and the swelling of his elbow were worse. McAdam testified

that a review of Preston's bodily systems was not completed because she and Dr. States were focused on the worsening of the elbow, although McAdam did not recall the specifics of the examination because there were no notes regarding Dr. States' examination on that day in the chart. McAdam testified that there was an escalation of Preston's pain and increased swelling in his elbow. McAdam testified that Dr. States contacted an orthopedic surgeon, who recommended a CAT scan of the elbow, which scan was then ordered and performed on that same day, April 10. McAdam testified that the CAT scan revealed that there was no fracture, dislocation, or growth plate injury, but there were abnormal findings consistent with hemarthrosis, or blood in the joint. McAdam testified that because Preston still lacked a fever on this day, she and Dr. States had "kind of established that [infection] wasn't currently the problem." McAdam testified that in her opinion, there was no indication at either the April 9 or the April 10 examination that Preston's elbow should have been "tapped."

Portions of Dr. States' deposition were read to the jury, in addition to live testimony given at trial, during which Dr. States testified that he graduated from medical school in 1992 and completed a family practice residency in 1995. For the following 10 years, Dr. States worked with two other family physicians until opening his own practice in 2005. Dr. States explained that there were no formal guidelines set forth regarding staff procedures other than the constant communication which took place throughout the day. Dr. States described the policy as "an open-door policy," through which he was open to discuss any patient with the staff at any time. Dr. States indicated that he did not review McAdam's record of Preston on April 9, 2007, and was not involved in the case on that date, but that he had reviewed the radiology report of Preston's x ray.

Dr. States testified that on April 10, 2007, he assisted McAdam with Preston's examination, but did not make any entries on Preston's medical chart. Dr. States testified that in situations which involve a problem-focused visit, such as a localized injury, a review of bodily systems was not necessary for diagnosis, treatment, or documentation. Dr. States explained

that he thought that Preston had most likely sustained a soft tissue injury to the elbow because there was no fracture evident on the x rays. Dr. States examined Preston but did not maneuver the arm due to Preston's severe pain. Dr. States testified that he most likely ordered the CAT scan of Preston's elbow because of the possibility of a "nondisplaced hairline fracture" which would be invisible on an x ray. Dr. States testified that Preston's CAT scan was not normal and indicated that there was "joint effusion," but that it did not cause Dr. States to reevaluate his diagnosis. Dr. States did not consider infection at any time because he determined there was a lack of symptoms of an infection. Dr. States testified that Preston had a small collection of fluid in his elbow with no heat and no redness to indicate an infection. Dr. States further testified that regarding the April 10 visit, "[Preston] had no swelling in his arm, he had no systematic symptoms, so he had no symptoms whatsoever of septic arthritis, sepsis, fasciitis or shock." Dr. States did not recall discussing the CAT scan results with Tracey, but knew that an orthopedic appointment had been scheduled for Preston for Friday, April 13.

Dr. States testified that it was not until Tracey's telephone call to him in the early morning hours on Friday that he first considered "sepsis" as a diagnosis for Preston. Dr. States testified that the triage time for Preston was 1:25 a.m., but that he did not immediately come to the emergency room. Annotations in the attending nurse's notes indicate that Dr. States was at the hospital at 2:45 a.m. Dr. States explained that Tracey indicated to medical staff in the emergency room that Preston was ill, feverish, vomiting, having difficulty breathing, and lethargic and that his arm was markedly swollen. Dr. States testified that he contacted numerous physicians and specialists for advice on the best course of treatment for Preston, in addition to calling additional physicians in to the hospital.

Upon Preston's death, Dr. States completed a discharge summary which, among the circumstances as set forth above, indicated as follows:

> [Tracey] relates that on [April 11, 2007,] the following day after being seen in the office [on April 10, Preston] began developing worsening arm pain and some

> systematic symptoms of illness with a flu type syndrome of vomiting, diarrhea, fevers, chills, and increasing edema and erythema of the arm. She apparently did not seek medical attention with his clinical deterioration until the early morning hours of this April 13th where she called me at my home and related the history to me of his clinical condition being lethargic, febrile and his arm pain being worse and having increased edema. She was then instructed to bring him to the emergency room as I suspected a septic joint as a differential diagnosis.

Dr. States testified that at the emergency room on Friday, April 13, 2007, Preston's arm looked dramatically different than it had on Tuesday, April 10. Dr. States described that the arm "looked more like the size of a leg, markedly discolored and edematous, mottled, as we have heard and it had spread out on to his chest wall." On cross-examination, Dr. States indicated that based upon nurses' notes, the details regarding the drastic change in skin coloration and mottling may have taken place after Preston's arrival, but before Dr. States actually arrived at the emergency room. Dr. States further admitted that he was not able to recall where he got all of the information included in his discharge summary and that it came from a variety of sources.

Dr. Wayne Kirk Weston, a board-certified physician, testified that he was working in the emergency room when Preston was admitted on April 13, 2007. Dr. Weston described that when Preston was admitted, he was "extremely pale [and] somewhat lethargic" and "[h]is left arm was completely blue, cold from his fingertips up to include his shoulder; and he had petechaie down his — in his axilla under his arm and down his side. He had no blood pressure and his temperature was approximately 94." Dr. Weston testified that blue coloration is also referred to as "mottling" and that the mottling was present before the intravenous fluid and warming blanket were administered. Dr. Weston testified that he believed Preston was in severe hypovolemic shock due to a lack of fluids in his vascular system and that Tracey and Michael had indicated that Preston had some vomiting and diarrhea for 2 days prior. Dr. Weston testified that after the intravenous fluids and warming

blankets were administered, the mottling spread to Preston's entire body because Preston was so "toxic" that most of his blood vessels had become damaged and were leaking fluid and blood.

Dr. Christine Odell testified via a video deposition that she was a pediatrician at the Boston Medical Center and specialized in pediatrics, pediatric emergency medicine, and pediatric infectious disease. Dr. Odell indicated that she had reviewed Preston's medical records generated from the States Family Practice clinic and the depositions of McAdam and Dr. States. The crux of Dr. Odell's testimony was that neither Dr. States nor McAdam had met the standard of care in the care provided to Preston. Dr. Odell testified that McAdam's initial examination of Preston was insufficient and failed to address several important factors such as medications being taken, recent history, and symptoms Preston experienced. Dr. Odell explained that a differential diagnosis approach, which was commonly taught in medical school for both physicians and physician's assistants, was not utilized for Preston's examination and would have been important in formulating a medical plan. Dr. Odell testified that in circumstances where a child has a swollen, tender joint and was unable to move the joint fully, one of the considerations in a differential diagnosis would have been infection in that particular joint. Dr. Odell further explained that while the order of the x ray was appropriate, there should have been further consideration of Preston's history of a sore throat, which would have also led to taking a blood culture or fluid from the joint to evaluate whether or not there was an infection.

Dr. Odell testified that there clearly was a suggestion of possible infection or septic arthritis, even with Preston's limited history requested by McAdam at the April 9, 2007, examination. Dr. Odell testified that from her review of the records, it appeared clear to her that Preston had septic arthritis on April 8 which continued to worsen on April 9 and 10. Dr. Odell testified that septic arthritis is a medical emergency and would have required immediate treatment by an orthopedic surgeon. The joint would have been irrigated to remove the infectious material, and Preston would have immediately

been placed on antibiotics. Dr. Odell opined that the failure of both McAdam and Dr. States to make that diagnosis led to Preston's death and that had that diagnosis been made, Preston would be alive. Dr. Odell further indicated that the CAT scan taken of Preston's elbow indicated that there was a "great deal of fluid in the joint" but that the medical records contain no indication that an orthopedic surgeon was called to discuss the fluid.

On cross-examination, Dr. Odell admitted that upon her first review of a portion of the records, she believed that the parents and McAdam and Dr. States may have been equally responsible for Preston's death, but that she did not have the complete set of records and information to review. Dr. Odell testified that after reviewing the depositions, she opined that 20 percent of the responsibility was on the parents. Dr. Odell explained that she did not believe Tracey's testimony given in her deposition that there was no change in Preston's arm from the second visit with Dr. States, on Tuesday, April 10, 2007, until Preston was taken to the emergency room the following Friday.

Dr. Frank Brodkey, a general internist from Janesville, Wisconsin, testified that he reviewed all of the office and medical records in this case, in addition to the depositions of other expert testimony given, including the depositions of McAdam and Dr. States. Dr. Brodkey testified that to a reasonable degree of medical certainty, McAdam had breached the standard of care in Preston's diagnosis on April 9 and 10, 2007. Dr. Brodkey explained that Preston's elbow would have been infected by the time of the medical examination on April 9, and still been infected at the examination on April 10. Dr. Brodkey testified that both McAdam and Dr. States breached the standard of care by not pursuing an appropriate differential diagnosis and by not prescribing appropriate therapy for Preston. Dr. Brodkey testified that the lack of any fever in a patient should not rule out infection in a differential diagnosis and that all of Preston's other symptoms clearly warranted a diagnosis of infection along with the trauma diagnosis made by McAdam and Dr. States. Dr. Brodkey testified that "not all

patients with septic arthritis have fever and not all patients with low grade fevers have septic arthritis." Dr. Brodkey explained that the same reasoning applied to a lack of redness in the joint inasmuch as redness is not a common symptom, whereas pain and restriction of range of motion are universal symptoms, of septic arthritis.

Dr. Brodkey testified that the orders for an x ray and a CAT scan were appropriate, but that the next step for an inflamed joint that is swollen and has an effusion, and where the patient is getting worse and in pain, is to tap the fluid out of the joint to release the pressure and diagnose what is going on by analyzing the fluid from the joint. Dr. Brodkey testified that one of the tests of the fluid which can be immediately completed is a "gram stain" which indicates if there are bacteria in the fluid. Dr. Brodkey testified that even though Dr. States was, according to his testimony, uncomfortable with tapping an elbow joint, he should have referred Preston to a physician who was able to perform the procedure, and that such procedure should have been done on either April 9 or 10, 2007. Dr. Brodkey testified that to a reasonable degree of medical certainty, had the procedure been done with Preston on either of those 2 days, Preston would have survived. Dr. Brodkey opined that Tracey acted reasonably in taking Preston to the clinic on both April 9 and 10 and that she should not be blamed for not bringing Preston in thereafter. Dr. Brodkey explained, "[Tracey] has already had Preston to see her physician assistant and physician who she trusts. She has already been seen not once, but twice that same week including just the day before, so I don't see what would motivate her to take him back the very next day."

On cross-examination, Dr. Brodkey testified that from his review of the records, Preston's arm was remarkably more swollen upon admission to the hospital than at the appointment on April 10, 2007. Dr. Brodkey agreed that streptococcus toxic shock syndrome was a rapidly moving and developing illness and could cause a child's death in less than 2 days.

Dr. Thomas Scott Stalder, an infectious disease physician in Lincoln, Nebraska, testified that he previously practiced

internal medicine for over 10 years and then elected to specialize in infectious disease by completing a 2-year fellowship at Creighton University in Omaha, Nebraska. Dr. Stalder explained that his current practice focused on treating patients with infections. Dr. Stalder testified that his practice has a very active orthopedic program and so it was not unusual for there to be patients with septic joints, although he has limited his practice to patients over the age of 14. Dr. Stalder testified that the treatment for a septic joint is typically a 4-week course of antibiotics which would begin in the hospital and be followed by outpatient care. Dr. Stalder explained that septic joints in children are rare.

Dr. Stalder testified that he reviewed States Family Practice office records, hospital records, and all of the depositions in this case, and he opined that the infection in Preston's elbow occurred subsequently to his office visit on April 10, 2007. Dr. Stalder testified that at the office visits on April 9 and 10, there was an absence of most of the signs and symptoms which one would expect to see when an infection is present, such as pain, warmth in the joint, and redness. Dr. Stalder explained that as the symptoms begin to develop, a loss of appetite would also be common.

Dr. Stalder suspected that Preston had not previously suffered from "strep throat" and that it was very uncommon that a person would develop an infected joint from strep throat, even if there were blood in the joint, as there was in Preston's case. Dr. Stalder opined that McAdam and Dr. States met the standard of care and that a full review of bodily systems was not necessary on either of the two office visits Preston had. Dr. Stalder testified that there was not sufficient evidence to create a level of suspicion necessary to tap Preston's joint and that "Preston would still [have been] salvageable" 12 to 24 hours before he presented in the emergency room.

Dr. Donald Frey, a family physician and administrator with Creighton University, testified that he also has had a number of professor and assistant or associate professor positions in which he both taught in a classroom and worked in a clinic. Dr. Frey testified that within some of those courses, he taught about "problem-focused" visits like that which McAdam

testified about. Dr. Frey testified that a full patient examination could take up to 3 hours and so his courses focused on teaching physicians how to combine their skills and focus on the visit that is occurring by addressing the particular problem presented by the patient.

Dr. Frey testified that he had reviewed the office records from States Family Practice, the hospital and autopsy records, and the depositions taken prior to trial. Dr. Frey testified that both McAdam and Dr. States provided the appropriate standard of care in this case. Dr. Frey testified that a full review of bodily systems was not necessary in this case because McAdam would have been asking too many questions, most of which would not have been relevant to the issue, and that the short time which Dr. Odell testified was necessary for a bodily systems review was insufficient. Dr. Frey explained that the problem-focused approach taken in this case was appropriate and that the history taken was also appropriate. Dr. Frey expanded that a full physical examination was not "a productive way of determining what was going on with a patient." Dr. Frey testified that Preston should not have been referred to an orthopedic surgeon to have the elbow tapped because there was no indication at the examinations that there was an infection. Dr. Frey testified that in determining whether to tap an elbow, a physician would look for redness in the elbow, a warm feeling, fever, indications in the overall disposition of the patient, and consistent pain. Dr. Frey disagreed with Dr. Brodkey's testimony that patients can experience septic joints without redness, warmth, or fever and stated that in his 30 years of practice, he had never seen a septic joint that did not have at least one of those symptoms. Dr. Frey testified that in his opinion, the infection was not present in Preston's elbow on either April 9 or 10, 2007, but by April 12, Preston would have been worse and the family should have sought out medical attention. Dr. Frey admitted that he was not an infection specialist but stated that in his opinion, it was highly probable that had Preston been brought in as little as 12 hours earlier, he could have been saved.

On cross-examination, Dr. Frey acknowledged that one of the teaching texts which he relies upon indicates that within a focused examination, it is still important to recognize that a

focused diagnosis does not mean that the physician should skip the differential diagnosis.

After the presentation of the parties' respective cases, Tracey made a motion for a directed verdict, which was overruled. The matter was submitted to the jury, which found, although not unanimously, against Tracey and for the appellees—McAdam, Dr. States, and States Family Practice. The jury found that both Tracey and the appellees had met their burdens of proof and attributed the percentages of negligence as follows: Tracey, 25 percent; Michael, 25 percent; McAdam, 15 percent; and Dr. States, 35 percent. The trial court accepted the jury's verdict and entered judgment in favor of the appellees, with costs taxed to Tracey.

Thereafter, Tracey filed a motion for a new trial alleging that the trial court erred by admitting the testimony of Dr. Stalder and Dr. Frey and for an unspecified "[e]rror of law occurring at trial." A hearing was held on the motion, after which the trial court overruled the motion. Tracey has now timely appealed to this court.

ASSIGNMENTS OF ERROR

Tracey assigns that the trial court erred (1) in overruling her motion for new trial, (2) by entering judgment for the appellees pursuant to the jury verdict, (3) in sustaining the objections to deposition testimony identified in a court order of May 13, 2011, and (4) in sustaining objections made by the appellees to the testimony of Dr. Odell identified in two exhibits. However, after a careful review of Tracey's brief, we note the brief contains no argument regarding the motion for directed verdict, the sustaining of the objections to deposition testimony identified in the May 13 order, or the sustaining of the appellees' objections to the testimony of Dr. Odell in the specified exhibits. As such, we will not address these assignments of error, nor will we address the arguments set forth in the brief for which errors have not been specifically assigned. See *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011) (in order to be considered by appellate court, alleged error must be both specifically assigned and argued in brief of party asserting error).

STANDARD OF REVIEW

[1,2] A motion for a new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Murray v. UNMC Physicians*, 282 Neb. 260, 806 N.W.2d 118 (2011). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives the litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *In re Petition of Omaha Pub. Power Dist.*, 268 Neb. 43, 680 N.W.2d 128 (2004).

ANALYSIS

Jury Instructions.

Upon our review of the record, we determined that before addressing Tracey's assignment of error, it was necessary to address an issue regarding jury instructions which was not raised to either the trial court or this court on appeal. Prior to oral arguments, the parties were ordered to be prepared to address the issue to the court.

[3-5] 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); *Deterding v. Deterding*, 18 Neb. App. 922, 797 N.W.2d 33 (2011). We are mindful that failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error. See *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001). 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).

The potential error is that the trial court, in its verdict form regarding the allocation of negligence, instructed that "[i]f the negligence of [Tracey and Michael] equals 50% or more, then [the jurors] must return a verdict for the defendants on the first cause of action for wrongful death." At the jury instruction

conference, Tracey's counsel objected to "the submission of the comparative." The jury instruction form sets forth the following list which was submitted to the jury:

LIST OF PERCENTAGES:

What percent, if any, of the negligence was that of [Tracey]?

What percent, if any, of the negligence was that of [Michael]?

What percent, if any, of the negligence was that of [Dr.] States . . . ?

What percent, if any, of the negligence was that of . . . McAdam?

At oral arguments, the appellees argued that as Preston's next of kin, Michael could be found contributorily negligent, and that the jury was properly instructed as to the allocation of contributory negligence. The appellees argued that "next of kin" negligence can be imputed to Michael, without a formal introduction into the case as a third-party defendant or a claimant under contributory negligence statutes. In support of their position, the appellees cited the court to *Tucker v. Draper*, 62 Neb. 66, 86 N.W. 917 (1901); *Weber v. Southwest Nebraska Dairy Suppliers, Inc.*, 187 Neb. 606, 193 N.W.2d 274 (1971); and *Richardson & Gillispie v. State*, 200 Neb. 225, 263 N.W.2d 442 (1978), *modified* 200 Neb. 781, 265 N.W.2d 457.

In *Tucker v. Draper, supra*, the plaintiff, the father and next of kin in the case, sued as administrator of his son's estate. The son was killed by falling into a well on the defendant's premises, and the father alleged that he had been damaged "'by reason of the loss of the service and society and fellowship of the [son] in the sum of $5,000.'" *Id.* at 68, 86 N.W. at 918. A jury trial was held, and the trial court excluded evidence offered by the defendant to show contributory negligence on the part of the father. At the close of the evidence, the court submitted the matter to the jury with an instruction that "'contributory negligence on the part of either or both . . . parents under the law is no bar to this action.'" *Id.* at 75, 86 N.W. at 920. The jury returned a verdict for the father. In reversing, and remanding the matter for a new trial, the

Nebraska Supreme Court found, in part, that in an action by the father for his own benefit to recover for the pecuniary injury suffered through the death of his son, the question of contributory negligence of the father should have been submitted to the jury.

In *Weber v. Southwest Nebraska Dairy Suppliers, Inc., supra*, a wrongful death action pursuant to Neb. Rev. Stat. § 30-810 (Reissue 1964) was brought on behalf of a deceased wife after an automobile accident during which a friend of the husband and wife was driving the vehicle owned jointly by the husband and the wife. The action was brought by an administrator of the wife's estate, who was not the husband, and the husband was not a party to the case. The court noted that the husband was the only person sustaining pecuniary loss in the death of his wife and determined that there was no

> distinction between a situation where the action is brought by a personal representative other than the beneficiary and one where the beneficiary himself is the plaintiff, if in both situations he is the sole and only person who can be benefited by the action and is guilty of negligence as a matter of law.

187 Neb. at 611, 193 N.W.2d at 277. The court held, "Where the evidence is clear that the only person within the class for which an action may be brought under [§] 30-810 . . . is guilty of negligence as a matter of law, it is the duty of the court to direct a verdict for the defendant."

In *Richardson & Gillispie v. State, supra*, actions for property damage and wrongful death were brought under the State Tort Claims Act after a one-vehicle accident was allegedly caused by the negligent maintenance of a state highway. A husband and wife were driving with their 18-month-old daughter, and the husband and the daughter survived, while the wife was killed in the accident. As to the negligence issue, the trial court, sitting without a jury, determined that the proximate cause of the accident was the driver of the vehicle, the husband, and it dismissed the actions. It appears that the case was brought on behalf of both the administrator of the wife's estate and the husband himself. The court found as follows:

> Even if the court's findings on remand were to determine that the negligence of [the husband] was a bar to recovery for his own damages, that finding does not necessarily affect the issue of liability in the action brought by the administratrix of [the wife's] estate, at least so far as the interest of [the daughter] is concerned. Neither [the wife] nor [the daughter is] chargeable with contributory negligence in this case. The general rule in a wrongful death case is that although the action will not be barred by the contributory negligence of one beneficiary, the amount of recovery will be reduced (if properly requested) to the extent of the contributorily negligent beneficiary's share in the recovery.

Richardson & Gillispie v. State, 200 Neb. 225, 232-33, 263 N.W.2d 442, 447 (1978), *modified* 200 Neb. 781, 265 N.W.2d 457.

The appellees also cited this court to an Oregon Court of Appeals case, *Robinson v. CSD*, 140 Or. App. 429, 914 P.2d 1123 (1996). In that case, the mother, as the personal representative of her son's estate, brought a wrongful death action against the children's services division of Oregon's department of human resources arising from her son's suicide after that agency placed her son in a facility. On appeal, the Oregon Court of Appeals determined that the jury could properly consider the alleged fault of both the mother and her husband (nonparties in the case) in causing the death, through physical and verbal abuse of the son, because they were both beneficiaries who were entitled to recover damages for the son's wrongful death. *Id*. Oregon's comparative fault statute has since been amended, but at that time, it provided as follows:

> Contributory negligence shall not bar recovery in an action by any person or the legal representative of the person to recover damages for death or injury to person or property if the fault attributable to the person seeking recovery was not greater than the combined fault of the person or persons against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the percentage of fault attributable to the person

> recovering. This section is not intended to create or abolish any defense.

Or. Rev. Stat. § 18.470 (1993).

The Oregon Court of Appeals compared the relationship between the comparative fault statute and the wrongful death statute and found that the conduct of beneficiaries should be considered when determining whether contributory negligence bars a wrongful death claim under the Oregon statute. The court held that "contributory negligence by the sole beneficiaries of a wrongful death claim is a defense to the claim if the beneficiaries are people who are designated as beneficiaries under the wrongful death statute." *Robinson v. CSD*, 140 Or. App. at 437, 914 P.2d at 1128.

[6] Under Neb. Rev. Stat. § 25-21,185.10 (Reissue 2008), it is possible, under certain circumstances, for multiple defendants to have a percentage of noneconomic damages allocated to them by the finder of fact based on each defendant's percentage of negligence, and in its application, § 25-21,185.10 operates only at the point when a finder of fact has determined the liability of the parties involved in the case and is apportioning damages between the parties. Because the statute's effect is on only the apportionment of damages between multiple defendants after liability has been established, the proper timeframe to consider in determining whether there are, in fact, multiple defendants in a case is when the case is submitted to the finder of fact. *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001). The term "defendant" in § 25-21,185.10, which governs joint and several liability and allocation of liability involving more than one defendant, also includes a third-party defendant brought into the action. See *Slaymaker v. Breyer*, 258 Neb. 942, 607 N.W.2d 506 (2000).

In this case, the amended complaint names two defendants, McAdam and Dr. States. Tracey is not a named defendant, but is a claimant, by virtue of being the personal representative of Preston's estate who brought and maintained the action. See Neb. Rev. Stat. § 25-21,185.07 (Reissue 2008). Neb. Rev. Stat. § 25-21,185.09 (Reissue 2008) provides in part:

> Any contributory negligence chargeable to the claimant shall diminish proportionately the amount awarded

> as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery.

In their amended complaint, the appellees allege the defense of contributory negligence against Tracey and Preston's "next of kin," but the record contains no evidence that Michael was ever formally brought into the action either as a claimant within the meaning of Neb. Rev. Stat. § 25-21,185.12 (Reissue 2008) or as a third-party defendant pursuant to Neb. Rev. Stat. § 25-331 (Reissue 2008).

[7] However, under Nebraska's wrongful death statutes, a wrongful death claim is brought in the name of the decedent's personal representative "for the exclusive benefit" of the decedent's next of kin. § 30-810 (Reissue 2008). Section 30-810 goes on to provide that the "avails [of any verdict or judgment of damages] shall be paid to and distributed among the widow or widower and next of kin in the proportion that the pecuniary loss suffered by each bears to the total pecuniary loss suffered by all such persons." In the context of the wrongful death statutes, "next of kin" is defined as those persons nearest in degree of blood surviving the decedent, who ordinarily are "'those persons who take the personal estate of the deceased under the statutes of distribution.'" *Reiser v. Coburn*, 255 Neb. 655, 659, 587 N.W.2d 336, 339 (1998), quoting *Mabe v. Gross*, 167 Neb. 593, 94 N.W.2d 12 (1959). Thus, under the wrongful death statutes, Tracey and Michael would be Preston's next of kin and would be awarded the avails of any judgment of damages as beneficiaries of Preston's estate.

Therefore, we find that as next of kin and a beneficiary of Preston's estate, Michael was properly included in the court's instruction to the jury regarding the allocation of the percentages of contributory negligence.

Motion for New Trial.

Tracey argues that the trial court erred by overruling her motion for new trial. In her motion, Tracey argued that the

trial court erred by allowing the expert testimony of Dr. Stalder and Dr. Frey and alleged unspecified "[e]rror of law occurring at trial."

During the lengthy trial in this case, and on the morning that Dr. Stalder was set to testify, Tracey filed a motion in limine regarding the testimony of Dr. Stalder. That motion has not been included in the record before this court, but during arguments before the trial court, Tracey indicated that there "is no competent methodology and no reliability established [and Dr. Stalder's testimony] should be excluded under" Neb. Rev. Stat. § 27-702 (Reissue 2008) and 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) (*Daubert/Schafersman*). At the conclusion of Dr. Stalder's testimony, Tracey renewed the motion to exclude Dr. Stalder's testimony in addition to making an oral motion to strike the testimony, both of which were overruled by the trial court, which found, "Dr. Stalder did have board certification in infectious disease as well as internal medicine, so I will find that he did have a sufficient basis for the opinions."

Similarly, just prior to Dr. Frey's testimony, Tracey also asked the court to limit his testimony due to the fact that he was not an infectious disease specialist and did not have the "basis, methodology and reliability" pursuant to § 27-702. The trial court overruled Tracey's motion, finding that Dr. Frey was sufficiently qualified as an expert.

Section 27-702 allows the admission of expert testimony "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue[;] a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

We disagree with Tracey's argument and find that both Dr. Stalder and Dr. Frey were properly qualified as experts in this case. Dr. Stalder completed his undergraduate degree at the University of Nebraska-Lincoln; medical school at the University of Nebraska Medical Center in Omaha; his residency in internal medicine at the Maine Medical Center in

Portland, Maine; and a fellowship in infectious diseases at Creighton University. Dr. Stalder was board certified in internal medicine and infectious diseases and was licensed to practice in Nebraska. Dr. Stalder was active in clinical practice in the areas of internal medicine, "HIV/AIDS," and infectious diseases. Dr. Stalder was an adjunct instructor of internal medicine at the University of Nebraska Medical Center and had also been involved in teaching at various other programs. Dr. Stalder also held many administrative positions at various medical centers and was an active member of various medical committees. Dr. Stalder testified that his current practice was a hospital-based practice wherein another physician would suspect or have documentation of an infection and would contact Dr. Stalder for review, interview, examination, diagnosis, and development of a treatment plan for the patient. Dr. Stalder indicated that his current practice was limited to adolescent and adult patients, but that during his previous practice experience, he treated children and young adolescents as well. Dr. Stalder's opinion in this case was based upon his review of the office records from Dr. States' office, hospital records, autopsy reports, and depositions from Tracey, Michael, McAdam, Dr. Weston, Dr. Odell, and Dr. Brodkey, as well as Dr. Michael McGuire, a board-certified orthopedic surgeon practicing in Columbus, Nebraska.

Dr. Frey attended undergraduate school at William Jewell College in Liberty, Missouri, and medical school at the University of Missouri at Columbia. Dr. Frey practiced family medicine for a few years before becoming the director of the family medicine residency program at various facilities such as United Hospital Center in Clarksburg, West Virginia; Bishop Clarkson Memorial Hospital in Omaha; and Creighton University School of Medicine in Omaha. Dr. Frey has also served as medical director of a nursing facility, chief of family medicine service at Creighton University, and chairperson of the department of family medicine at Creighton University. Dr. Frey currently was the vice president for health sciences, held an endowed chair, and was a faculty associate at Creighton University. Dr. Frey had several medical staff memberships, was active in numerous medical professional

organizations, and had published numerous peer-reviewed articles on various subjects, including family practice, in addition to numerous non-peer-reviewed articles and book reviews. Dr. Frey was also active in the medical community with professional presentations, both internationally and in the United States.

Upon our review of the record, it is clear that both Dr. Stalder and Dr. Frey were qualified and that sufficient foundation was given to allow the expert testimony of both of these medical professionals pursuant to § 27-702.

[8] Tracey also objected to the testimony of Dr. Stalder pursuant to the requirements of *Daubert/Schafersman*. *Daubert/Schafersman* requires the trial court to act as a gatekeeper to ensure that expert testimony is scientifically valid and can be properly applied to the facts in issue and is therefore helpful to the trier of fact.

In the case of *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010), the Nebraska Supreme Court found that to sufficiently call specialized knowledge into question under *Daubert/Schafersman* is to object with enough specificity so that the court understands what is being challenged and can accordingly determine the necessity and extent of any pretrial proceeding. Assuming that the opponent has been given timely notice of the proposed testimony, the opponent's challenge to the admissibility of evidence under *Daubert/Schafersman* should take the form of a concise pretrial motion. *State v. Casillas, supra*. It should identify, in terms of the *Daubert/Schafersman* factors, what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case. *State v. Casillas, supra*. In order to preserve judicial economy and resources, the motion should include or incorporate all other bases for challenging the admissibility, including any challenge to the qualifications of the expert. *Id*.

In this case, Tracey's last-minute motion, just prior to Dr. Stalder's testimony, did not meet these criteria. There is nothing in the record to suggest that notice was not given that Dr. Stalder would be testifying, and in fact, well before trial had been contemplated, both parties had the opportunity to and

did in fact depose each of the expert witnesses testifying in this case, including Dr. Stalder. The actual motion in limine is not in the record for our review, and the oral motion merely indicates that Dr. Stalder's testimony should be excluded under *Daubert/Schafersman*. See *In re Interest of Britny S.*, 11 Neb. App. 704, 659 N.W.2d 831 (2003) (appellant bears burden of presenting adequate record on appeal). Furthermore, the motion was filed in the midst of the trial and instead should have been addressed in a pretrial motion to the court.

CONCLUSION

In sum, we find that the trial court did not abuse its discretion by overruling Tracey's motion for a new trial and that Tracey's assignment of error to that effect is without merit. Therefore, we affirm.

AFFIRMED.

IRWIN, Judge, participating on briefs.

LORINA HEESCH, APPELLANT, V. SWIMTASTIC SWIM SCHOOL AND TECHNOLOGY INSURANCE COMPANY, ITS WORKERS' COMPENSATION INSURANCE CARRIER, APPELLEES.

823 N.W.2d 211

Filed October 30, 2012. No. A-12-140.

1. **Workers' Compensation: Appeal and Error.** With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong.
3. **Jurisdiction: Words and Phrases.** Ancillary jurisdiction is the power of a court to adjudicate and determine matters incidental to the exercise of its primary jurisdiction of an action.
4. **Workers' Compensation: Courts: Statutes.** A statutorily created court, such as the Workers' Compensation Court, has only such authority as has been conferred upon it by statute, and its power cannot extend beyond that expressed in the statute.

5. **Workers' Compensation: Jurisdiction: Attorney Fees.** While the compensation court has jurisdiction to decide ancillary matters to a workers' compensation claim, an award of attorney fees for the creation of a common fund is not within such ancillary jurisdiction when the entity from which such fees are sought is not a party to the case.
6. **Workers' Compensation: Parties.** No supplier or payor may be made or become a party to any action before the compensation court.
7. **Workers' Compensation: Due Process: Attorney Fees.** If a court is to order that money be taken from a payor and paid to an attorney, a significant property interest is involved.
8. **Workers' Compensation: Due Process: Notice.** If a significant property interest is shown, due process requires notice and an opportunity to be heard that is appropriate to the nature of the case.
9. **Workers' Compensation: Due Process: Attorney Fees: Costs.** Fundamental due process requires that a payor or supplier have a forum in which to be heard before it can be ordered to pay any attorney fees or costs.
10. **Due Process.** Due process minimally requires that absent countervailing state interest of overriding significance, persons forced to settle claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.
11. **Trial: Evidence: Appeal and Error.** To preserve a claimed error in admission of evidence, a litigant must make a timely objection which specifies the ground of the objection to the offered evidence.
12. **Workers' Compensation.** Whether a reasonable controversy exists under Neb. Rev. Stat. § 48-125 (Reissue 2010) is a question of fact.
13. **Workers' Compensation: Appeal and Error.** On appellate review of a workers' compensation award, the trial judge's factual findings have the effect of a jury verdict and will not be disturbed unless clearly wrong.
14. **Workers' Compensation.** A reasonable controversy under Neb. Rev. Stat. § 48-125 (Reissue 2010) may exist (1) if there is a question of law previously unanswered by the appellate courts, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.
15. **Workers' Compensation: Penalties and Forfeitures.** To avoid the penalty provided for in Neb. Rev. Stat. § 48-125 (Reissue 2010), an employer need not prevail on an employee's claim for compensation, but must have an actual basis in law or fact for disputing the claim and refusing compensation.
16. **Expert Witnesses.** "Magic words" indicating that an expert's opinion is based on a reasonable degree of medical certainty or probability are not necessary.
17. ____. An expert opinion is to be judged in view of the entirety of the expert's opinion and is not validated or invalidated solely on the basis of the presence or lack of the magic words "reasonable medical certainty."

18. **Pleadings: Waiver.** An admission made in a pleading on which the trial is had is more than an ordinary admission; it is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and therefore is a limitation of the issues.
19. **Workers' Compensation.** An injured worker may recover workers' compensation benefits for a new injury resulting from medical or surgical treatment of a compensable injury, even though the new injury was not incurred while performing work duties.
20. **Workers' Compensation: Penalties and Forfeitures.** A 50-percent waiting-time penalty cannot be awarded when there is an award of delinquent medical payments, because that remedy is available only on awards of delinquent payments of disability or indemnity benefits, not on awards of medical payments.
21. **Workers' Compensation: Attorney Fees: Interest.** When an attorney fee is allowed pursuant to Neb. Rev. Stat. § 48-125 (Reissue 2010), interest shall be assessed on the final award of weekly compensation benefits, but interest is not proper for medical payments, because an award of medical payments is not one of the weekly compensation benefits for which interest, penalties, and attorney fees are available under § 48-125.

Appeal from the Workers' Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

Terrence J. Salerno for appellant.

Justin High, of McAnany, Van Cleave & Phillips, P.C., for appellees.

IRWIN, SIEVERS, and PIRTLE, Judges.

SIEVERS, Judge.

The primary question before us is whether the Nebraska Workers' Compensation Court can compel the plaintiff's private health insurer, which was awarded its subrogation interest for payments it made on the plaintiff's behalf, to pay an attorney fee to the plaintiff's attorney. We answer that question in the negative, because in this case, Blue Cross Blue Shield (BC/BS), the holder of the subrogation interest, was not a party to the litigation in which such fees were sought. We also find that the trial judge erred in concluding that there was a reasonable controversy which prevented an award of penalty, interest, and attorney fees under Neb. Rev. Stat. § 48-125 (Reissue 2010).

FACTUAL AND PROCEDURAL BACKGROUND

On March 15, 2010, Lorina Heesch was performing her normal job duties at Swimtastic Swim School (Swimtastic), when she bent over to reach into the pool and felt a "pop" in her lower back. The trial judge's award recites that the parties stipulated in the pretrial order (which is not in our record) that (1) Heesch was employed by Swimtastic at a weekly wage of $273, (2) she suffered an injury to her back by an accident on March 15, and (3) she suffered an allergic reaction to her medical treatment (epidural cortisone injections), all of which arose out of and in the course of her employment, according to the stipulation. The award further recites that pursuant to the pretrial order, the "issues for trial" were whether the medical treatment Heesch had received to date was reasonable and necessary and, in addition, whether the treatment related to her work injury—which seems inconsistent with the court's recitation of the issues stipulated to in the pretrial order. The court also said that at issue were whether there is a need for continuing medical care, whether there is a reasonable controversy over the refusal of Swimtastic and its insurer (collectively the defendants) to pay "medical indemnity benefits," and whether Heesch is entitled to attorney fees and penalties.

At the outset, we think it is important to note that on March 30, 2011, the defendants filed an amended answer in which they admitted all the allegations of Heesch's petition, with the exception of her allegation that her back condition necessitated epidural injections, which caused an anaphylactic reaction requiring referral to and treatment by an allergist. Thus, summarized, the effect of the amended answer was an admission that Heesch had sustained the compensable on-the-job back injury that she alleged. In paragraph 6 of the petition, Heesch alleged that the matters in dispute were the extent of her disability, "continued medical care and treatment, payment of medical bills, temporary total disability benefits, permanent partial disability benefits, and other benefits as allowed by [law]." The defendants' amended answer admitted these were the disputed issues, and the trial judge's

award reflects that these were the issues tried and submitted for decision.

Heesch underwent conservative treatment for her back condition, including three epidural injections that caused an allergic reaction, which has resulted in hypersensitivity to various chemicals that continued up to the time of trial. Her hypersensitivity is manifested by difficulty in breathing, occasionally a tight chest, coughing, itchy and popping ears, and an itchy and scratchy throat. In July 2011, it was felt that conservative treatment, including extensive physical therapy, had been exhausted, and a neurosurgeon recommended and ultimately performed surgery on Heesch's lower back, which lessened her back and upper leg pain, but not the pain in her lower leg. At trial on January 30, 2012, the neurosurgeon's questionnaire was received in evidence, in which she opined that Heesch had not reached maximum medical improvement, that she would need further medical care and treatment, and that while she would have physical limitations, such could not yet be determined. The trial court determined that Heesch had not achieved maximum medical improvement and that any finding of permanent disability or loss of earning capacity would be premature.

The trial court's decision sets forth an itemized listing, derived from exhibit 16, of medical service providers and the costs charged by each provider. According to exhibit 16, the total charged medical expenses were $93,457.07, BC/BS was billed $42,919.96, and $22,683.39 was paid toward the medical expenses. After finding that all of the medical treatments received by Heesch as detailed by exhibits 1 through 18 were "reasonable and necessary and directly related to [Heesch's] work injury of March 15, 2010," the trial court ordered that the defendants shall pay all of the listed expenses to the listed providers, "less any amounts paid by [BC/BS]." The court further ordered that the "[d]efendant[s] shall reimburse [BC/BS] as its interest appears in Exhibit 16." It is clear from the evidence and briefing that there is no disagreement that the amount to be paid to BC/BS under this portion of the decision is $22,683.39. However, the trial court rejected Heesch's claim that BC/BS should pay her attorney a fee

for the recovery of the BC/BS subrogation interest that was ordered as part of the decision on her workers' compensation claim. The trial judge denied the fee on the basis that BC/BS was not a party to this litigation, citing our decision in *Kaiman v. Mercy Midlands Medical & Dental Plan*, 1 Neb. App. 148, 491 N.W.2d 356 (1992). Heesch has appealed. The defendants do not cross-appeal.

ASSIGNMENTS OF ERROR

Heesch's first assignment of error, restated, is that the compensation court erred in its determination that it lacked jurisdiction to decide whether her attorney was entitled to a fee from BC/BS for securing the recovery of its subrogation interest. Second, Heesch claims that the trial judge erred in admitting "the medical report of Dr. Mercier" and in finding that such report created a reasonable controversy. Finally, Heesch claims that no reasonable controversy could have existed after the neurosurgeon performed surgery in July 2011 and after the report of an independent medical examiner in September 2011.

STANDARD OF REVIEW

[1,2] With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Tapia-Reyes v. Excel Corp.*, 281 Neb. 15, 793 N.W.2d 319 (2011). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong. *Stacy v. Great Lakes Agri Mktg.*, 276 Neb. 236, 753 N.W.2d 785 (2008).

ANALYSIS

Is Injured Worker's Counsel Entitled to Be Awarded Fee by Workers' Compensation Court for Recovery of Worker's Private Health Insurer's Subrogation Interest?

The question presented above is a question of law on which we reach an independent conclusion. In 1992, this court

authored *Kaiman, supra*. Our *Kaiman* decision was succinctly summarized by the Nebraska Supreme Court in *Kindred v. City of Omaha Emp. Ret. Sys.*, 252 Neb. 658, 662, 564 N.W.2d 592, 596 (1997):

> In *Kaiman*, an attorney who had obtained a favorable award for his client in a workers' compensation action filed an action against a health maintenance organization (HMO) which had received reimbursement from the award for medical expenses which it had paid on behalf of the injured worker. The attorney brought an action against the HMO in which he sought a percentage fee on the amount of the reimbursement under the common fund doctrine. The district court sustained a demurrer and dismissed the action. The Court of Appeals reversed, holding that the common fund doctrine permitted an injured worker "to shift an appropriate share of the cost of the litigation to a health care insurer *who directly and substantially benefits by the litigation through reimbursement*." (Emphasis supplied.) 1 Neb. App. at 162, 491 N.W.2d at 363.

At the outset, *Kaiman, supra*, is procedurally different from the present case, because there, the health maintenance organization that gained the recovery of the payments it had made on the injured worker's behalf was sued in the district court. In contrast, in the present case, BC/BS, against which the attorney fee is sought to be assessed, is not a party to this litigation occurring in the Workers' Compensation Court.

In *Kaiman v. Mercy Midlands Medical & Dental Plan*, 1 Neb. App. 148, 491 N.W.2d 356 (1992), Patty Junge, an employee of Bergan Mercy Hospital, asserted that she had sustained an on-the-job injury for which compensation benefits were denied. Junge had private health insurance with Mercy Midlands Medical and Dental Plan (Mercy Midlands), which paid $13,554.38 for medical expenses for her injury. Junge retained an attorney, who filed the workers' compensation suit that resulted in an award in Junge's favor. As a result of the award in Junge's favor, Mercy Midlands received full reimbursement of the $13,554.38 it had paid to Junge's medical providers. Junge's attorney then filed suit against Mercy Midlands in the district court for Douglas County, seeking

judgment against Mercy Midlands in the amount of $4,518.13 for a one-third attorney fee. Mercy Midlands filed a demurrer, which asserted that the district court lacked jurisdiction and that the petition failed to state a cause of action. The district court sustained the demurrer without comment or opinion. Junge's attorney perfected his appeal and assigned the sustaining of the demurrer as error. Our opinion said: "We must determine whether the petition states a cause of action, and if so, where jurisdiction lies." *Id.* at 150, 491 N.W.2d at 357.

After a lengthy examination of authority from Nebraska and other jurisdictions, we found that the petition did state a cause of action, concluding: "We cannot find, nor are we able to articulate, any logical, fair, or equitable reason why a health care insurer who receives reimbursement should not share in the cost of obtaining that reimbursement." *Id.* at 161, 491 N.W.2d at 363. Thus, we found that the common fund doctrine was applicable. However, we cited a previous version of Neb. Rev. Stat. § 48-120(8) (Reissue 2010), which provided, and still does, that

> [t]he compensation court shall order the employer to make payment directly to the supplier of any [medical] services provided for in this section or reimbursement to anyone who has made any payment to the supplier for services provided in this section. *No such supplier or payor may be made or become a party to any action before the compensation court.*

(Emphasis supplied.)

Thus, the compensation court has statutorily conferred jurisdiction to order the payment to be made to BC/BS. In *Kaiman*, the litigation over fees for creating the common fund was in the district court, rather than as here, where we have a claim advanced in the workers' compensation case. Heesch's brief correctly points out that the Nebraska Workers' Compensation Act was amended in 1990, specifically Neb. Rev. Stat. § 48-161 (Reissue 2010), so that such statute provides: "All disputed claims for workers' compensation shall be submitted to the Nebraska Workers' Compensation Court for a finding, award, order, or judgment. *Such compensation court shall have jurisdiction to decide any issue ancillary to*

the resolution of an employee's right to workers' compensation benefits . . . ." (Emphasis supplied.)

Heesch calls our attention to the Supreme Court's opinion in *Midwest PMS v. Olsen*, 279 Neb. 492, 778 N.W.2d 727 (2010), as support for her position that the compensation court can now award an attorney fee in the present case under the ancillary jurisdiction provided for in § 48-161 via the 1990 amendment. *Midwest PMS* initially notes that the ancillary jurisdiction was added to the statute by 1990 Neb. Laws, L.B. 313, which was enacted in response to the Supreme Court's opinion in *Thomas v. Omega Re-Bar, Inc.*, 234 Neb. 449, 451 N.W.2d 396 (1990). That legislation abrogated the majority's decision and adopted the three dissenting justices' language that the Workers' Compensation Court should "'have jurisdiction to decide any issue ancillary to the resolution of an employee's right to workers' compensation benefits.'" *Midwest PMS*, 279 Neb. at 496, 778 N.W.2d at 731. The *Midwest PMS* court then noted the legislative history of § 48-161 suggests that the amendment was made at the request of the Workers' Compensation Court and that the Legislature's primary concern was that a claimant's compensation might be delayed if the Workers' Compensation Court was unable to resolve ancillary issues that affected the claimant's ability to obtain benefits. Clearly, whether BC/BS has to pay Heesch's attorney a fee for creating its right to recover its subrogation interest does not affect Heesch's right to compensation benefits.

[3] In *Midwest PMS, supra*, the two "dueling" insurers were both parties to the litigation, and one insurer was arguing that it was entitled to be reimbursed by the other carrier for the workers' compensation benefits it had paid for and on behalf of the injured worker. But in *Midwest PMS*, by the time of trial, the worker's claim had already been fully resolved by a lump-sum settlement. Thus, the court phrased the issue as "[w]hether the court's jurisdiction over issues 'ancillary to the resolution of an employee's right to workers' compensation benefits' terminates when the employee's right to benefits is no longer at issue." *Id.* at 497, 778 N.W.2d at 732, citing *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999). In answering the question in the negative, the court reasoned that

"'[a]ncillary jurisdiction' is the power of a court to adjudicate and determine matters incidental to the exercise of its primary jurisdiction of an action." *Midwest PMS*, 279 Neb. at 497, 778 N.W.2d at 732. The *Midwest PMS* court noted that a subrogation claim was involved, as it is in this case, but the two insurers who were involved in *Midwest PMS* were both parties to the litigation.

[4,5] In *Schweitzer*, the court held: "A statutorily created court, such as the Workers' Compensation Court, has only such authority as has been conferred upon it by statute, and its power cannot extend beyond that expressed in the statute." 256 Neb. at 358, 591 N.W.2d at 530, citing *Jolly v. State*, 252 Neb. 289, 562 N.W.2d 61 (1997). While the compensation court has jurisdiction to decide ancillary matters to a workers' compensation claim, such as which of two workers' compensation insurers is liable for an injury, there is no authority cited by Heesch that holds that an award of attorney fees for the creation of a common fund is within such ancillary jurisdiction when the entity from which such fees are sought is not a party to the case, and we know of no such authority.

[6-10] Earlier in our opinion, we cited § 48-120(8), which provides in part: "No such supplier or payor [of medical services] may be made or become a party to any action before the compensation court." Obviously, in the case before us, BC/BS is a "payor," and as such, it cannot be a party to this case. If a court is to order that money be taken from BC/BS and paid to an attorney, a property right of significance is involved. If a significant property interest is shown, due process requires notice and an opportunity to be heard that is appropriate to the nature of the case. *Prime Realty Dev. v. City of Omaha*, 258 Neb. 72, 602 N.W.2d 13 (1999). In short, BC/BS should have a forum and an opportunity to be heard on what fee, if any, it owes Heesch's attorney. This takes us back to the core rationale of our decision in *Kaiman v. Mercy Midlands Medical & Dental Plan*, 1 Neb. App. 148, 164, 491 N.W.2d 356, 365 (1992):

> We hold that fundamental due process requires that Mercy Midlands, as well as any other similarly situated payor or supplier, have a forum in which to be heard

> before it can be ordered to pay any attorney fees or costs. Due process minimally requires that absent countervailing state interest of overriding significance, persons forced to settle claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.

None of the cases cited by Heesch in support of this claim of error have abrogated or weakened this fundamental concept. And, the statutory prohibition against a payor, such as BC/BS was in this case, being a party is still operative, given that the Legislature has not acted to change or modify the holding of *Kaiman, supra*. For these reasons, the Workers' Compensation Court did not err in holding that it lacked jurisdiction to grant an award of attorney fees to Heesch's counsel for enforcing BC/BS' subrogation rights. As *Kaiman* illustrates, there is another proper forum for such claim.

Did Trial Judge Err in Admitting Reports of Dr. Lonnie Mercier and Finding That Such Reports Created Reasonable Controversy?

[11] Heesch asserts that "the medical report of Dr. Mercier," the medical examiner for the defense, was improperly admitted. However, there are two reports from him in evidence, one dated November 11, 2010 (exhibit 21), and one dated January 3, 2012 (exhibit 25), and the assignment of error does not specify which report was allegedly wrongfully admitted. The trial judge found that while he was "not impressed with the overall analysis provided by Dr. Mercier, his reports provide the bare minimum to establish a reasonable controversy" so as to prevent an award of attorney fees and penalties. While the assignment of error is nonspecific as to which of the two reports the inadmissibility claim relates to, it appears from the argument section that it is the first report, exhibit 21, that is the intended target of this assignment. This conclusion comes from the argument asserting that exhibit 21 is the "sole basis" that was relied upon by the defendants for terminating medical care and treatment for Heesch. Brief for appellant at 11. However, when the defendants offered exhibit 21, Heesch's counsel stated: "I have no objection." Therefore, without an objection, the trial judge

did not err in admitting exhibit 21. See *Allphin v. Ward*, 253 Neb. 302, 570 N.W.2d 360 (1997) (to preserve claimed error in admission of evidence, litigant must make timely objection which specifies ground of objection to offered evidence). Thus, exhibit 21 was properly admitted and this assignment of error is without merit.

Was There Reasonable Controversy That Would Avoid the Defendants' Having to Pay Statutory Penalties?

The third assignment of error alleges error on the part of the trial judge in concluding that there was a reasonable controversy "after the July 2011 surgery . . . and the receipt of the report of the court appointed [independent medical examiner] in September 2011." Our analysis is somewhat complicated by the trial judge's failure to specify what the reasonable controversy was; e.g., over causation, nature of treatment, extent of disability, or all of such or some combination thereof. However, the defendants' brief argues that they are responsible only for

> the reasonable and necessary medical treatment that is proximately caused by a work-related injury. [Heesch] did not allege that her allergic reaction was caused by an independent injury or occupational exposure to any substances in . . . Swimtastic's facility. The allergic reaction was solely related to the injections [Heesch] received in the course of treatment that was proscribed for her back injury. As such, a reasonable controversy with regard to [Heesch's] back injury applies to any issues related to the treatment of that back injury.

Brief for appellees at 17-18.

[12-15] First, we set forth the legal principles that are applicable to the analysis of the reasonable controversy issue. *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 775 N.W.2d 179 (2009), teaches that whether a reasonable controversy exists under § 48-125 is a question of fact. On appellate review of a workers' compensation award, the trial judge's factual findings have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Lagemann v. Nebraska Methodist Hosp.*,

277 Neb. 335, 762 N.W.2d 51 (2009). A reasonable controversy under § 48-125 may exist (1) if there is a question of law previously unanswered by the appellate courts, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part. See *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000). To avoid the penalty provided for in § 48-125, an employer need not prevail on the employee's claim, but must have an actual basis in law or fact for disputing the claim and refusing compensation. See *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987).

Here, the prime issue is whether the defendants have an actual basis in fact for disputing the claim. Dr. Lonnie Mercier's first report, exhibit 21, does not address causation of Heesch's back condition in any way, so it obviously does not provide the necessary factual basis for a finding of reasonable controversy on causation.

[16,17] Exhibit 25, Mercier's second report, dated January 3, 2012, was received over the objection of Heesch's counsel on competence and relevance and on the ground that the opinions found therein were not stated "to a reasonable degree of medical probability or certainty." However, the third assignment of error does not attack the report's admissibility, but, rather, it assigns that the court erred in finding a reasonable controversy existed after Heesch's July 2011 surgery. "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). An expert opinion is to be judged in view of the entirety of the expert's opinion and is not validated or invalidated solely on the basis of the presence or lack of the magic words "reasonable medical certainty." *Id.* In the end, because the assignment of error does not raise the issue of admissibility, we deem that exhibit 25 was properly admitted.

When we review Mercier's January 3, 2012, report, it is clear his opinion was that Heesch had not sustained an on-the-job injury to her back at the Swimtastic pool in March 2010. His report recites: "I do not believe that any diagnosis can be connected with the activities of March 15 in that I do not believe an actual 'injury' was sustained. . . . I do not connect any diagnosis with any alleged injury of that date."

[18] Heesch's petition clearly alleged a back injury arising out of and in the course of her employment by Swimtastic on March 15, 2010, while she was "bending and reaching over the side of the pool giving instructions to a child when she felt a pop in her back." The occurrence of the work injury is alleged in paragraphs 2, 3, and 4 of the petition. In an amended answer filed March 30, 2011, the defendants expressly admit the allegations of paragraphs 2, 3, and 4. Additionally, while we do not have the pretrial order in our record, the trial judge's award recites that the parties stipulated pursuant to the pretrial order that Heesch suffered "an injury by accident to her back, and an allergic reaction to medical treatment, arising out of and in the course and scope of her employment." But because we do not have the stipulation in our record, we do not rely on it. However, the admissions in the amended answer are judicial admissions which bind the defendants. See *Saberzadeh v. Shaw*, 266 Neb. 196, 663 N.W.2d 612 (2003) (admission made in pleading on which trial is had is more than ordinary admission; it is judicial admission and constitutes waiver of all controversy so far as adverse party desires to take advantage of it, and therefore is limitation of issues).

In short, the amended answer filed March 30, 2011, completely resolved in Heesch's favor the question of whether she had sustained an on-the-job back injury on March 15, 2010. That she had sustained such injury was an established fact to be relied upon and considered by the trial judge in assessing Heesch's claim for attorney fees, interest, and the 50-percent waiting-time penalty provided for in § 48-125, because of a lack of reasonable controversy. And Mercier's opinion that she had not sustained such an injury is clearly nullified by the judicial admission and, thus, does not play any role in the assessment of whether there was a reasonable controversy.

Therefore, there was no reasonable controversy about the basic compensability of Heesch's workers' compensation claim of March 15.

At oral argument, and in their brief, the defendants asserted that the question of the connection of the allergic reaction from injections to the back condition is the basis for the trial judge's finding that there was a reasonable controversy. There was, according to the award, a stipulation that the allergic reaction to medical treatment arose out of and in the course and scope of Heesch's employment, but without such in our record, we cannot rely on a stipulation that is not before us. However, the defendants' own expert, Mercier, says in exhibit 25, his January 3, 2012, report: "I believe that the treatment that . . . Heesch has undergone is certainly reasonable and necessary." Although he qualifies that by saying that the "[treatment] is not connected with any activity of March 15, 2010 for the reasons that I stated previously." Those reasons are, of course, that he believes that she did not sustain an injury on March 15, 2010. But, as explained above, the defendants' judicial admissions effectively nullify, and render immaterial, Mercier's opinion that she was not injured on March 15. Therefore, the defendants' admission that Heesch had sustained a compensable back injury on March 15, when coupled with Mercier's opinion that all of her treatment was "reasonable and necessary" for her back condition, means that the defendants provided no factual basis that her treatment was not reasonable and necessary, including the epidural injections.

[19] Moreover, we think Nebraska law is clear that an injury suffered in the course of reasonable treatment for a compensable injury is likewise compensable. In *Smith v. Goodyear Tire & Rubber Co.*, 10 Neb. App. 666, 636 N.W.2d 884 (2001), we concluded that the injured worker was entitled to workers' compensation benefits for an injury that he suffered while he received physical therapy as treatment for compensable injuries he had sustained while on the job. In *Smith*, we recognized the legal proposition that an injured worker may recover workers' compensation benefits for a new injury resulting from medical or surgical treatment of a compensable injury, even though the new injury was not incurred while performing work duties.

The Nebraska Supreme Court approved our *Smith* holding and rationale and applied it in *Bennett v. Saint Elizabeth Health Sys.*, 273 Neb. 300, 729 N.W.2d 80 (2007).

Therefore, in this present case, it is clear that epidural injections were a reasonable conservative treatment measure, which had adverse health consequences requiring diagnoses and treatment, and that the associated expenses are compensable. Thus, we reject the defendants' argument that the resulting adverse consequences of the injections were not compensable medical expenses, and further, we find that there was no factual evidence, including expert opinion, to support the defendants' argument so as to create a reasonable controversy about the compensability of the injections, as well as the diagnosis and treatment of the allergic reactions to the injections that Heesch suffered. Finally, we note the lack of a cross-appeal of the trial judge's findings that a compensable injury occurred on March 15, 2010, or that the medical expenses resulting therefrom, including those for the allergic reaction to the injections, were compensable. Thus, we need not detail the evidence supporting such findings other than observing that the record clearly supports such conclusions.

[20,21] However, before proceeding further, we point out that a 50-percent waiting-time penalty cannot be awarded when there is an award of delinquent medical payments, because that remedy is available only on awards of delinquent payments of disability or indemnity benefits, not on awards of medical payments. See *Bronzynski v. Model Electric*, 14 Neb. App. 355, 707 N.W.2d 46 (2005). Additionally, when an attorney fee is allowed pursuant to § 48-125, interest shall be assessed on the final award of weekly compensation benefits, but interest is not proper for medical payments, because an award of medical payments is plainly not one of the "weekly compensation benefits" for which interest, penalties, and attorney fees are available under § 48-125. See *Bronzynski, supra*. In the present case, Heesch apparently missed little work, because her award of temporary total and temporary partial benefits was only $659.05. In any event, we find that she is entitled to recover the penalty, interest, and attorney fees because she was awarded some such "compensation"

payments. We additionally note that § 48-125(2) provides a limitation: "Attorney's fees allowed shall not be deducted from the amounts ordered to be paid for medical services nor shall attorney's fees be charged to the medical providers." In short, the attorney fees under such subsection are in addition to the payment of the medical expenses themselves that the award requires the defendants to pay.

CONCLUSION

For the reasons set forth above, we find that the Workers' Compensation Court trial judge's decision denying an award of fees from BC/BS for the award of its subrogation interest was correct as a matter of law. However, taking the defendants' judicial admissions in their amended answer along with Mercier's admission that all treatment for Heesch's back condition was necessary and reasonable means that there was no reasonable controversy over either the compensability of her injury or the compensability of her medical expenses, including for the allergic reaction she suffered from the epidural injections. Therefore, the trial court was clearly wrong in finding that there was a reasonable controversy, and as a result, we remand the cause to the compensation court trial judge for assessment of the 50-percent waiting-time penalty, interest, and attorney fees as provided for in § 48-125.

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

SARAH E. PENRY, APPELLEE, V. BEVERLY NETH, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES FOR THE STATE OF NEBRASKA, AND THE DEPARTMENT OF MOTOR VEHICLES FOR THE STATE OF NEBRASKA, APPELLANTS.

823 N.W.2d 243

Filed November 6, 2012. No. A-11-544.

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 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. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
5. **Administrative Law.** Agency regulations that are properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.
6. **Administrative Law: Appeal and Error.** An appellate court accords deference to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent.
7. **Administrative Law.** An administrative body has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the Administrative Procedure Act.
8. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation.** The authority of the director of the Department of Motor Vehicles to administratively revoke an operator's license is only that which is specifically conferred by the administrative license revocation statutes.
9. **Administrative Law: Rules of Evidence.** Telephonic hearings are permitted in proceedings under the Administrative Procedure Act in a formal rules of evidence hearing.
10. **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.
11. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.
12. ____. That which is implied in a statute is as much a part of it as that which is expressed.
13. **Statutes: Appeal and Error.** An appellate court will not read into a statute a meaning that is not there.
14. **Statutes.** A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.
15. **Statutes: Intent: Appeal and Error.** In construing a statute, an appellate court looks to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served.
16. **Statutes: Presumptions: Legislature: Intent.** In construing a statute, it is presumed that the Legislature intended a sensible rather than an absurd result.
17. **Administrative Law: Statutes.** Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction.

18. **Statutes: Legislature: Intent.** For a court to inquire into a statute's legislative history, the statute in question must be open to construction. A statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.
19. **Statutes.** A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.
20. **Administrative Law: Drunk Driving: Licenses and Permits: Revocation.** The purpose of administrative license revocation is to protect the public from the health and safety hazards of drunk driving by quickly getting offenders off the road. At the same time, the administrative license revocation statutes also further a purpose of deterring other Nebraskans from driving drunk.
21. **Administrative Law: Motor Vehicles: Revocation.** Because of the substantial procedural benefits conveyed upon the Department of Motor Vehicles in an administrative license revocation proceeding, the department is expected to strictly comply with the applicable rules and regulations.
22. **Due Process: Notice.** Procedural due process limits the ability of the government to deprive people of interests which constitute liberty or property interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.
23. **Due Process.** Due process claims are generally subjected to a two-part analysis: (1) Is the asserted interest protected by the Due Process Clause and (2) if so, what process is due?
24. **Motor Vehicles: Licenses and Permits: Revocation.** Suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees.
25. **Administrative Law: Motor Vehicles: Licenses and Permits: Due Process.** Under procedural due process, before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case.
26. **Administrative Law: Due Process: Notice: Evidence.** In proceedings before an administrative agency or tribunal that adjudicates property interests of an accused person, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial adjudicator.
27. **Administrative Law: Due Process.** In determining whether an administrative procedure comports with due process, a court must consider (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
28. **Affidavits: Words and Phrases.** An affidavit is a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.

29. **Affidavits: Proof.** 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.
30. **Drunk Driving: Public Health and Welfare.** There is a substantial governmental interest in protecting public health and safety by removing drunken drivers from the highways.
31. **Due Process.** The concept of due process embodies the notion of fundamental fairness and defies precise definition.
32. ____. Due process is a flexible notion that must be decided on the facts presented in a particular case and calls for such procedural protections as the particular situation demands.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded with directions.

Jon Bruning, Attorney General, and Gregory J. Walklin for appellants.

Brad Roth, of McHenry, Haszard, Roth, Hupp, Burkholder & Blomenberg, P.C., L.L.O., and, on brief, Timothy C. Phillips, P.C., L.L.O., for appellee.

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

MOORE, Judge.

INTRODUCTION

In this appeal, brought pursuant to the Administrative Procedure Act, the director of the Nebraska Department of Motor Vehicles and the Nebraska Department of Motor Vehicles (collectively the Department) appeal from a decision of the district court for Lancaster County vacating and remanding the Department's revocation of Sarah E. Penry's operator's license. The district court's decision was based on the conclusion that the hearing officer did not have statutory authority to swear in witnesses over the telephone and that Penry's due process rights were violated by having the arresting officer appear and be sworn telephonically during her administrative license revocation (ALR) hearing. For the reasons set forth herein, we reverse the decision of the district court and remand the cause with directions to affirm the revocation of Penry's license.

BACKGROUND

On January 17, 2011, Officer Chris Fields observed a vehicle fail to signal a turn and cross the centerline. After initiating a stop, Fields identified the driver as Penry. Penry had bloodshot and watery eyes and an odor of alcohol about her person. Penry admitted to drinking and showed impairment on several field sobriety tests. She also failed a preliminary breath test. After her arrest, Penry completed a chemical test of her breath, which showed the presence of .122 of a gram of alcohol per 210 liters of breath. Thereafter, Fields completed a sworn report, which was notarized. Upon receiving the sworn report, the Department sent a notice of hearing to Penry and Fields which indicated the hearing would be "held by teleconference hearing procedures" and explained the telephonic hearing procedures for the motorist and the arresting officer.

Penry filed a petition with the Department, and an ALR hearing was held on February 24, 2011. The hearing officer and Penry's attorney were located together in Lincoln, Nebraska. Penry was not present. Fields appeared as a witness via telephone. The hearing officer administered the oath to Fields over the telephone, and Fields swore to tell the truth and identified himself. Penry's attorney objected to the oath's being administered to Fields outside of the presence of the officer administering it and requested a standing objection to Fields' testimony. The hearing officer overruled the objection and granted the continuing objection to the testimony.

Fields testified that he had contact with Penry and completed a sworn report, which he identified by the identification number and the date stamp. The hearing officer received Fields' sworn report into evidence. Penry's counsel asked Fields only four questions: (1) "Officer Fields, you're currently testifying by telephone, correct?"; (2) "And you were administered an oath prior to your telephonic testimony?"; (3) "And you are not in the presence of the officer that was administering the oath, are you?"; and (4) "And there is no officer there with you that's authorized to administer oaths?"

Following the hearing, the hearing officer issued findings of fact, and on February 25, 2011, the director issued an order

revoking Penry's license for the statutory period, effective March 3.

On March 1, 2011, Penry filed a complaint for review in the district court for Lancaster County. The district court entered an amended judgment finding that minimum due process requires a person clothed with the power to administer oaths be personally present with the witness at the time the witness is sworn and testifies in telephonic ALR hearings before the Department. The court also found that the Department was without statutory authority to permit a witness, who was not a party, to testify telephonically.

The decision of the Department was vacated, and the case was remanded for proceedings consistent with the district court's order. The Department perfected its appeal to this court.

ASSIGNMENTS OF ERROR

The Department assigns that the district court erred in finding (1) that the Department hearing officer was without statutory authority to administer an oath telephonically to the arresting officer and (2) that administering an oath telephonically to the arresting officer violated Penry's due process rights.

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. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). 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*. 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. *Id*.

[4-6] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Liddell-Toney v. Department of Health & Human Servs.*, 281 Neb. 532, 797 N.W.2d 28 (2011). Agency regulations that are properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law. *Smalley v. Nebraska Dept. of Health & Human Servs.*, 283 Neb. 544, 811 N.W.2d 246 (2012). An appellate court accords deference to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent. *Liddell-Toney v. Department of Health & Human Servs., supra.*

ANALYSIS

In the instant appeal, we must decide whether the district court's decision vacating the Department's revocation of Penry's license and remanding the case for further proceedings conforms to the law. The district court determined that the hearing officer was without statutory authority to swear in witnesses over the telephone in an ALR proceeding and that doing so violated Penry's due process rights.

Statutory Authority to Administer Telephonic Oaths.

[7,8] We first examine whether the hearing officer has the statutory authority to administer telephonic oaths during an ALR hearing, because an administrative body has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act. See *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). The authority of the director of the Department to administratively revoke an operator's license is only that which is specifically conferred by the ALR statutes. *Id.*

[9] Ordinarily, judges may not use telephonic methods to conduct proceedings involving testimony of witnesses by oral examination. Neb. Rev. Stat. § 24-734(3) (Reissue 2008). However, the Nebraska Supreme Court has previously held

that telephonic hearings are permitted in proceedings under the Administrative Procedure Act in a formal "rules of evidence" hearing. See *Kimball v. Nebraska Dept. of Motor Vehicles*, 255 Neb. 430, 586 N.W.2d 439 (1998).

Further, the statutes specifically relating to ALR's allow for telephonic hearings. Neb. Rev. Stat. § 60-498.01(6)(a) (Reissue 2010) provides in pertinent part: "The hearing and any prehearing conference may be conducted in person or by telephone, television, or other electronic means at the discretion of the director, and all parties may participate by such means at the discretion of the director." See, also, 247 Neb. Admin. Code, ch. 1, § 022.01 (2006).

Additionally, § 60-498.01(7) provides in part that

> [t]he director shall adopt and promulgate rules and regulations to govern the conduct of the hearing and insure that the hearing will proceed in an orderly manner. The director may appoint a hearing officer to preside at the hearing, administer oaths, examine witnesses, take testimony, and report to the director.

[10-13] We are guided in our analysis by several well-known principles of statutory construction. 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. See *Trumble v. Sarpy County Board*, 283 Neb. 486, 810 N.W.2d 732 (2012). Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision. *In re Interest of Katrina R.*, 281 Neb. 907, 799 N.W.2d 673 (2011). That which is implied in a statute is as much a part of it as that which is expressed. *Pepitone v. Winn*, 272 Neb. 443, 722 N.W.2d 710 (2006). An appellate court will not read into a statute a meaning that is not there. *AT&T Communications v. Nebraska Public Serv. Comm.*, 283 Neb. 204, 811 N.W.2d 666 (2012).

[14-17] A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose. *Herrington v. P.R. Ventures*, 279 Neb. 754, 781 N.W.2d 196 (2010). In construing a statute, an appellate court looks to the statutory

objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served. *Id*. See *Martensen v. Rejda Bros*., 283 Neb. 279, 808 N.W.2d 855 (2012). In construing a statute, it is presumed that the Legislature intended a sensible rather than an absurd result. *Frenchman-Cambridge Irr. Dist. v. Dept. of Nat. Res*., 281 Neb. 992, 801 N.W.2d 253 (2011). Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction. *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002).

[18,19] For a court to inquire into a statute's legislative history, the statute in question must be open to construction. A statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous. *Agena v. Lancaster Cty. Bd. of Equal*., 276 Neb. 851, 758 N.W.2d 363 (2008). A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes. *Id*.

The Department argues that the plain meaning of the statute allows the hearings to be conducted by telephone and allows the hearing officer to administer oaths, examine witnesses, and take testimony. § 60-498.01(7); 247 Neb. Admin. Code, ch. 1, § 003.05A (2006). The Department also argues that the sensible interpretation of the ALR statutes is the hearing officer may administer oaths telephonically and that this interpretation is consistent with the purpose of the legislation. Finally, the Department adds that the interpretation by the district court produces an absurd result.

On the other hand, Penry argues that § 60-498.01(6)(a) refers only to "*all parties*" as being able to participate by telephone. (Emphasis supplied.) Penry also points to the Department's rules which define "party" as the driver and the director. See 247 Neb. Admin. Code, ch. 1, § 002.07 (2006). Penry argues that because the statute does not specifically allow nonparty witnesses to appear telephonically or to swear to an oath telephonically, then the director and the hearing officers do not have the authority to give the oath to or hear testimony from arresting officers telephonically.

We determine that it is appropriate to look to the legislative history in this case in order to construe the statute in question as it relates to the participation of parties by telephone. During the committee hearing, there was testimony that the proposed procedure, including the discretion to hear an ALR matter by telephone, would free up officers' time and save the cost of paying overtime. Transportation and Telecommunications Committee Hearing, L.B. 209, 98th Leg., 1st Sess. 24, 37 (Feb. 10, 2003); Floor Debate, L.B. 209, Transportation and Telecommunications Committee, 98th Leg., 1st Sess. 2348 (Mar. 13, 2003).

We have also examined the Department's regulations concerning the ALR hearing. The regulations provide that "[t]he hearing and any preconference hearing may be conducted in person or by telephone, video conference, or other electronic means at the discretion of the Director, and *all participants* may participate by such means." 247 Neb. Admin. Code, ch. 1, § 004.01C (2006) (emphasis supplied). The regulations also provide that the "failure of the arresting officer to appear [at the ALR hearing] *or be otherwise available for cross-examination* shall be cause for dismissal of the [ALR] by the Department except when the motorist does not appear or make any showing." 247 Neb. Admin. Code, ch. 1, § 017.02 (2006) (emphasis supplied). These regulations indicate the Department's construction of § 60-498.01(6)(a) as applicable to the arresting officer, such that the arresting officer may appear by telephone.

[20] The purpose of an ALR is to protect the public from the health and safety hazards of drunk driving by quickly getting offenders off the road. *Murray v. Neth*, 279 Neb. 947, 783 N.W.2d 424 (2010). At the same time, the ALR statutes also further a purpose of deterring other Nebraskans from driving drunk. *Id.*

> Because persons who drive while under the influence of alcohol present a hazard to the health and safety of all persons using the highways, a procedure is needed for the swift and certain revocation of the operator's license of any person who has shown himself or herself to be a health and safety hazard . . . .

§ 60-498.01(1). Accord, *Murray v. Neth, supra*; 247 Neb. Admin. Code, ch. 1, § 001.02 (2006). Here, the Department's procedures governing the revocation of an operator's license when an individual has been driving a vehicle while under the influence of alcohol are in furtherance of this statutory purpose.

[21] On the other hand, it has also been recognized that because of the substantial procedural benefits conveyed upon the Department in an ALR proceeding, the Department is expected to strictly comply with the applicable rules and regulations. *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005); *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002), *disapproved on other grounds, Hahn v. Neth, supra*. The Department complied with its rules and regulations in allowing the arresting officer to appear by telephone. See 247 Neb. Admin. Code, ch. 1, § 004.01C.

We are required to reach an independent conclusion regarding the meaning and interpretation of a statute. We conclude that a reasonable construction of § 60-498.01(6)(a) is that it applies to the participation of the arresting officer by telephone at the ALR hearing.

Due Process.

The Department also alleges that it was error for the district court to find that Penry was deprived of due process of law by the administration of an oath telephonically to the arresting officer in the ALR hearing.

[22] Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003); *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001).

[23-26] Due process claims are generally subjected to a two-part analysis: (1) Is the asserted interest protected by the Due Process Clause and (2) if so, what process is due? *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001). When it comes to the suspension of motor vehicle operators' licenses, both of

these questions have previously been addressed by Nebraska courts. In response to the first question, the Nebraska Supreme Court has held that the "[s]uspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees." *Stenger v. Department of Motor Vehicles*, 274 Neb. 819, 824, 743 N.W.2d 758, 762 (2008). Consequently, licenses are not to be taken away by a state without the procedural due process required by the 14th Amendment. See *Stenger v. Department of Motor Vehicles, supra*. As for the specific procedures required in this situation, our due process jurisprudence mandates that the Department "provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case." See *Murray v. Neth*, 279 Neb. 947, 955, 783 N.W.2d 424, 432 (2010). This hearing must include "notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial adjudicator." *Id*.

The specific question before the district court in the instant case—whether the arresting officer can be sworn telephonically—relates to whether there was sufficient identification of the accuser.

[27] In *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the U.S. Supreme Court set forth a three-part balancing test to be considered in resolving an inquiry into the specific dictates of due process: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. The Nebraska Supreme Court has adopted this *Mathews* analysis when determining whether an administrative procedure comports with due process. See *Marshall v. Wimes, supra*.

With respect to the first factor of the *Mathews* analysis, the private interest at stake is the continued possession of an operator's license, which we have already recognized

as being significant. See *Stenger v. Department of Motor Vehicles, supra*.

The next factor we consider is the risk of an erroneous deprivation and the value, if any, of alternative procedures. In the present context, the risks identified by the district court are the possibility that the witness appearing by telephone is not actually the arresting officer or that the arresting officer may be testifying from materials not available to the other participants. The district court concluded that without the assurance of the identity of the person testifying and the document about which he or she testified, Penry was deprived of the opportunity to meaningfully cross-examine the arresting officer.

The Department argues that the officer's sworn report, standing alone, provides a strong procedural safeguard which eliminates the risk of erroneous deprivation and that there were several safeguards taken to ensure the arresting officer was referring to the correct sworn report. The Department also argues that there is little to no risk that someone could appear telephonically impersonating the arresting officer at an ALR hearing.

[28,29] We agree with the Department that the officer's sworn report provides a procedural safeguard eliminating the risk of erroneous deprivation. In the sworn report, the "accuser" (the arresting officer) has been identified and has had a notary verify such identity. The sworn report is, by definition, an affidavit. An affidavit is a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). 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. *Id.*

In this case, when questioned about the sworn report, the hearing officer specifically asked Fields whether he was on duty on January 17, 2011; whether he arrested Penry on that date; and whether as a result of that arrest, he filled out a sworn report. The hearing officer asked Fields to verify the identification number at the top of the document, which verification

ensured that the hearing officer and Fields were referring to the same document. There was no risk that the arresting officer was referring to a document other than the sworn report received in evidence at the hearing.

Additionally, the notice of hearing is provided to the arresting officer and asks the arresting officer to provide a telephone number to the Department. On the date and time of the hearing, the hearing officer then calls the number that was provided. If the arresting officer does not receive a call within 10 minutes of the hearing start time, he or she is instructed on the notice of hearing to call in to the hearing officer's line. There is little risk that a person other than the arresting officer would be called by the hearing officer or call into the hearing.

Finally, Penry was entitled to cross-examine the arresting officer to dispel any concerns about his identity and the exhibit from which he was testifying. She chose not to do so, but asked questions only to confirm that the officer was administered the oath telephonically and that the officer was not in the presence of an officer authorized to administer oaths.

We now turn to the final factor of the balancing test set out in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976): the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. The Department argues that requiring a notary to be present for every arresting officer's testimony would severely undermine the rapidity and effectiveness of the ALR process. The Department contends that this additional requirement would impose a significant financial and administrative burden in retaining and coordinating notaries and undermine the convenience of the arresting officers because they could no longer call into such hearings from any location.

It is clear that the purpose of allowing telephonic hearings is to ensure that these matters are resolved quickly and economically. The fiscal and administrative burdens of the additional requirements proposed by the district court would clearly frustrate these interests.

[30] It is well established that there is a substantial governmental interest in protecting public health and safety by

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

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

CONCLUSION

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

REVERSED AND REMANDED WITH DIRECTIONS.

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

824 N.W.2d 63

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

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Appeal and Error.** An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, and alimony.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

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

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

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

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

IRWIN, SIEVERS, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

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

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

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

II. BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

Timothy appeals and Janna cross-appeals here.

III. ASSIGNMENTS OF ERROR

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

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

IV. ANALYSIS

1. Standard of Review

[1] An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, and alimony. See, *Millatmal v. Millatmal*, 272 Neb. 452, 723

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

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

2. Timothy's Appeal

(a) Custody

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Property Division

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

Under Neb. Rev. Stat. § 42-365 (Reissue 2008), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008). In this case, Timothy does not contest the district court's classifications of marital and nonmarital property. Rather, he focuses his arguments on the second and third steps of the division of property. We address each of his arguments in turn.

(i) Valuation of Marital Estate

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

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

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

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

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

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

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

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

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

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

(ii) Distribution of Marital Estate

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

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

Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness determined by the facts of each case. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006). Section 42-365 provides in part, "The purpose of a property division is to distribute the marital assets equitably between the parties." That statutory section also indicates that in dividing the marital estate, a court should consider such things as the circumstances of the parties, the duration of the marriage, and the history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities.

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

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

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

(c) Calculation of Timothy's Annual Income

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

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

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

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

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

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

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

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

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

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

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

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

(d) Alimony

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

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

> [T]he circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and

> education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

Disparity in income or potential income may partially justify an award of alimony. *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004).

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

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

3. Janna's Cross-Appeal

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

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

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

V. CONCLUSION

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

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

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

822 N.W.2d 444

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

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

4. **Workers' Compensation: Witnesses.** The Workers' Compensation Court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony.

Appeal from the Workers' Compensation Court. Affirmed.

James L. Quinlan, of Fraser Stryker, P.C., L.L.O., for appellant.

Michael P. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellee Gem Hubbart.

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

INBODY, Chief Judge.

INTRODUCTION

Hormel Foods (Hormel) appeals the order of the Nebraska Workers' Compensation Court approving an amended vocational rehabilitation plan for the appellee, Gem Hubbart, to reinstate GED training for 1 additional year. For the following reasons, we affirm.

STATEMENT OF FACTS

This case began in 2001, when Hubbart filed an amended petition with the trial court alleging that she had sustained injuries to her bilateral upper extremities in an accident arising out of and in the course of her employment with Hormel. Eventually, after several years of proceedings, Hubbart was awarded temporary total disability for her left hand and found to have a 12-percent permanent functional impairment of her left upper extremity. The trial court further found that Hubbart was entitled to temporary total indemnity for depression, which determination was reversed by this court. See *Hubbart v. Hormel Foods Corp.*, 15 Neb. App. 129, 723 N.W.2d 350 (2006).

On September 17, 2010, Hubbart filed an amended petition with the trial court alleging that on November 3, 2008, Hormel filed a motion to terminate the vocational plan, which motion was denied by the trial court on July 15, 2009. The amended petition alleges that shortly thereafter, Hubbart returned to Thailand as a result of her mother's death, and that

her participation with the vocational plan was discontinued. Hubbart alleged that since returning to the United States, she had attempted to reinstate the vocational program, but was denied payment of those services by Hormel. Hormel filed an answer alleging that the most recent approved vocational rehabilitation plan had concluded on June 5, 2009, and that no additional plan had been approved by a vocational rehabilitation specialist. The State of Nebraska, Workers' Compensation Trust Fund, also filed an answer generally denying the allegations contained in the amended petition. Representatives for the trust fund have notified this court that no responsive brief or further participation would be undertaken with regard to the appeal.

On February 9, 2011, the trial court entered an order finding that Hubbart remained entitled to vocational rehabilitation services in order to provide the opportunity for her to return to suitable employment. The court found that Hubbart had generally attended all available classes and received tutoring but was unable to pass the four remaining subject tests in order to obtain her diploma through the GED program. The court found that Hubbart's progress was interrupted by her return to Thailand following the death of her mother. The court ordered the court-appointed counselor to submit the amended plan for continuation of GED classes and warned that should Hubbart not complete such classes or fail to pass the remaining GED subject tests, "it is highly unlikely the Court will approve any further vocational services."

Michelle Holtz, a rehabilitation consultant, had been involved in providing vocational rehabilitation services to Hubbart since the inception of the case in 2001. On April 28, 2011, Holtz filed the amended plan of vocational rehabilitation which indicates that the plan was approved by Holtz and Hubbart and was also signed by the vocational rehabilitation specialist with a note to "[i]mplement [it] per [the trial court's] order [of] 2/9/11." Hormel filed objections to the plan, and a hearing was held on the matter.

During the hearing, the trial court received numerous exhibits and heard arguments. Hubbart submitted extensive evidence regarding her participation in vocational rehabilitation services,

in addition to the current recommendation by the previously appointed rehabilitation consultant, Holtz. The progress reports indicate that since the adoption of the April 2008 vocational rehabilitation plan, Hubbart had consistently attended all of her classes and completed all of her tutoring hours, but had been unable to pass all of the requisite subject tests in order to obtain her diploma through the GED program. At the time of trial, Hubbart needed to pass four subjects.

The trial court also received into evidence a rebuttal report regarding Holtz' rehabilitation plan prepared by a rehabilitation specialist, Patricia Conway. The report indicated that Hubbart should have been participating in skills training programs and not GED programs. Conway opined that there were several jobs available to Hubbart which did not require a GED program diploma and would be better suited to Hubbart with short-term skills training. Conway stated it was unlikely that Hubbart would obtain such a diploma and would certainly be unable to obtain one as set forth in Holtz' plan, because Hubbart had been unable to demonstrate any increase in her skill levels. Conway concluded that job placement would be the more appropriate form of vocational rehabilitation for Hubbart.

On July 14, 2011, the trial court issued an order finding that the court had previously approved a plan for continued GED program classes as proposed by Holtz and that the formal plan had been approved by the vocational rehabilitation section of the court. The trial court formally adopted the plan and reiterated that continuation of the plan beyond the timeframe adopted was highly unlikely.

Hormel filed a notice of appeal to the review panel, which subsequently affirmed the order in its entirety, finding that pursuant to Neb. Rev. Stat. § 48-162.01(7) (Reissue 2010), the trial court was within its authority to develop an amended plan of vocational rehabilitation. The review panel also determined that the trial court had chosen to adopt Holtz' recommendations, instead of Conway's recommendations, and that it was not an issue for the review panel to reweigh. Hormel has timely appealed to this court.

ASSIGNMENTS OF ERROR

Hormel assigns, rephrased and consolidated, that the trial court erred by approving the amended vocational plan without submission of the plan to a vocational rehabilitation specialist, in violation of § 48-162.01, and that the evidence does not support the adoption of the ordered vocational plan.

STANDARD OF REVIEW

[1-3] A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Pearson v. Archer-Daniels-Midland Milling Co.*, 282 Neb. 400, 803 N.W.2d 489 (2011). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the finding of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong. *Id.* With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Id.*

ANALYSIS

Approval of Amended Vocational Plan.

Hormel argues that the trial court erred by approving the amended vocational rehabilitation plan without first submitting the plan to a vocational rehabilitation specialist for an independent evaluation pursuant to § 48-162.01.

In support of its argument, Hormel cites to the case of *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001). In *Rodriguez v. Monfort, Inc.*, the employee was awarded benefits for his work-related injuries, which benefits included an order for vocational rehabilitation services. The Nebraska Supreme Court addressed the rebuttable presumption of correctness pursuant to § 48-162.01(3) (Cum. Supp. 2000)

and found that a vocational rehabilitation plan had not been developed and that no plan had been approved by a specialist to which a rebuttable presumption could attach. The court held that the plain language of the statute "requires both the submission of a plan by the vocational rehabilitation counselor and the approval of that plan by a Workers' Compensation Court vocational rehabilitation specialist in order for the plan to benefit from the rebuttable presumption of correctness." 262 Neb. at 808, 635 N.W.2d at 446-47.

The situation presented in this case is distinguishable from that presented in *Rodriguez v. Monfort, Inc.*, because this is not the institution of a new plan for vocational rehabilitation services, but the continuation of the previously approved plan. Section 48-162.01(7) (Reissue 2010) provides that the trial court may "also modify a previous finding, order, award, or judgment relating to physical, medical, or vocational rehabilitation services as necessary in order to accomplish the goal of restoring the injured employee to gainful and suitable employment, or as otherwise required in the interest of justice."

The record clearly reveals that the previously approved vocational rehabilitation plan was submitted on April 24, 2008, by Holtz, was approved by all parties, and was adopted by the trial court. The plan recommended GED training for Hubbart. Progress reports indicate that Hubbart attended class and tutoring sessions regularly, but was not able to score high enough on some subject testing to pass pursuant to GED program standards. The progress reports indicate that Hubbart was motivated, worked hard, and was a good student. The record indicates that Hubbart's GED plan concluded on June 5, 2009, and that Hubbart took all of the GED tests required by the plan, but was unable to pass any of the four GED tests administered. Shortly thereafter, Hubbart left the United States for Thailand to care for her mother and did not return until September 2009. Hubbart immediately contacted the vocational rehabilitation services office and requested that she be able to resume her participation in GED classes. On November 18, Holtz recommended that Hubbart be given an additional year on her GED plan to afford Hubbart an opportunity to pass the four

remaining tests necessary to obtain a diploma through the GED program.

On April 28, 2011, Holtz submitted a vocational rehabilitation plan which incorporated much of the information as set forth in the April 24, 2008, plan and recommended that Hubbart be allowed to resume work on obtaining a diploma through the GED program, with an estimated completion date of May 31, 2012. This plan was not a new plan and did not set forth any recommendations or goals for Hubbart that were not included in the April 24, 2008, plan. Furthermore, Hormel has failed to mention in its argument to this court that the vocational rehabilitation specialist signed Holtz' plan, which act certifies that the individual signing has "evaluated th[e] plan in accordance with section 48-162.01(3)," with a notation to "[i]mplement per [the trial court's] order 2/9/11." Therefore, pursuant to § 48-162.01(7), we find that the trial court was within its authority to modify a previous order relating to vocational rehabilitation services and that the submission and approval of the vocational rehabilitation plan to and by a vocational rehabilitation specialist were unnecessary, even though the specialist in this case signed off on the report in accordance with § 48-162.01(3) and ordered its implementation pursuant to the trial court's orders. This assignment of error is without merit.

Adoption of Amended Vocational Rehabilitation Plan.

Hormel also argues that the trial court erred by adopting the vocational plan submitted by Holtz, because the plan did not undergo an independent evaluation and, as such, did not have a rebuttable presumption of correctness. Hormel asserts that the trial court was required to accept the vocational assessment provided by Conway because there was no other evidence before the court.

[4] The April 2008 plan prepared by Holtz had already been submitted by the parties, had been adopted by the trial court, and was entitled to a rebuttable presumption of correctness under § 48-162.01(3). The amended plan was similarly entitled to the presumption, because, contrary to Hormel's contention,

Holtz had approved the plan and the vocational rehabilitation specialist had also signed off on the plan with directions to implement it as ordered by the trial court. At the hearing on the plan, Hormel submitted a vocational needs assessment prepared by Conway to rebut that presumption. As discussed, Holtz' plan recommends an additional year of GED training for Hubbart, while Conway's report recommends that a GED program is not appropriate for Hubbart and that she should instead move forward with a short-term skills training program or a job placement plan. The trial court chose to approve Holtz' amended vocational plan over Conway's plan. The Workers' Compensation Court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony. See *Parks v. Marsden Bldg Maintenance*, 19 Neb. App. 762, 811 N.W.2d 306 (2012). This assignment of error is also without merit.

CONCLUSION

For the foregoing reasons, we find that in accordance with § 48-162.01(7), the trial court modified a previous vocational rehabilitation plan and submission of that modification to a rehabilitation specialist was not required. Further, we find that the findings of the trial court were not clearly wrong. Therefore, we affirm the trial court's order in its entirety.

AFFIRMED.

LALINDA FINLEY-SWANSON, APPELLEE AND CROSS-APPELLANT, V. JEFFREY B. SWANSON, APPELLANT AND CROSS-APPELLEE.

823 N.W.2d 697

Filed November 20, 2012. No. A-11-748.

1. **Appeal and Error.** A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered except to the extent that it is narrowed by the specific arguments asserted in the appellant's brief.
2. **Divorce: 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, and this standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.

3. **Judgments: Words and Phrases.** An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Judgments: Appeal and Error.** Under the general acceptance of benefits rule, an appellant may not voluntarily accept the benefits of part of a judgment in the appellant's favor and afterward prosecute an appeal or error proceeding from the part that is against the appellant.
5. **Divorce: Judgments: Waiver: Appeal and Error.** In a dissolution action, a spouse who accepts the benefits of a divorce judgment does not waive the right to appellate review under circumstances where the spouse's right to the benefits accepted is conceded by the other spouse, the spouse was entitled as a matter of right to the benefits accepted such that the outcome of the appeal could have no effect on the right to those benefits, or the benefits accepted are pursuant to a severable award which will not be subject to appellate review.
6. **Property Division.** The equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in Neb. Rev. Stat. § 42-365 (Reissue 2008).
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, the polestar being fairness and reasonableness as determined by the facts of each case.
8. ____. The purpose of a property division is to distribute the marital assets equitably between the parties.
9. **Parties: Appeal and Error.** A party is not entitled to prosecute error upon that which was made with his or her consent.
10. **Alimony.** In awarding alimony, a court should consider, in addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 2008), the income and earning capacity of each party as well as the general equities of each situation.
11. ____. Disparity in income or potential income may partially justify an award of alimony.
12. **Attorney Fees: Appeal and Error.** An award of attorney fees is discretionary and will not be disturbed on appeal absent an abuse of discretion.
13. **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.
14. **Divorce: Attorney Fees.** Customarily in dissolution cases, attorney fees and costs are awarded only to prevailing parties or assessed against those who file frivolous suits.

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

John J. Heieck and Matthew Stuart Higgins, of Higgins Law, for appellant.

LaLinda Finley-Swanson, pro se.

IRWIN, SIEVERS, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Jeffrey B. Swanson appeals, and LaLinda Finley-Swanson cross-appeals, from a decree of dissolution entered by the district court, which decree dissolved the parties' marriage, divided the marital assets and debts, awarded LaLinda custody of the parties' minor child, and ordered Jeffrey to pay child support and alimony. On appeal, Jeffrey asserts that the district court erred in its division of the marital property. On cross-appeal, LaLinda asserts that the court erred in its valuation of one of Jeffrey's retirement accounts, in awarding her too little alimony, and in failing to order Jeffrey to pay her attorney fees. For the reasons set forth herein, we affirm the decision of the district court in its entirety.

II. BACKGROUND

Jeffrey and LaLinda were originally married on February 13, 1993. In February 2000, a decree of dissolution was entered dissolving that marriage. Jeffrey and LaLinda were remarried on July 1, 2000. The dissolution of this second marriage is the subject of the current appeal.

The parties have one child together who was born in September 1992. This child remained a minor throughout these dissolution proceedings.

Jeffrey is employed with Hawkins Construction Company (Hawkins Construction) and has been employed there for the duration of the parties' second marriage. He is the family's primary financial provider.

LaLinda has been employed periodically during the marriage. Recently, her ability to engage in gainful employment has been affected by an injury she suffered in July 2009. The injury has required her to undergo multiple surgeries to her hip, including a hip replacement, and she continues to

experience pain. Despite her health problems, LaLinda is currently employed full time as a "recovery specialist." There is some indication, however, that her current full-time position may not be permanent in nature due to some reorganization within her current company.

On March 3, 2010, LaLinda filed a complaint for dissolution of marriage. LaLinda specifically asked that the parties' marriage be dissolved, that their marital assets and debts be equitably divided, and that Jeffrey be ordered to pay alimony and attorney fees.

On May 24, 2010, Jeffrey filed an answer and cross-complaint for dissolution of marriage. In his cross-complaint, Jeffrey specifically asked that the parties' marriage be dissolved and that their marital assets and debts be equitably divided. In addition, he requested the court to find that an award of alimony and attorney fees to LaLinda was not warranted.

In May 2011, trial was held. At trial, both parties testified concerning their employment histories, their current financial circumstances, and their marital assets and debts. In addition, LaLinda testified about her hip injury and her current physical health. We will provide a more detailed recitation of the testimony of the parties and of the other evidence presented at the trial as necessary in our analysis below.

After the trial, the district court entered a decree of dissolution. The court divided the parties' marital assets and debts, awarded LaLinda alimony in the amount of $1,000 per month for a period of 36 months, and ordered each party to pay his or her own attorney fees.

Jeffrey appeals, and LaLinda cross-appeals.

III. ASSIGNMENTS OF ERROR

On appeal, Jeffrey assigns one error. He asserts that the district court erred in its division of the parties' marital property. Specifically, he argues that the district court awarded him an insufficient portion of the net marital estate.

On cross-appeal, LaLinda assigns four errors. Restated and renumbered, LaLinda's first three assigned errors allege that the district court erred in its valuation of one of Jeffrey's retirement accounts, in awarding her too little alimony, and in failing to order Jeffrey to pay her attorney fees.

[1] LaLinda's final assignment of error alleges, "The trial court erred by entering findings that show irregularity with the evidence that was admitted during the trial and the witnesses' testimony provided at trial during the lower trial court proceedings." This assigned error does not provide a clear indication of any specific error committed by the district court. A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered except to the extent that it is narrowed by the specific arguments asserted in the appellant's brief. See *State ex rel. Wagner v. Gilbane Bldg. Co.*, 276 Neb. 686, 757 N.W.2d 194 (2008). Upon our review of LaLinda's brief on appeal, we are unable to find an argument that corresponds with this general assertion of error. Because LaLinda provided only a vague assertion of error and because such error was not both assigned and argued, we do not address this error further. See, *State ex rel. Wagner v. Gilbane Bldg. Co., supra*; *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008) (stating that appellate court will not review errors that were not assigned and argued in party's brief).

We also note that in the argument section of LaLinda's brief, she asserts that the district court erred in failing to find that Jeffrey committed "fraud" when he refinanced the mortgage on the parties' marital home and when he purchased a new home after the entry of the decree. Brief for appellee at 16. LaLinda did not specifically assign as error these assertions. Accordingly, we decline to consider such assertions. *Shepherd v. Chambers*, 281 Neb. 57, 64, 794 N.W.2d 678, 683-84 (2011) ("errors argued but not assigned will not be considered on appeal").

IV. ANALYSIS

1. Standard of Review

[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, and this standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. See, *Millatmal v. Millatmal*, 272 Neb. 452, 723

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

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

2. Jeffrey's Appeal

(a) Acceptance of Benefits

Before we address the merits of Jeffrey's assigned error on appeal, we must first address whether he waived his right to appeal from the decree of dissolution by accepting the benefits of the judgment. After Jeffrey filed his notice of appeal, LaLinda filed a motion to dismiss Jeffrey's appeal on the ground that he accepted certain benefits awarded to him in the decree. Specifically, she argues that he accepted his portion of the proceeds from the sale of the parties' marital home and the proceeds from his 2011 bonus from Hawkins Construction.

[4] Under the general acceptance of benefits rule, an appellant may not voluntarily accept the benefits of part of a judgment in the appellant's favor and afterward prosecute an appeal or error proceeding from the part that is against the appellant. See *Liming v. Liming*, 272 Neb. 534, 723 N.W.2d 89 (2006). However, there are several exceptions to the general rule.

[5] The Nebraska Supreme Court has previously held that in a dissolution action, a spouse who accepts the benefits of a divorce judgment does not waive the right to appellate review under circumstances where the spouse's right to the benefits accepted is conceded by the other spouse, the spouse was entitled as a matter of right to the benefits accepted such that the outcome of the appeal could have no effect on the right to those benefits, or the benefits accepted are pursuant to a severable award which will not be subject to appellate review. *Id*. The reason for these exceptions is that to preclude appeal by the acceptance of the benefits of a divorce judgment, the acceptance of benefits must be of such a nature as to clearly

indicate an intention to be bound by the divorce decree. *Id.* And, there must be unusual circumstances, demonstrating prejudice to the appellee, or a very clear intent to accept the judgment and waive the right to appeal, to keep an appellate court from reaching the merits of the appeal. *Id.*

LaLinda first argues that Jeffrey has waived his right to appellate review because he accepted his portion of the proceeds from the sale of the parties' marital home. We conclude that Jeffrey's acceptance of such funds did not waive his right to appellate review, because LaLinda conceded at trial that Jeffrey was entitled to the amount he received from the proceeds of the sale of the marital home.

In the decree, the district court awarded Jeffrey $11,000 as his portion of the proceeds from the sale of the marital home. The court directed LaLinda's attorney to issue a check in the amount of $11,000 to Jeffrey and his attorney within 7 days of the entry of the decree. LaLinda's attorney issued a check to Jeffrey, and Jeffrey filed with the district court a document he entitled "Receipt and Satisfaction" evidencing his acceptance of these funds. As such, it is clear that Jeffrey accepted a portion of the benefits awarded to him pursuant to the decree.

However, at trial, LaLinda conceded that Jeffrey was entitled to at least $11,000 from the proceeds of the sale of the home. In fact, in her proposed property distribution balance sheet which she offered as an exhibit to the court, she argued that Jeffrey should receive $11,071.51 from the proceeds of the sale. The court essentially accepted LaLinda's proposed distribution when it awarded Jeffrey $11,000.

Because LaLinda conceded that Jeffrey was entitled to $11,000 from the proceeds of the sale of the marital home, we conclude that his acceptance of these funds prior to his appeal did not waive his right to appellate review.

LaLinda next argues that Jeffrey has waived his right to appellate review because he accepted the proceeds from his 2011 bonus from Hawkins Construction. We conclude that Jeffrey's acceptance of such funds also did not waive his right to appellate review, because LaLinda does not assert on appeal that Jeffrey is not entitled to this money and because Jeffrey's

acceptance of the money is not inconsistent with his position on appeal.

In the decree, the district court awarded Jeffrey the remaining one-half interest in the 2011 bonus he received as a result of his employment with Hawkins Construction. The remaining funds totaled almost $21,000. Although there is no evidence in the record indicating that Jeffrey accepted these funds prior to filing his appeal, he conceded in his response to LaLinda's motion to dismiss his appeal that he had received and accepted the money.

We first note that LaLinda does not argue in her brief on cross-appeal that the court erred in awarding the funds from the 2011 bonus to Jeffrey. In fact, LaLinda does not contest the property division at all except to the extent the court valued one of the retirement accounts held by Jeffrey.

Moreover, we do not find that Jeffrey's acceptance of these funds is in any way inconsistent with his position on appeal that he did not receive a large enough percentage of the marital estate. His acceptance of a portion of an award that he argues is unsatisfactory and inadequate does not clearly indicate an intention to be bound by the divorce decree.

Accordingly, we conclude that Jeffrey's acceptance of the funds from his 2011 bonus did not waive his right to appellate review. And, having found that Jeffrey did not waive his right to appellate review by accepting certain benefits awarded to him pursuant to the decree, we now address the merits of Jeffrey's assigned error on appeal.

(b) Division of Marital Property

On appeal, Jeffrey argues that the district court erred in its distribution of the net marital estate between the parties. Specifically, he asserts that "[t]he issue on appeal is whether the trial court erred when it awarded 84% of the marital estate to [LaLinda], but only 16% thereof to [Jeffrey]." Brief for appellant at 13. Jeffrey goes on to assert that such a property division is necessarily an abuse of discretion, "[b]ecause the trial court's property distribution fell outside of the one-third to one-half range required in all marital property distribution cases . . . ." *Id*. Jeffrey requests this court to order LaLinda to

pay an equalization payment to him which would ensure that he receives "at least" one-third of the net marital estate. *Id.* at 15. Upon our review of the record, we conclude that Jeffrey's assertions on appeal have no merit, because his calculations of each party's share of the net marital estate are in error.

[6] Under Neb. Rev. Stat. § 42-365 (Reissue 2008), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008). In this case, Jeffrey does not contest the district court's classifications of marital and nonmarital property or its valuation of any particular marital asset or liability. Rather, he focuses his argument on the third step of the division of property, the court's division of the marital estate between the parties.

[7,8] 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. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006). Section 42-365 provides, "The purpose of a property division is to distribute the marital assets equitably between the parties." That statutory section also indicates that in dividing the marital estate, a court should consider such things as the circumstances of the parties; the duration of the marriage; and the history of the contributions to the marriage by each party, including contributions to the care and education of the children and interruption of personal careers or educational opportunities.

Before we address Jeffrey's assertion that the district court erred in its property distribution because it did not adhere to the general rule to award each spouse one-third to one-half of the net marital estate, we must first address what evidence we are to consider in our analysis. In his brief on appeal, Jeffrey relies heavily on letters that transpired between the parties' attorneys and the district court prior to the entry of

the decree of dissolution. These letters were never filed in the district court. When Jeffrey filed his notice of appeal with this court, he also filed a request with the district court to reopen the record in order to include all of these letters. The district court denied his request. Jeffrey then requested a supplemental transcript be filed in this court, which transcript included his motion to reopen the record. His motion included, as exhibits, copies of the letters that transpired between the parties and the court.

We find that the letters are not properly before us, and, as such, we do not consider the substance of the letters in our resolution of Jeffrey's assigned error. The letters were never file stamped, nor were they included in the district court's case file. Moreover, the district court specifically declined to reopen the record to include the correspondence.

We now address Jeffrey's assertion that the court erred in its distribution of the net marital estate. Jeffrey asserts that he received only 16 percent of the marital estate. We find that Jeffrey's calculations are inaccurate because he erred in including the parties' attorney fees as a marital debt.

In his calculations of each party's share of the marital estate, Jeffrey included the parties' attorney fees as a marital debt. A marital debt has previously been defined by this court as a debt incurred during the marriage and before the date of separation, by either spouse or both spouses, for the joint benefit of the parties. *McGuire v. McGuire*, 11 Neb. App. 433, 652 N.W.2d 293 (2002). The attorney fees incurred by Jeffrey and LaLinda during the pendency of these dissolution proceedings do not constitute a marital debt. This debt was incurred after the parties were estranged and after LaLinda filed her complaint for dissolution of marriage. In addition, the attorney fees incurred by each party were clearly not for the parties' joint benefit.

When we recalculate each party's share of the net marital estate without including the attorney fees as a marital debt, we find that Jeffrey was awarded 36 percent of the marital estate, while LaLinda was awarded 64 percent of the estate. Accordingly, we find that contrary to Jeffrey's assertions on appeal, he did receive more than one-third of the net marital

estate and the district court adhered to the "general rule" that each spouse is entitled to one-third to one-half of the marital estate. And, upon our de novo review of the record, we affirm the decision of the district court concerning the division of the marital estate.

3. LaLinda's Cross-Appeal

(a) Valuation of Retirement Account

Evidence presented at trial revealed that Jeffrey had two retirement accounts as a result of his employment with Hawkins Construction. The first account was referred to as a "Hawkins International, Inc. 401k Profit Sharing Plan and Trust." Testimony at trial revealed that Jeffrey contributes to this account on a regular basis and that all of his contributions were made during the course of the parties' second marriage. Just prior to the time of trial, this account was valued at $59,701.85, and the district court awarded each party one-half of the amount of the account. LaLinda's appeal does not concern this account. Instead, she focuses her assertions on Jeffrey's second retirement account with Hawkins Construction.

The second account was referred to as a "Hawkins Employee Benefit Pension Plan." The parties agreed that this account existed prior to the time of the parties' second marriage in July 2000, but that Jeffrey has made regular contributions to this account since that time. Just prior to the time of trial, this account was valued at approximately $97,500.

During LaLinda's testimony, she initially asked that she be awarded one-half of the entire value of Jeffrey's pension plan. However, later in her testimony, LaLinda acknowledged that only a portion of that retirement account was marital property. She testified that it was her understanding only about 5 percent of the account had accrued during the parties' current marriage and that she was not asking to receive the total amount of that account. Instead, she was asking to receive only the 5 percent of the account that amounted to marital property.

In fact, on LaLinda's proposed property distribution balance sheet, she noted that a majority of that account, totaling approximately $92,000, was Jeffrey's nonmarital property. She

then indicated that she was asking for the marital portion of the account, which was about $5,000.

In the decree, the district court found that the marital portion of Jeffrey's pension plan totaled $36,333.33. The court divided the marital portion of the account equitably between the parties such that Jeffrey and LaLinda each received about $18,000.

On appeal, LaLinda argues that the court erred in its valuation of Jeffrey's pension plan. Specifically, she argues that the court erred in determining that a majority of the retirement account constituted Jeffrey's nonmarital property. LaLinda argues that because the parties remarried each other less than 6 months after the entry of the decree dissolving their first marriage, the original decree is void, and that, as a result, the majority of the retirement account is actually marital property subject to an equitable division between Jeffrey and LaLinda. Upon our review of the record, we find that LaLinda's assertion has no merit.

As we discussed above, the equitable division of property is a three-step process and the first step is to classify the parties' property as marital or nonmarital. See § 42-365. See, also, *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008). At trial, LaLinda ultimately conceded that most of Jeffrey's pension plan was nonmarital property. She testified it was her understanding that only about 5 percent of the funds in the account had accrued after the date of the parties' second marriage and that, as such, she was entitled to only 5 percent of the account. Her testimony was reiterated in her proposed property distribution.

The district court accepted LaLinda's concession that most of the retirement account was Jeffrey's nonmarital property. It then calculated the marital portion of the property and awarded both Jeffrey and LaLinda one-half of that amount. And, we note that according to the district court's calculation, LaLinda actually received more money from the account than she asked for, because she indicated that she was entitled to about $5,000 and the court awarded her more than $18,000.

[9] Because LaLinda conceded that a majority of the retirement account constituted Jeffrey's nonmarital property and because LaLinda received more money from the account than she had even requested, she cannot now assert that the court erred in its characterization or valuation of the retirement account. A party is not entitled to prosecute error upon that which was made with his or her consent. *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 997, 792 N.W.2d 484 (2011).

Additionally, we note that at trial, LaLinda's other requests concerning the property division were inconsistent with her current argument that the district court erred in failing to value the parties' property as of the date of their first marriage rather than at the date of their current marriage. Specifically, we point to LaLinda's testimony that she possessed a nonmarital interest in the parties' marital home because of a portion of the award she received under the original decree. Essentially, we understand LaLinda to assert that the original decree is valid except as it applies to the valuation of Jeffrey's retirement accounts. We decline to treat the original decree as partially valid and partially void as LaLinda's argument suggests.

Finally, we note that because we find that LaLinda cannot now contest the district court's characterization and valuation of Jeffrey's retirement account because she acquiesced in the court's decision through her testimony at trial, we do not specifically address the effect of the parties' remarriage less than 6 months after the entry of the decree dissolving their first marriage. This issue is not necessary for our disposition of the current appeal.

(b) Alimony

In the decree, the district court ordered Jeffrey to pay LaLinda alimony in the amount of $1,000 per month for a period of 36 months. The court explained its decision concerning the alimony award as follows:

> [LaLinda] experienced an injury to her hip in the summer of 2009, which has required multiple surgeries, and has interfered with her employment since the time of

> her injury. [She] testified that her hip injury causes her daily pain which has made it difficult for her to maintain employment since summer 2009, and that her physicians are unable to tell her whether she will need additional surgery on her hip in the future.
>
> [Jeffrey] has been continuously employed by Hawkins Construction throughout the parties' marriage, and his income has steadily increased over that time. [His] tax return reflected that he earned $146,123 in wages in 2010 . . . , and that he currently earns $39.90 per hour . . . .
>
> The Court finds that due to the length of the marriage, the need for [LaLinda] to seek additional training, the need for [LaLinda] to obtain full-time employment on a permanent basis, the income disparity of the parties, and in light of the evidence described hereinabove, [LaLinda] is hereby awarded alimony from [Jeffrey] in the sum of $1,000 per month for a period of thirty-six (36) months.

On appeal, LaLinda argues that the district court abused its discretion in its award of alimony. Specifically, LaLinda argues that due to the large disparity in the parties' incomes, the court should have awarded her alimony in the amount of $1,500 per month for a period of 5 years. Upon our review of the record, we cannot say that the district court abused its discretion in its award of alimony. As such, we affirm the decision of the district court.

[10,11] In awarding alimony, a court should consider, in addition to the specific criteria listed in § 42-365, the income and earning capacity of each party as well as the general equities of each situation. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004). The criteria in § 42-365 include

> 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.

Disparity in income or potential income may partially justify an award of alimony. *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004).

The record reveals that Jeffrey has earned a higher income than LaLinda throughout the parties' 11-year marriage. In fact, the district court's calculation of the parties' incomes reveals that at the time of trial, Jeffrey had a net monthly income of approximately $8,200, while LaLinda had a net monthly income of approximately $2,600. Based on the court's calculations, we agree with LaLinda's assertion that there is a large disparity between the parties' current incomes. However, we do not agree with her assertion that such a disparity, by itself, justifies a higher amount of alimony for a longer duration than ordered by the district court in the decree.

In awarding alimony, a court must consider more than disparity in the parties' incomes. The court must also consider other aspects of the parties' financial circumstances, in addition to their contributions to the marriage. In this case, there was evidence that despite Jeffrey's net monthly income, he is struggling to keep up with his financial obligations. As we discussed more thoroughly above, he was awarded less than 50 percent of the parties' marital estate in addition to being ordered to pay child support and alimony. There was evidence that LaLinda is also struggling to pay her financial obligations and that she has had to take out loans or accept charitable donations to help her pay certain debts. However, there was other evidence to demonstrate that LaLinda is currently employed full time and that she is capable of maintaining such a work schedule despite her health problems.

When we consider the evidence presented at the dissolution trial as a whole, in addition to the division of property determined by the district court, we conclude that the district court did not abuse its discretion in its award of alimony to LaLinda. The court clearly considered the disparity in the parties' incomes in addition to other factors contributing to the parties' current financial circumstances in making such an award, and we affirm the court's decision.

(c) Attorney Fees

In the decree, the district court ordered Jeffrey and LaLinda to pay their own attorney fees. On appeal, LaLinda asserts that the court erred in failing to order Jeffrey to pay for all or a portion of her attorney fees. Specifically, she argues that she cannot afford to pay her attorney fees, in part, because Jeffrey's actions during the dissolution proceedings "caused [her] to incur exuberant legal fee expenses." Brief for appellee on cross-appeal at 21. Upon our review of the record, we do not find that the district court abused its discretion in failing to award LaLinda attorney fees.

[12-14] An award of attorney fees is discretionary and will not be disturbed on appeal absent an abuse of discretion. See *Emery v. Moffett*, 269 Neb. 867, 697 N.W.2d 249 (2005). 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. *Id.* Customarily in dissolution cases, attorney fees and costs are awarded only to prevailing parties or assessed against those who file frivolous suits. *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001).

This was a particularly contentious dissolution case. Inside the courtroom, the parties were unable to come to any sort of agreement on any issue relevant to the dissolution proceedings. In fact, the parties requested the court to revise a temporary order concerning the parties' housing; the temporary alimony payments awarded to LaLinda; and custody of the parties' child, on multiple occasions during the pendency of the proceedings because the parties could not cooperate with each other. In addition, the record reveals that LaLinda filed multiple motions asking the court to hold Jeffrey in contempt for various actions.

Outside the courtroom, the parties did not get along any better. There was evidence that the parties had multiple confrontations during the proceedings, which ultimately resulted in the parties' obtaining harassment and protection orders against each other. This further complicated the parties' relationship

and communication with each other, because such orders prevented them from speaking to or making any sort of contact with each other. As such, the parties had to rely on their attorneys and the court to act as intermediaries.

Although LaLinda argues that the contentious nature of these proceedings was entirely Jeffrey's fault, the record reveals that both Jeffrey and LaLinda engaged in behavior which contributed to their poor communication and cooperation with each other. Essentially, the record reveals that both parties incurred costly attorney fees because they could not get along with each other and could not reach some sort of agreement on any issue. Based on this evidence, we cannot say that the district court abused its discretion in ordering each party to pay for his or her own attorney fees. We affirm the decision of the district court.

V. CONCLUSION

Upon our review of the record, we find that the district court did not abuse its discretion in its valuation and distribution of the marital estate, in its award of alimony to LaLinda, or in its failure to order Jeffrey to pay LaLinda's attorney fees. Accordingly, we affirm the decision of the district court in its entirety.

AFFIRMED.

RANDALL WISSING, APPELLEE, V.
WALGREEN COMPANY, APPELLANT.
823 N.W.2d 710

Filed November 20, 2012. No. A-12-361.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is 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. ____: ____. Findings of fact made by a compensation court trial judge are not to be disturbed upon appeal to a review panel unless they are clearly wrong, and

if the record contains evidence to substantiate factual conclusions reached by the trial judge, a review panel shall not substitute its view of the facts for that of the trial judge.

3. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
4. **Workers' Compensation: Limitations of Actions.** There are two exceptions to the statute of limitations found in Neb. Rev. Stat. § 48-137 (Reissue 2010): (1) where a latent and progressive injury is not discovered within 2 years of the accident which caused the injury and (2) where a material change in condition occurs which necessitates additional medical care and from which an employee suffers increased disability.
5. ____: ____. The 2-year limitations period contained in Neb. Rev. Stat. § 48-137 (Reissue 2010) is tolled when a claimant suffers a latent and progressive injury.
6. ____: ____. Neb. Rev. Stat. § 48-137 (Reissue 2010) will not begin to run until it becomes, or should have become, reasonably apparent to the claimant that a compensable disability was present.
7. ____: ____. If an employee suffers an injury which appears to be slight but which is progressive in its course, and which several physicians are unable to correctly diagnose, the worker's failure to file a claim or bring suit in time will not defeat his right to recovery, if he gave notice and commenced the action within the statutory period after he learned that a compensable disability resulted from the original accident.
8. **Workers' Compensation: Limitations of Actions: Proof.** The mere fact that an employee does not know the full extent of his injury from a medical standpoint does not make it latent so as to toll the running of the limitations period, particularly where medical facts were reasonably discoverable, and the burden of proving the injury to have been latent and progressive is upon the employee.
9. **Workers' Compensation: Limitations of Actions.** Where an injury is latent and progressive, the period of limitation for workers' compensation benefits begins to run when the true nature thereof is first discovered by the claimant.
10. ____: ____. In the case of a latent injury, the time for commencement of a workers' compensation action is 1 year after the employee obtained knowledge that the accident caused the compensable disability.
11. **Workers' Compensation: Limitations of Actions: Proof.** Where an injury from which a workers' compensation claim arises is latent and progressive, the statute of limitations is tolled until it becomes reasonably apparent, or should have become apparent to the employee, that a compensable disability is present, and the burden of proving the latent and progressive nature of the injury is on the employee.
12. **Workers' Compensation: Limitations of Actions.** Knowledge that there is a compensable disability, and not awareness of the full extent thereof, is the factor which controls in determining when the statute of limitations with respect to a workers' compensation claim begins to run.
13. **Workers' Compensation: Appeal and Error.** Where the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court.

Appeal from the Workers' Compensation Court. Affirmed.

Jenny L. Panko, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellee.

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

SIEVERS, Judge.

INTRODUCTION

Randall Wissing received an award of workers' compensation benefits from his employer, Walgreen Company (Walgreen), after the trial judge found that Wissing's claim for benefits arising out of a work-related accident on January 1, 2007, was not barred by the statute of limitations set forth in Neb. Rev. Stat. § 48-137 (Reissue 2010) because his injury was latent and progressive and therefore the statute of limitations was tolled. That decision was affirmed by the review panel of the Nebraska Workers' Compensation Court, and Walgreen now appeals to this court.

FACTUAL BACKGROUND

Wissing was involved in a work-related accident while employed by Walgreen on January 1, 2007, when he fell from a ladder and injured his right shoulder. On February 15 and July 19, Wissing underwent surgery by Dr. Scott Franssen for a torn rotator cuff and other injuries to his right shoulder. After a course of physical therapy, Wissing was given a permanent impairment rating of 15 percent on March 19, 2008. Dr. Franssen told Wissing that he would continue to have some shoulder pain, and on November 4, he wrote that Wissing would likely develop posttraumatic osteoarthritis, which can lead to ongoing pain and dysfunction. Walgreen paid all medical bills relating to the shoulder injury associated with the January 1, 2007, accident. The last payment was received by Wissing on April 30, 2008.

Wissing continued to experience pain of the same level, as Dr. Franssen indicated he would, until late July and early August 2010, when the pain increased substantially to the point where it was impossible for Wissing to sleep at night. On August 24, Wissing returned to Dr. Franssen to let him know he was experiencing an increase in pain over and above what was contemplated at the time he was originally released from care, as well as numbness and tingling. Dr. Franssen diagnosed Wissing with posttraumatic osteoarthritis and referred Wissing to Dr. Curtis Albers and Dr. Michael Longley for a full spine consultation and treatment. On February 2, 2011, Dr. Albers administered a cervical epidural steroid injection to Wissing, which cured the pain. On March 18, Wissing was examined by Dr. Longley, who concluded that Wissing had significant congenital spinal stenosis.

Wissing filed a complaint with the Workers' Compensation Court on October 20, 2010, alleging injury to his cervical spine as a result of the January 1, 2007, accident. At trial, the parties stipulated that the claim was barred by the 2-year statute of limitations found in § 48-137 unless there was an applicable exception. Walgreen argued that no applicable exception applied and that even if the claim was not barred, the injury was not compensable because it was not caused by the work accident. In response, Wissing claimed that the cervical spine injury was latent and progressive and that thus, the claim was not barred by the statute of limitations. Further, Wissing claimed that the cervical spine injury was caused by the January 1 accident.

At trial, Wissing testified that he continued to have lingering pain in his shoulder when he was released from Dr. Franssen's care, but that this was discussed and he was aware that the pain may not completely subside. The pain was the same dull pain until late July or early August 2010, when the pain became so severe that he could not sleep at night. Within a few weeks of the pain's becoming much more severe, Wissing returned to Dr. Franssen, who referred him to Dr. Albers and Dr. Longley for a spinal diagnosis.

At trial, reports from three physicians were accepted into evidence. In one such report, Dr. Longley, who diagnosed Wissing's spinal injury, wrote:

> Careful review . . . identifies that [for] his injury [on January 1, 2007], he was certainly treated for a shoulder injury and as part of the recovery started noticing increasing pain down the right arm. This was initially interpreted as apparently related to residuals from his shoulder. It was only more recently that he was evaluated for possible cervical spinal problems.
>
> . . . .
>
> . . . It is very difficult for me to ascertain whether the trauma is the source of his symptoms at this point or whether this was strictly related to his congenital stenosis and degenerative disc disease. This is especially true given the fact I am seeing him three years after his injury.

Dr. Ian Crabb, who examined Wissing on behalf of Walgreen on June 7, 2011, opined in another report:

> The patient's upper extremity pain, which began to get really severe for him in the summer of 2010 and eventually led him to receive an epidural steroid injection, was entirely related to his cervical spine. This is supported by the 100% relief he received from the epidural steroid injection done in February of 2011. The response to this injection proved that there are two separate conditions present viz, (1) the right shoulder rotator cuff tear and its sequelae and (2) cervical spine condition with radiculopathy. These are entirely separate problems. Although the patient feels he had some of the pain in the trapezius region at the time of the injury, the medical record does not support that as being a significant component of his injury. Furthermore, the patient had a substantial escalation in his symptoms in 2010 necessitating further medical treatment. The patient has underlying degenerative condition in the cervical spine as well as congenitally short pedicles, which predispose him to radiculopathy as the aging process affects the facet joints and intervertebral joints. There is no reason, or credible evidence

to link the cervical radiculopathy to his injury three years prior.

In contrast, Dr. Franssen, the physician who treated Wissing immediately after the accident, wrote the following on March 4, 2011:

> It is my opinion with a high degree of reasonable medical certainty that patient's current spinal diagnosis is directly related to his right shoulder injury on or about [January 1, 2007,] at Walgreens in Grand Island . . . . His initial office visit on [January 3, 2007], the patient complained of right sided pain, discomfort, decreased range of motion, decreased muscle strength and some numbness and tingling ever since then to the right upper extremity. We have taken care of his mechanical issues with his right shoulder, however, the persistent numbness, tingling and pain has persisted and was recently addressed and an MRI corresponds with his symptomatology in the diagnosis of severe bilateral foraminal stenosis, C4-7 with multi-level degenerative disc disease and severe central stenosis C4/5 noted on MRI on [January 19, 2011]. . . .
>
> . . . .
>
> . . . Patient did have numbness and tingling, decreased range of motion and function with pain on his initial presentation. We treated his shoulder and that is fixed. His pain, numbness and tingling, discomfort and weakness has persisted and was probably overlooked due to his shoulder and trying to save special studying and procedure cost. However due to his persistent symptomatology and objective findings, his MRI was warranted. His treatments are helping him and was [sic] definitely needed. Patient's symptomatology and objective findings can take time to present themselves as well as acute presentation.
>
> It is my opinion with a high degree of reasonable medical certainty with the information provided to me at this point in time that the patient's acute injuries on or about [January 1, 2007,] is [sic] the causation of his current symptomatology and that it was presented in his initial complaints. It has persisted and it has progressed to the

point which necessitated his current symptoms, diagnoses, clinical presentation and treatment plans.

PROCEDURAL BACKGROUND

The Nebraska Workers' Compensation Court found that Wissing's shoulder and spine injuries were caused by the January 1, 2007, accident and that the spine injury was latent and progressive and thus tolled the statute of limitations set forth in § 48-137. The court entered Wissing's award on September 14, 2011, ordering Walgreen to pay the medical expenses listed in exhibits 20 through 30 which were incurred for treatment of the right shoulder and cervical spine injuries, including future medical care. The review panel affirmed the Workers' Compensation Court's decision on April 11, 2012, and Walgreen appealed to this court on April 23.

ASSIGNMENTS OF ERROR

Walgreen alleges, renumbered and restated, that the trial court erred in (1) determining that Wissing's claim was not barred by the statute of limitations set forth in § 48-137 because his injuries were latent and progressive, thereby tolling the statute; (2) finding Walgreen liable for past and future medical expenses for the treatment of Wissing's cervical spine and right shoulder; and (3) finding Wissing's cervical spine condition was caused by the accident.

STANDARD OF REVIEW

[1] An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is 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] Findings of fact made by a compensation court trial judge are not to be disturbed upon appeal to a review panel unless they are clearly wrong, and if the record contains evidence to substantiate factual conclusions reached by the

trial judge, a review panel shall not substitute its view of the facts for that of the trial judge. See *Ideen v. American Signature Graphics*, 257 Neb. 82, 595 N.W.2d 233 (1999). With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Lovelace v. City of Lincoln*, 283 Neb. 12, 809 N.W.2d 505 (2012).

ANALYSIS

Latent and Progressive Exception to Statute of Limitations.

[4] Section 48-137 provides:

> In case of personal injury, all claims for compensation shall be forever barred unless, within two years after the accident, the parties shall have agreed upon the compensation payable under the Nebraska Workers' Compensation Act, or unless, within two years after the accident, one of the parties shall have filed a petition as provided in section 48-173. . . . When payments of compensation have been made in any case, such limitation shall not take effect until the expiration of two years from the time of the making of the last payment.

There are two exceptions to this statute of limitations: (1) where a "latent and progressive" injury is not discovered within 2 years of the accident which caused the injury and (2) where a material change in condition occurs which necessitates additional medical care and from which an employee suffers increased disability. See *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997).

[5-10] Wissing relied on the first exception to the statute of limitations, claiming that his spinal injury was latent and progressive. The 2-year limitations period contained in § 48-137 is tolled when a claimant suffers a latent and progressive injury. See *Gloria v. Nebraska Public Power Dist.*, 231 Neb. 786, 438 N.W.2d 142 (1989). The statute will not begin to run until it becomes, or should have become, reasonably apparent to the claimant that a compensable disability was present. *Id.* If an employee suffers an injury which appears to be slight but which is progressive in its course, and which several

physicians are unable to correctly diagnose, the worker's failure to file a claim or bring suit in time will not defeat his right to recovery, if he gave notice and commenced the action within the statutory period after he learned that a compensable disability resulted from the original accident. See *Thomas v. Kayser-Roth Corp.*, 211 Neb. 704, 320 N.W.2d 111 (1982). The mere fact that the employee does not know the full extent of his injury from a medical standpoint does not make it latent so as to toll the running of the limitations period, particularly where medical facts were reasonably discoverable, and the burden of proving the injury to have been latent and progressive is upon the employee. See *id.* Where an injury is latent and progressive, the period of limitation begins to run when the true nature thereof is first discovered by the claimant. See *Borowski v. Armco Steel Corp.*, 188 Neb. 654, 198 N.W.2d 460 (1972). In the case of a latent injury, the time for commencement of the action is 1 year after the employee obtained knowledge that the accident caused the compensable disability. See *Seymour v. Journal-Star Printing Co.*, 174 Neb. 150, 116 N.W.2d 297 (1962).

[11,12] In *Maxey v. Fremont Department of Utilities*, 220 Neb. 627, 371 N.W.2d 294 (1985), the court held that where an injury from which a workers' compensation claim arises is latent and progressive, the statute of limitations is tolled until it becomes reasonably apparent, or should have become apparent to the employee, that a compensable disability is present, and the burden of proving the latent and progressive nature of the injury is on the employee. Knowledge that there is a compensable disability, and not awareness of the full extent thereof, is the factor which controls in determining when the statute of limitations with respect to a workers' compensation claim begins to run. *Id.* The mere fact that an employee does not know the full extent of his injury from a medical standpoint does not make it latent so as to toll the running of the limitations period, particularly where medical facts were reasonably discoverable. *Id.*

In *Maxey*, evidence which showed that, following a work-related injury, the claimant sought medical treatment and was forced to take many days off was sufficient to support

the conclusion that his knee injury was not latent or progressive and therefore was not within the "latent and progressive exception" to the statute of limitations. According to a diary which the employee prepared from his employment records, he was off work in excess of 20 days from May 15, 1980, to May 15, 1982, all because of the pain in his knee. The employee took either sick leave or vacation time and did not make a claim for workers' compensation benefits. Other than the self-serving statements of the employee 3 years after the alleged accident, the court found there was no competent evidence presented that the knee injury was ever claimed to be work related. The employee knew he was suffering from some disability, as evidenced by the many days off, but he did not claim workers' compensation benefits, even though by his own admission he knew he was eligible for payment after 7 days. The court determined that he was certainly aware of the need for medical treatment, which he sought, but he never did claim to be entitled to compensation benefits for the particular injury.

The employee in *Maxey* cited to *O'Connor v. Anderson Bros. Plumbing & Heating*, 207 Neb. 641, 300 N.W.2d 188 (1981), and *Borowski v. Armco Steel Corp.*, 188 Neb. 654, 198 N.W.2d 460 (1972), in support of his claim that his was a latent and progressive injury. However, the court quoted *Thomas v. Kayser-Roth Corp.*, 211 Neb. 704, 320 N.W.2d 111 (1982), for the following distinction:

> "In both the *O'Connor* case and the *Borowski* case, and cases of similar import where we have applied the latent exception, the evidence disclosed that indeed the initial accident was either trifling in nature or appeared to be healed and subsequently the injury began to get progressively worse. Specifically, in *Borowski* the employee was advised by the treating physician that while he suffered damages to the muscles of his upper leg and . . . it would be a slow healing process, he should not be alarmed and would fully recover. After a period of months the pain subsided. Thereafter, when the pain reoccurred, he consulted a physician on seven occasions and was assured that his condition was normal. It was not until sometime

> later that he was referred to an orthopedic surgeon who performed a myelogram and discovered the herniated disc caused by the initial injury.
>
> "Likewise, in *O'Connor* the employee was initially injured in September of 1965 while laying a sewer line in a ditch. He received compensation for this injury and continued thereafter working. It was not until October of 1977, when operating a cigarette machine, that the employee's left arm went completely dead. From the time of the accident until the original award, plaintiff was examined or treated by five different doctors—a general practitioner, three orthopedic surgeons, and a neurologist—none of whom diagnosed his subsequent condition. He repeatedly consulted his personal physician and periodically received ultrasonic treatments and physiotherapy. He was advised by a treating physician: 'It's all in your head. Go see a psychiatrist.' It was not until the incident resulting in the complete disability of his left arm that the worker's condition was fully diagnosed following the administration of a myelogram."

Maxey v. Fremont Department of Utilities, 220 Neb. 627, 637-38, 371 N.W.2d 294, 301-02 (1985). The court in *Maxey* also cited *Thomas* for the proposition that the mere fact that an employee did not know the full extent of his injury from a medical standpoint does not make it latent, particularly where the medical facts were reasonably discoverable.

Maxey is not analogous to this case for a number of reasons. While Wissing knew that his shoulder injury was a compensable disability, he was treated and compensated for this particular disability at the time of the accident and did not experience until August 2010 any symptoms inconsistent with the original diagnosis to alert him that he had an additional compensable disability. At that point in time, Wissing's symptoms changed, as the pain grew far worse than it had been. This situation is unlike that in *Maxey*, where the symptom the employee experienced, pain in his knee, remained the same since the time of the accident. The employee in *Maxey* never received, or filed a claim to receive, compensation benefits other than for the care provided on the date

of the injury. However, the employee in *Maxey* continued to suffer from the knee injury and sought treatment during the limitations period which was paid for by his own insurance provider rather than his employer. In fact, the employee submitted documentation to his insurance provider indicating that the knee injury was *not* work related. However, the employee admitted that he knew the injury was work related, even though he did not realize its full extent, but he did not file a claim or receive any compensation from the employer which would have functioned to toll the statute of limitations beyond the employer's payment of medical expenses for the day-of-injury treatment. As Wissing points out, a critical difference is that the employee in *Maxey* continued to receive medical treatment for the injury at issue during the period of time in which he could have filed a claim. Unlike the employee in *Maxey*, Wissing did not receive medical treatment for the injury at issue—namely the spinal injury—until August 2010, and he filed his claim shortly thereafter. Unlike the employee in *Maxey*, Wissing did not experience ongoing symptoms indicating an additional compensable injury, seek treatment for these symptoms, and request that his insurance pay for such treatment.

Walgreen also cites to *Maxey* in support of the argument that Wissing's spinal injury was reasonably discoverable. Walgreen argues that according to Dr. Franssen's report of March 4, 2011, the cervical spine problem was presented in Wissing's initial complaints and was probably overlooked in an effort to treat the more obvious rotator cuff tear. However, Dr. Franssen's report years later does not mean that the medical facts indicating a spinal injury were reasonably discoverable to Wissing, who was treated by Dr. Franssen for a shoulder injury and told that the pain remaining in his shoulder was something he would have to live with. Wissing had no reason to question the lingering ache or speculate that its source was an undiagnosed spinal injury. It was beyond Wissing's control that Dr. Franssen did not discover the spine condition immediately after the accident, and thus, it was not reasonably discoverable by Wissing even if it was reasonably discoverable by Dr. Franssen in retrospect.

As Wissing points out, Walgreen attempts to expand the holding of *Maxey v. Fremont Department of Utilities*, 220 Neb. 627, 371 N.W.2d 294 (1985), beyond what was contemplated at the time the case was decided. Walgreen repeatedly relies on the proposition from *Maxey* that it is the knowledge of a compensable disability which controls, not the awareness of the full extent of the disability. Based on this maxim, Walgreen argues that it does not matter which specific body part was injured or that the cervical spine condition arose later. We find that the proposition of law from *Maxey* cannot be taken out of the context of the facts in which it was decided. In *Maxey*, the court was referring to the employee's knowledge of the compensable disability of the employee's injured knee, which he was aware of from the time of the accident, evidenced by his seeking out treatment paid for by his own insurance. Here, Wissing had no knowledge of a compensable disability relating to his spine, only to his shoulder, and that is why the spine injury is considered latent. While the spine injury may have manifested itself at the time of the initial treatment, it was overlooked by Dr. Franssen and the symptoms were diagnosed as part of the shoulder injury. The spinal injury did not manifest itself any differently until August 2010, when it became reasonably discoverable by Wissing because of the newly intense pain, at which point he sought medical treatment promptly.

Walgreen distinguishes *O'Connor v. Anderson Bros. Plumbing & Heating*, 207 Neb. 641, 300 N.W.2d 188 (1981), by arguing that Wissing was not misdiagnosed or in some way prevented from knowing that he had a claim for a compensable disability. However, the trial court found that Wissing was incompletely diagnosed, as Dr. Franssen missed the cervical spine condition in focusing on the more obvious injury, the torn rotator cuff. That finding of fact is not clearly erroneous, and we do not disturb it. Wissing was, in a sense, prevented from knowing that he had a claim for a compensable disability relating to his spine because he was told that the pain he was experiencing was consistent with his shoulder injury and would continue into the future. Thus, Wissing had no reason to discover the compensable disability of his spinal injury when he

had no reason to question Dr. Franssen's diagnosis until August 2010, at which point his symptoms changed and his pain became much more intense than he had been told to expect as a residual of his shoulder injury and surgery.

Wissing's case is more akin to *Borowski v. Armco Steel Corp.*, 188 Neb. 654, 198 N.W.2d 460 (1972), where the employee was compensated for what appeared to be a minor work-related injury in 1965, but it did not become apparent until 1970 that he suffered from a herniated disk as a result of the accident. The court found that the employee did not know he had a back ailment until April 1970, and he commenced the action within 1 year from that date, so the statute of limitations did not bar the action, because the injury was latent and progressive. As the court explained, this exception applies where it later becomes apparent that a much more serious injury resulted from the accident than was at first supposed and the plaintiff had no knowledge of the more serious injury:

> "'If an employee suffers an injury, which appears to be slight, but which is progressive in its course, and which several physicians were unable to correctly diagnose, his failure to file claim, or bring suit within the time limited by law, will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident.' . . ."

Id. at 657-58, 198 N.W.2d at 462.

Similarly, there can be little question that Wissing did not know he had a spine injury until August 2010. Although Wissing experienced ongoing dull pain, Dr. Franssen had attributed this symptom to the shoulder injury, and Wissing had no reason to question the pain that he was told he would experience. As in *Borowski*, it did not become apparent until years after the accident that a much more serious injury resulted from the accident than at first supposed, namely the spinal injury in Wissing's case. As soon as Wissing experienced symptoms incongruous with his initial diagnosis and treatment, he returned to his physician, and the cervical spine injury was subsequently diagnosed. Dr. Franssen failed to completely diagnose the injury until he referred Wissing to Dr. Longley

in August 2010. Wissing commenced his action within a year of his knowledge of the compensable disability of the spinal injury. Thus, we determine that the trial court did not err in finding that Wissing's spinal injury was latent and progressive and therefore tolled the statute of limitations.

Future Medical Care.

Walgreen claims that there is no dispute that Wissing knew by March 18, 2008, of both a compensable disability and need for future care resulting from the January 2007 accident. However, his knowledge related to the shoulder only. Wissing had no way of knowing of a compensable disability relating to his spine, including a need for future care, until his symptoms changed or worsened, leading to a proper diagnosis in August 2010. Walgreen argues that *Maxey v. Fremont Department of Utilities*, 220 Neb. 627, 371 N.W.2d 294 (1985), holds it is the knowledge of a compensable disability which controls, not the awareness of the full extent of the disability. However, we interpret *Maxey* to mean that the employee must have knowledge of a compensable disability in general, not necessarily how extensive the injury is. Here, Wissing did not know that he had a compensable spine injury at all, as he thought the only injury was to his shoulder, which had been treated. Walgreen argues that Wissing should have filed a petition within 2 years of the date of the last payment for future medical care. However, Wissing was prepared to live with the dull, tolerable pain that he was left with after the initial surgeries by Dr. Franssen and was unaware until August 2010 he would need future medical care related to his spine.

The trial court determined that Wissing's claim for future care was not barred by the statute of limitations, because his complaint was filed within 2 years of the date of Dr. Franssen's November 4, 2008, report that future medical care would be needed for the shoulder condition. Walgreen correctly argues that the statute of limitations begins to run from the date of the accident or the date of the last payment, not the date of an opinion regarding the need for future medical care. Thus, as stipulated, the statutory period expired on April 30, 2010, 2 years after the date of the last payment. However, as we

determined above, the spine injury falls within the latent and progressive exception to the statute of limitations, and therefore, the claim for future care, which is part of the claim for treatment, was proper when filed within a year of discovering that a compensable injury of the spine also resulted from the January 2007 accident. Thus, the trial court reached the correct result in finding that Walgreen was liable for future medical care relating to the spinal injury despite its mistaken use of the date of Dr. Franssen's report, November 4, 2008, from which to start the 2-year count when the statute of limitations would run. Instead, the count begins when the employee has knowledge that a compensable disability resulted from the accident. As determined above, Wissing became aware of the compensable disability of his spinal injury in August 2010.

Cervical Spine Condition Caused by Accident.

[13] Walgreen contends that there is no credible evidence of a cervical spine problem resulting from the January 2007 accident, but that is exactly what Dr. Franssen opines, and his testimony is certainly credible evidence, as he was the only physician that testified through report who had treated Wissing directly after the accident. Walgreen repeatedly contends that Wissing had no complaints of neck pain early in his treatment, specifically during his visit to the emergency room, and that there was no mention of ongoing numbness, tingling, or other significant symptoms at the last appointment for the shoulder or during the following 2 years. However, the record shows that Wissing did complain of pain, numbness, and tingling in his shoulder and arm at the initial appointment with Dr. Franssen and that Wissing continued to experience pain in his shoulder after he was released from care, as he had been told he would by Dr. Franssen. These are the same symptoms, albeit much more severe, that caused further diagnostic procedures that produced the diagnosis of a spinal injury. We note that Dr. Crabb, Walgreen's expert, reported that Wissing's upper extremity pain, rather than numbness and tingling, was entirely related to his cervical spine. Thus, the pain in the shoulder was related to the spine, and this was

identified by Wissing immediately after the accident. Thus, the trial court was not incorrect in finding that the cervical spine condition was caused by the January 2007 accident, as there was credible evidence supporting this factual determination. We recognize that Walgreen introduced expert opinion to contradict Wissing's expert's opinion, but our task is not to choose between competing and conflicting expert testimony. See *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003) (where record presents nothing more than conflicting medical testimony, appellate court will not substitute its judgment for that of compensation court).

CONCLUSION

Accepting the findings of fact made by the trial court judge, as they are not clearly wrong, we determine that the court did not err in finding that the latent and progressive exception applied in this instance to toll the statute of limitations, and therefore, Walgreen was liable for past and future medical expenses for the treatment of Wissing's cervical spine and right shoulder. Further, the trial court did not err in determining that the cervical spine condition was caused by the accident, a factual determination supported by the evidence.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JAMES GRIFFIN, APPELLANT.
823 N.W.2d 471

Filed November 27, 2012. Nos. A-11-1084, A-11-1085.

1. **Mental Competency.** Concerning the issue of competency of the defendant, it is the trial court's responsibility to assess and make a determination concerning competency when the issue is brought to the court's attention.
2. **Mental Competency: Attorney and Client.** Attorneys have a duty, when a question of a client's competency arises, to ensure that the client is competent or to bring to the attention of the court that there is a question of the client's competency.
3. **Mental Competency: Convictions: Sentences: Due Process.** Issues of competency of criminal defendants to be convicted and sentenced implicate fundamental and long-established due process principles.

4. **Mental Competency: Convictions: Due Process.** The conviction of an accused person while he or she is legally incompetent violates the constitutional guarantee of substantive due process.
5. **Mental Competency: Trial: Waiver.** A criminal defendant's assertions of competency cannot be dispositive because it is contradictory to argue that a defendant may be incompetent and yet knowingly or intelligently waive his or her right to have the court determine his or her capacity to stand trial.
6. **Mental Competency.** If facts are brought to the attention of the court which raise doubts about the competency of the defendant, the question of competency should be determined at that time.
7. **Mental Competency: Convictions: Due Process.** A conviction of a mentally incompetent accused is a violation of substantive due process.
8. **Mental Competency: Trial: Due Process.** Due process requires that a hearing be held whenever there is evidence that raises a sufficient doubt about the mental competency of an accused to stand trial.
9. **Mental Competency: Sentences: Attorney and Client.** Counsel's suggestion to a court that a defendant be evaluated, counsel's numerous suggestions to the court that counsel's interactions with the defendant suggested a competency or mental illness problem, and the defendant's statement to the court are sufficient to at least create a doubt about the defendant's competence to be sentenced.
10. **Mental Competency: Due Process: Notice.** When competency becomes an issue, due process requires that a defendant be afforded notice a hearing will be held and that the defendant receive a full, fair, and adequate hearing.
11. **Mental Competency: Sentences.** Included within the direction for a new sentencing hearing should be the question whether the defendant is competent to be sentenced at the time of that proceeding.

Appeal from the District Court for Douglas County: W. RUSSELL BOWIE III, Judge. Sentences vacated, and cases remanded for further proceedings.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

IRWIN, PIRTLE, and RIEDMANN, Judges.

IRWIN, Judge.

I. INTRODUCTION

James Griffin appeals an order of the district court for Douglas County, Nebraska, denying his application for post-conviction relief without conducting an evidentiary hearing in these two consolidated cases. We find that the record

demonstrates that a reasonable doubt concerning Griffin's competency to be sentenced was raised to the trial court at the time of Griffin's sentencing and that the trial court failed to comport with due process in addressing the matter. As such, we vacate Griffin's sentences and remand for further proceedings.

II. BACKGROUND

In 2005, Griffin was charged in separate dockets with burglary and first degree sexual assault. The two charges were consolidated at trial and remain consolidated in our discussion. Griffin entered pleas of no contest to the two charges and was ultimately sentenced to 5 to 10 years' imprisonment on the burglary conviction and 25 to 40 years' imprisonment on the first degree sexual assault conviction, to be served consecutively.

Prior to entry of pleas, Griffin's counsel had scheduled a competency evaluation, but Griffin refused to attend. At the time of his plea, Griffin represented to the court that he did not want to be evaluated and that his mind was clear. At the time of sentencing, Griffin's counsel expressed a concern about Griffin's competency and suggested the court consider having Griffin evaluated prior to sentencing. Griffin's counsel indicated that he had observed a number of behaviors and statements by Griffin suggesting that he "proceeds in and out of reality" and that the presentence investigation report appeared to be based on an assumption that Griffin had been evaluated, even though he had not been evaluated. The court denied the request and proceeded to sentence Griffin.

Griffin filed direct appeals from the convictions and sentences, in cases Nos. A-05-1245 and A-05-1246, and asserted on appeal that the district court had abused its discretion in imposing excessive sentences. Griffin was represented by the same counsel on appeal as at trial. This court summarily affirmed Griffin's convictions and sentences.

On June 6, 2011, Griffin filed motions for postconviction relief in both cases. Griffin asserted that he had received ineffective assistance of trial counsel. Griffin alleged that his trial counsel had been ineffective in a variety of particulars,

including by failing to ensure that Griffin was fully evaluated as to his mental competency to enter pleas in the two cases. Griffin made factual assertions that he had not attended the first mental evaluation scheduled by counsel, but that he had intended to attend a second evaluation, that another inmate had instead attended the second evaluation, and that counsel did not do anything when Griffin informed counsel what had happened. Griffin also alleged that he suffered from paranoid schizophrenia, was treated by prescription medication, was being housed in the mental health unit at the correctional facility, and had been untreated at the time of his offenses and pleas. Griffin alleged that there was a reasonable probability he would have been found incompetent to enter pleas and that his pleas were involuntary.

Griffin requested an evidentiary hearing on his postconviction requests. The State sought dismissal of the postconviction requests without an evidentiary hearing.

On November 29, 2011, the district court entered an order denying the requests for postconviction relief and denying the requests for an evidentiary hearing. In addition to finding no merit to Griffin's other claims of ineffective assistance of counsel, the court found that Griffin's claims concerning his mental competency did not merit an evidentiary hearing. In that regard, the court noted that Griffin had informed the court at the time of his pleas that he had never been treated for a mental illness and did not then suffer from a mental or emotional disability, that Griffin had indicated he did not want to be evaluated and was thinking clearly, and that he never sought to withdraw his pleas. The court held that it had "reviewed the entire record in this matter, and being fully advised, [found] that the records and files affirmatively show that [Griffin] is entitled to no relief on [his] allegations."

These appeals followed.

III. ASSIGNMENT OF ERROR

Griffin's sole assignment of error is that the district court erred in dismissing his requests for postconviction relief without granting an evidentiary hearing concerning Griffin's claims about his competency to enter pleas and be sentenced.

IV. ANALYSIS

Griffin argues that the district court erred in denying him postconviction relief without an evidentiary hearing because he raised sufficient allegations to demonstrate that the trial court had been made aware of facts which raised doubts about his competency and the trial court failed to sufficiently determine the question of his competency. We agree.

1. *State v. Johnson*

[1] We agree with Griffin that the procedural context of the present case is similar to that discussed in this court's decision in *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996), concerning the issue of competency of the defendant and the trial court's responsibility to assess and make a determination concerning competency when the issue is brought to the court's attention. In that case, Darrell Johnson appealed from the district court's denial of postconviction relief after holding an evidentiary hearing. Johnson had been convicted upon a plea to a charge of incest. In his postconviction pleading, Johnson raised issues related to the effectiveness of his trial counsel concerning counsel's advice and conduct related to questions about Johnson's competency at the time of the plea and sentencing.

In *State v. Johnson*, the evidence demonstrated that Johnson and his counsel had discussed his competency several times before the entry of his plea, but that Johnson had not wanted to raise the issue to the trial court. Nonetheless, a doctor did perform an evaluation which included a determination concerning Johnson's competency. The doctor authored a written report prior to the plea hearing, in which report the doctor diagnosed Johnson as suffering from posttraumatic stress disorder and dissociative disorder, with paranoia. The doctor's report also included descriptions of some of Johnson's symptoms and actions that had led the doctor to his conclusions. The doctor specifically questioned Johnson's ability to confer coherently and raised questions about Johnson's ability to assist in his own defense. The doctor opined that Johnson was not competent to stand trial.

At the plea hearing, the court questioned Johnson about the issue of his competency. The court asked Johnson if he felt he was competent to stand trial and enter a plea, and Johnson answered affirmatively. Johnson then made statements admitting that "'Darrell Johnson'" had committed the offense, acknowledging that he was "'Darrell Johnson,'" but indicating that he "'wasn't [t]here'" and did not have independent recollection of the events taking place. *State v. Johnson*, 4 Neb. App. at 780, 551 N.W.2d at 747. The court found him competent, accepted his plea, and convicted him.

At Johnson's initial sentencing hearing, his counsel requested a diagnostic evaluation prior to sentencing. His counsel noted that there were additional concerns about Johnson's mental or psychiatric problems raised in the presentence investigation report. The court granted the request and ordered an evaluation. That evaluation resulted in a report indicating that Johnson was "'confused and potentially dangerous.'" *Id.* at 781, 551 N.W.2d at 748. At the subsequent sentencing hearing, the court received the report and also heard testimony from Johnson. In his testimony, Johnson made what we described as "a lengthy, obviously disjointed, and mostly nonsensical statement" concerning former military service and prisoner status, despite there being no record he had actually been in the military. *Id.*

Despite the medical reports questioning Johnson's competency, his own testimony suggesting breaks with reality, and his counsel's expressed concerns about Johnson's competency, the court proceeded to sentence Johnson. Johnson did not file a direct appeal, but brought a postconviction action. At the conclusion of an evidentiary hearing where all of the foregoing was presented and discussed, the court denied postconviction relief.

[2] On appeal, we recognized that Johnson's postconviction claim was that his trial counsel had been ineffective in failing to properly advise him concerning the "'defense'" that he was not competent to stand trial. *State v. Johnson*, 4 Neb. App. 776, 783, 551 N.W.2d 742, 749 (1996). We noted that attorneys do have a duty, when a question of a client's competency arises,

to ensure that the client is competent or to bring to the attention of the court that there is a question of the client's competency. See *State v. Johnson, supra*. We concluded that because Johnson's trial counsel had sought and obtained evaluations of Johnson and had brought to the court's attention the issue of Johnson's competency, the record failed to demonstrate that counsel had been ineffective. *Id*.

[3-5] Despite finding no merit to the ineffective assistance of counsel issue raised by Johnson, we also recognized that issues of competency of criminal defendants to be convicted and sentenced implicate fundamental and long-established due process principles. See *id*. The conviction of an accused person while he or she is legally incompetent violates the constitutional guarantee of substantive due process. *Id*. See, also, *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). Moreover, a criminal defendant's assertions of competency cannot be dispositive because "'[i]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial.'" *State v. Johnson*, 4 Neb. App. at 786-87, 551 N.W.2d at 750, quoting *Pate v. Robinson, supra*.

[6-8] We noted that if facts are brought to the attention of the court which raise doubts about the competency of the defendant, the question of competency should be determined at that time. See *State v. Johnson, supra*. We recognized that two fundamental constitutional principles are implicated in such a situation. The first is that a conviction of a mentally incompetent accused is a violation of substantive due process, and the second is that due process requires that a hearing be held whenever there is evidence that raises a sufficient doubt about the mental competency of an accused to stand trial. *Id*.

On the facts of *State v. Johnson*, we concluded that the trial court's admission of the psychiatrist's report, the questioning of Johnson and his counsel, and the court's observations of Johnson in court at the time of Johnson's plea constituted a competency hearing. We concluded, however, that the hearing did not comport with fundamental due process because Johnson had not received advance notice that the issue would

be heard and because the court's reliance on Johnson's own representations of competency was not sufficient to overcome the uncontroverted psychiatric report. *Id*. We also noted that the additional information made available to the trial court at the time of sentencing further strongly suggested that Johnson was not competent. *Id*. We concluded that at the time of sentencing, the trial court had before it evidence which compelled a conclusion that there was reasonable doubt about Johnson's competency sufficient to require another competency hearing. *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996).

We noted that if the threshold level of doubt concerning the competency of a criminal defendant is reached at any time while criminal proceedings are pending, the matter of competency must be settled before further steps are taken. *Id*. Thus, the issue of competency was raised to the trial court and required resolution both at the time of Johnson's plea and at the time of Johnson's sentencing. See *id*.

We also specifically recognized that the issue of competency is not one that can be considered waived or procedurally barred by a defendant's failure to raise the issue on direct appeal. *Id*. We specifically concluded that postconviction relief was not precluded on the basis of a defendant's failure to have raised the issue in a direct appeal. *Id*. Thus, although we did not find merit to Johnson's assertion of ineffective assistance of counsel, we did find plain error in the trial court's failure to comport with due process in properly resolving the issue of competency when the issue was presented to the court. We found that the district court erred in denying postconviction relief. *Id*.

2. *State v. Dunkin*

We note that the Nebraska Supreme Court recently addressed another case wherein a defendant sought postconviction relief by alleging, in part, that his counsel had been ineffective for failing to request a mental health or competency examination to determine whether he understood the effect of plea proceedings. See *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012). In *State v. Dunkin*, there was nothing in the record

from Robert J. Dunkin's plea hearing to reflect that he was incompetent; there was no indication to raise a sufficient doubt about his competency to trigger the need for a competency hearing. Moreover, in seeking postconviction relief, Dunkin argued that a competency hearing "'would have seemed prudent, *even though nothing may have come of it*.'" *Id.* at 47, 807 N.W.2d at 757. The Supreme Court concluded that Dunkin failed to establish ineffective assistance of counsel, and the court did not analyze the case or record as posing any due process issues.

Despite the State's assertion to the contrary, we do not find *State v. Dunkin* instructive to our analysis in the present case. As noted, the Supreme Court did not suggest that any due process concerns were even raised, and the court's analysis suggests that the record of Dunkin's plea contained no evidence to suggest that there was any reason for the court to have doubted his competency at the time of his plea.

3. Present Case

In the present case, we conclude that the record demonstrates that there was not sufficient reasonable doubt raised to the trial court to raise a question about Griffin's competency to enter pleas. However, there was sufficient reasonable doubt raised to the trial court to raise a question about Griffin's competency at the time of sentencing. We also conclude that the record demonstrates the trial court failed to comport with due process in resolving the competency issue at the time of sentencing and that Griffin's sentences must be vacated and the matter remanded for a new sentencing hearing.

There are a number of similarities between the present case and *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996), concerning the issue of competency and the trial court's being alerted to a question about the defendant's competency. First, we note that Griffin, like Johnson, has couched his assertions in the postconviction proceeding as being matters of ineffective assistance of counsel. Like *State v. Johnson*, it appears that counsel was not ineffective because counsel did seek to determine competency and did bring the matter to the attention of the trial court. Nonetheless, just as the manner in which

Johnson raised the competency issue did not preclude our finding of plain error and determination that Johnson was entitled to relief, the manner in which Griffin has raised the issue here does not resolve the question of whether his competency and the trial court's consideration of it entitle him to postconviction relief.

Next, we note that Griffin's counsel, like Johnson's counsel, brought to the court's attention that there was a potential issue concerning his client's competency, both at the time of the pleas and at the time of sentencing. Prior to the entry of Griffin's pleas, his counsel requested and received a court order to have Griffin evaluated. At the plea hearing, the court engaged in a colloquy with Griffin about his failure to attend the scheduled evaluation. Then, at the time of sentencing, Griffin's counsel indicated to the court that Griffin had engaged in behaviors and comments suggesting incompetency, indicated to the court that counsel's position was that Griffin suffered a mental illness and was not grounded in reality, and referred to specific incidents of behavior. Griffin's counsel suggested to the court that an evaluation of Griffin's competency was warranted.

As such, the district court was correct in concluding that the record does not demonstrate that Griffin's counsel was ineffective. As we noted in *State v. Johnson*, however, that determination is not dispositive. The issues concerning competency at the time of the pleas and sentencing implicate due process concerns, and if the record demonstrates that those due process concerns were not satisfied, there may be plain error entitling Griffin to postconviction relief.

Unlike *State v. Johnson*, however, we conclude that the record in the present case does not demonstrate the same level of clear incompetency at both the time of the pleas and sentencing. Where the trial court in *State v. Johnson* was presented with sufficient evidence to demand a hearing and determination of competency consistent with due process both at the time of the plea and at sentencing, the trial court in the present case was presented with differing indications of doubt about competency at each stage.

(a) Griffin's Pleas

We first conclude that the record does not demonstrate that the trial court was presented with sufficient evidence to create doubt about Griffin's competency to enter his pleas. At the time of his pleas, although a competency hearing had been requested, there was not otherwise sufficient indication on the record that the trial court should have had a doubt about Griffin's competency.

In *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996), Johnson had been evaluated by a psychiatrist prior to entry of his plea and the psychiatrist had authored a report concluding that Johnson was not competent. At the time of the plea, the trial court did conduct a hearing of sorts on Johnson's competency to enter his plea, by receiving psychiatric reports, questioning Johnson and his counsel, and making observations of Johnson. Johnson's answers to questions at the time of the plea indicated that while he acknowledged that "'Darrell Johnson'" had committed the offense and that he was, in fact, Darrell Johnson, he also represented to the court that he was not present when "'Darrell Johnson'" committed the offense and that he had no independent recollection of the offense. *Id.* at 780, 551 N.W.2d at 747. The results of the uncontroverted psychiatric report, as well as Johnson's own responses to court questions, were sufficient to raise doubts as to his competency, which triggered the due process requirements that Johnson receive notice and a full, fair, and adequate hearing on competency.

In the present case, the court was advised by Griffin that he had never been treated for a mental illness and did not then suffer from a mental or emotional disability. Griffin represented that he knew a request for an evaluation had been filed, but that he did not want to participate in such an evaluation. There was no other testimony, evidence, or other indication to the trial court that there was a reasonable question about Griffin's competency. Thus, unlike in *State v. Johnson* where the record demonstrated that the trial court failed to comport with due process at the time of Johnson's plea, the record in the present case does not demonstrate that the trial court

was presented with sufficient indicia to create a doubt about Griffin's competency at the time of his pleas.

(b) Griffin's Sentencing

We conclude that the record in the present case does contain sufficient indication that the trial court was presented with information sufficient to raise a doubt about Griffin's competency at the time of sentencing. Similarly to *State v. Johnson, supra*, the record in the present case demonstrates that the trial court failed to comport with due process in resolving the competency issue at the time of sentencing.

In *State v. Johnson*, the trial court also conducted a hearing of sorts on Johnson's competency to be sentenced. When Johnson's counsel requested another evaluation of his competency prior to sentencing, the trial court granted the motion, ordered a diagnostic evaluation, and continued the sentencing. The trial court was notified of a variety of information in the presentence investigation report suggesting psychiatric and mental problems. The diagnostic evaluation resulted in an evaluation report in which the evaluator concluded that Johnson was confused and potentially dangerous. In addition, at the subsequent sentencing hearing, Johnson presented what we characterized as "a lengthy, obviously disjointed, and mostly nonsensical statement" concerning service in the military, "being sent to Vietnam to search for POW's," and hypnotism. *State v. Johnson*, 4 Neb. App. 776, 781, 551 N.W.2d 742, 748 (1996). We concluded that this information was sufficient to create a doubt in the trial court concerning Johnson's competency and to trigger due process rights to notice and a full, fair, and adequate hearing.

The present case is similar, even if the evidence was not as overwhelming concerning the defendant's competency. At the time of Griffin's sentencing, his counsel raised concerns about competency and again requested an evaluation, but the court denied the request and never again mentioned Griffin's competency. Counsel indicated concerns about information in the presentence investigation report and personal observations that caused counsel "to believe [Griffin] proceed[ed] in and out of reality." Counsel indicated that Griffin had never been

evaluated for mental illness and indicated that it was counsel's position that Griffin did suffer from mental illness. Counsel indicated that Griffin's comments "are often not grounded in reality."

Counsel provided the court with examples of what counsel believed were irrational behaviors. Counsel recounted one specific incident where, in dealing with Griffin on an unrelated matter, Griffin "would get so irrational and insistent that [counsel] had to actually throw [Griffin] out of [counsel's] office at one time." Counsel also noted that Griffin had been removed from drug court "because of the way he was interacting with people at the drug court" and because "[t]hey felt uncomfortable around him." Counsel pointed to Griffin's responses to questioning in preparation of the presentence investigation report as confirming his view that Griffin was mentally ill.

Griffin also provided a statement in his own behalf. Griffin's statement was as follows:

> I can just say that I feel that the crimes that I committed concerning my neglecting the law and going about my own manner and how I lived in life. You know, we can come to a point where when we do come to jail we do talk to people and one another a lot more than we do in the house, and it feels a lot more comfortable. You know what I mean? Because you just can't talk to a total stranger that you never slept with. You know what I mean? You're riding a bike and on the bus stop, you know, things of that nature. But when we come to jail, we get together, kind of, sometimes, and the brothers sit down and play spades.
>
> It feels kind of good because you know what's going on with the next person beside you instead of just sitting by a total stranger at the bus stop. So we get along kind of good in jail. You know what I mean? But it's a different story in the house. People kind of, you know, come toward each other sometimes, you know. You don't go through that type of ordeal when you're in jail because it's like we're all brothers. You know what I mean? And we're trying — just trying to survive the whole thing.

> What we're here for, we still don't know. But life is good as we know it, and I respect it.

[9] The record of Griffin's sentencing certainly does not contain information as clearly suggesting a lack of competency as the evidence in the record at the time of sentencing in *State v. Johnson*. Nonetheless, we conclude that counsel's suggestion to the court that Griffin be evaluated, counsel's numerous suggestions to the court that counsel's interactions with Griffin suggested a competency or mental illness problem, and Griffin's statement to the court were sufficient to at least create a doubt about Griffin's competence to be sentenced.

[10] As we held in *State v. Johnson*, 4 Neb. App. 776, 787, 551 N.W.2d 742, 751 (1996), "[i]f facts are brought to the attention of the court which raise doubts as to the sanity of the defendant, the question of competency should be determined at that time." When competency becomes an issue, due process requires that the defendant be afforded notice a hearing will be held and that the defendant receive a full, fair, and adequate hearing. See *id*.

In the present case, the trial court at sentencing simply denied the request for Griffin to be evaluated and did not take any further action concerning Griffin's competency. The court did not provide any notice that the issue would be resolved, did not order or receive any evaluations, and did not even make a finding concerning Griffin's competency to be sentenced. The record in the present case demonstrates that because there was sufficient indication to raise adequate doubt about Griffin's competency, Griffin was denied due process when the court failed to provide notice and a full, fair, and adequate hearing.

(c) Resolution

In *State v. Johnson, supra*, we concluded that Johnson's due process rights were violated at the entry of his plea, as well as at the time of sentencing. We concluded that, consistent with Neb. Rev. Stat. § 29-3001 (Reissue 2008), the appropriate remedy was to reverse Johnson's conviction and remand for a new trial.

[11] In the present case, we conclude that Griffin's due process rights were not violated at the time of his pleas because there was not sufficient indication at that time to raise a sufficient doubt about his competency to trigger the trial court's obligation to provide notice and a hearing. We conclude, however, that there was a sufficient indication to trigger that obligation at the time of Griffin's sentencing. As such, we vacate Griffin's sentences and remand the matter to the district court with directions to conduct a new sentencing hearing. Included within the direction for a new sentencing hearing should be the question whether Griffin is competent to be sentenced at the time of that proceeding. See *State v. Johnson, supra*.

V. CONCLUSION

We find that the district court erred in denying postconviction relief. The record demonstrates that there was sufficient indication to create a sufficient doubt about Griffin's competency at the time of his sentencing and that the trial court failed to comport with due process in resolving the competency issue. We vacate the sentences and remand the matter for a new sentencing hearing consistent with this opinion.

SENTENCES VACATED, AND CASES REMANDED FOR FURTHER PROCEEDINGS.

ERIN K. TOLAN KEIG, APPELLEE AND CROSS-APPELLANT, V. THOMAS E. KEIG, APPELLANT AND CROSS-APPELLEE.

826 N.W.2d 879

Filed December 4, 2012. No. A-11-776.

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 discretion.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

3. **Evidence: Appeal and Error.** When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Divorce: Property Division.** In a divorce action, the purpose of a property division is to distribute the marital assets equitably between the parties.
5. ____: ____. Equitable property division under Neb. Rev. Stat. § 42-365 (Reissue 2008) 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. **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 an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held.
8. **Divorce: Modification of Decree: Child Support.** The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child.
9. **Child Support: Rules of the Supreme Court.** The main principle behind the Nebraska Child Support Guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes.
10. ____: ____. The Nebraska Supreme Court has not set forth a rigid definition of what constitutes "income," but has instead relied on a flexible, fact-specific inquiry that recognizes the wide variety of circumstances that may be present in child support cases.
11. **Child Support: Taxation.** Income for the purpose of child support is not necessarily synonymous with taxable income.
12. **Child Support: Rules of the Supreme Court: Equity.** A flexible approach is taken in determining a person's "income" for purposes of child support, because child support proceedings are, despite the child support guidelines, equitable in nature.
13. **Child Support.** A court is allowed to add "in-kind" benefits, derived from an employer or other third party, to a party's income for child support purposes.

Appeal from the District Court for Nemaha County: DANIEL E. BRYAN, JR., Judge. Affirmed in part, and in part reversed and remanded with directions.

Richard H. Hoch, of Hoch, Partsch & Noerrlinger, for appellant.

Louie M. Ligouri, of Ligouri Law Office, for appellee.

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

INBODY, Chief Judge.

INTRODUCTION

Thomas E. Keig appeals from the decree of dissolution entered by the Nemaha County District Court, which dissolved his marriage to Erin K. Tolan Keig and divided the parties' marital property. Erin has also cross-appealed the district court's child support calculation in the decree of dissolution.

STATEMENT OF FACTS

Thomas and Erin were married on January 30, 2004, although the parties began residing together in 1996. Thomas and Erin are the parents of two children: a daughter born in 1994 and another daughter born in 1999. Thomas is not the older child's biological father, but he adopted her in 2007. Prior to trial, the parties were able to agree on several issues, including custody, visitation, and alimony. Thomas and Erin were not able to agree upon the division and distribution of the marital estate and the calculation of child support.

In 2002, the family moved from a farm near Papillion, Nebraska, to a farm located in Nemaha County. The farming operations at that site were called Mooarkegin Farms, LLC, hereinafter referred to as "the farm." A $250,000 home was built on the land for the family to reside in. Erin was the children's primary caregiver and took most of the responsibility for the home. Erin also earned a salary of $623 per month from the farm. Erin assisted with farmwork by cleaning out tree lines, removing dead trees, mowing, landscaping, filling trenches, cleaning out grain bins, and removing debris from around the farmhouse. Erin planted and maintained fruit trees and shrubs, in addition to a vegetable garden on the farm. Erin testified that she was Thomas' primary mode of transportation from field to field. Erin explained that she also took soil samples for plant diagnostics and consulted with an agronomist regarding disease and pests. Erin testified that she used the farm salary for family needs and did not save any of those funds for herself. The evidence indicates that during the marriage, $313,750.11

in farm machinery and equipment was purchased by the farm, for the farm.

Erin earned two associate degrees, one in nursery management and one in landscaping. Prior to the younger child's birth, Erin worked for 7 years as the lead waitress for a restaurant. Erin testified that she and Thomas agreed that Erin become a stay-at-home mother once the younger child was born. Erin testified that after the parties separated, she moved with the two children to Papillion, where she took a position with a garden center as an associate manager and landscape designer. Erin earns about $10.50 per hour, depending upon if she is working in or outside of the store.

Thomas was employed as a full-time farmer for the farm, farming approximately 800 to 900 acres of corn and soybeans, with 140 of those acres being rented by the farm. Thomas and the family were the only individuals living on the farm, and Thomas was solely responsible for the day-to-day operations. For approximately 12 years prior to trial, Thomas did not have any employment other than the family farming business. The farm paid Thomas a yearly guaranteed payment of $24,000 and provided Thomas and Erin with the home that was built on the farm, in addition to paying for utilities, vehicles, and fuel for the vehicles. Thomas testified that the home in which the family had resided on the property was paid for by the farm and worth approximately $250,000. Although Thomas later testified that his father had actually paid for the home by putting those funds into the farm operations, he did not refute that it was built specifically for the family. The farm also provided Thomas with health insurance. Thomas testified that he still lives in the home and that the home was a benefit of working for the farm. Thomas testified that he believed those additional benefits were worth an additional $20,000 per year. Thomas also testified that each year, he takes out an additional $40,000 from his investments to use for the family. Both parties testified that throughout the marriage, they maintained separate financial accounts and deposited their earnings from the farm into those separate accounts. Thomas testified that he paid for all the family bills with his money and that

Erin paid for personal items for herself and the children with her earnings.

Thomas explained that when the limited liability company (LLC) for the farm was formed, prior to the marriage, he injected capital into the entity, which capital he received from inheritances, but that he had not made any capital contributions to the farm during the marriage. Thomas testified that he had a percentage interest of ownership in the farm which he acquired through "donations from [his] father." Thomas testified that he held a personal percentage of 30.92-percent interest in the farm, that the remaining interest was held in two trusts, and that all of the interest was premarital because the contributions to the farm were made from inherited money and were made prior to the marriage. Evidence received by the court indicates that in October 1997, the LLC for the farm was formed, and that Thomas was assigned a 0.1-percent interest in the LLC. In December 1999, Thomas' father assigned Thomas a 40.422-percent interest in the farm, and in 2002, an additional 1.23 percent was assigned to Thomas. In 2002, Thomas' father assigned a 46-percent interest in the farm to Thomas' mother, who, in July 2004, assigned 40.189 percent to the "Thomas E. Keig Skip Generation Family Trust."

Thomas testified that the farm equipment listed on the farm's depreciation report, and from which Erin had compiled the list of farm equipment and machinery purchased during the marriage, had been purchased during the marriage, with the exception of a laptop computer which had been purchased during the separation. Thomas testified that during the separation, the farm had spent $200,000 on farm "inputs" such as seed, fertilizer, herbicides, and fuel. Thomas also testified that during the marriage, there had been buildings and improvements made on the farm, including a "Morton" building in 2009, which cost $89,325. Thomas testified that the farm paid for the erection of that building, although he later explained that he loaned the farm about $44,000 for the project and that the farm had been making payments to him, but that the loan had not been completely repaid at the time of trial. Thomas explained that the income generated from the farming

operations was used to purchase all of the farm machinery and buildings purchased during the marriage. Thomas testified that none of the income from the farm was invested for the family during the marriage, outside of the farming operations, because Thomas was trying to "keep the business going." Thomas further testified that the only marital property they had acquired during the marriage was two vehicles and some furniture.

All of the grain farmed by Thomas was stored onsite at the farm in grain bins. Thomas testified that he had 32,000 bushels of corn in storage from the 2010 crop year which had not previously been sold, but that 2 weeks prior to trial, he sold 5,000 to 6,000 bushels of his 2009 corn for around $7 per bushel. Thomas also testified that he had 14,000 bushels of soybeans in storage from the 2010 crop year, which he had not sold, but that during the previous year, Thomas had sold soybeans at $14 per bushel.

Thomas testified that he had six life insurance policies which he continued to pay for quarterly during the marriage with funds from a Wells Fargo investment account. Evidence indicates that the cash value of the six policies increased by $29,788.50 during the time of the marriage. Thomas had four Wells Fargo investment accounts which each contained significant funds. The first two accounts had balances of $378,004.67 and $1,448,753.93, respectively, and were funded by inheritances Thomas received. Thomas testified that no marital income was utilized to fund these accounts and that he annually receives interest and dividends from those accounts. The other two Wells Fargo accounts consisted of educational accounts for the older child and the younger child, containing $63,000 and $122,000, respectively. At the time of trial, the account statement indicated that the younger child's educational account had an increased value of $189,000, which Thomas testified was actually a "combined snapshot" of both of the children's accounts. Thomas testified that the funds in the children's educational accounts came from funds from either of the other two Wells Fargo accounts. Thomas also testified that he had an interest in the limited life estate of the Thomas E. Keig Skip Generation Family

Trust, but had never received any income distributions from said trust.

Tax returns indicate that in 2009, Erin earned $13,362, and that in 2010, Erin earned $14,462. Tax documents indicated that in 2009, Thomas received $24,000 from the farm, $29,598 in interest income, $36,596 in dividend income, and $18,189 in partnership income. In 2010, Thomas earned a total of $123,155 from the interest, dividend, and partnership income. The tax returns for the farm indicate that in 2009, the farm's ordinary income was a loss of $18,793 after deducting Thomas' $24,000 payment, and that in 2010, the ordinary income of the farm was $94,944 after deducting Thomas' $24,000 payment. Partnership tax documents also indicate that in 2010, the farm sold $444,389 worth of grain.

Joe Hower, a certified public accountant and the Keig family accountant, testified that he had been the family's accountant since 2006. Hower testified that Thomas owns a 30.8-percent interest, even though based on the assignments of interest in the farm, Thomas owns approximately 40.19 percent. Hower testified that Thomas' shares were diluted by money that had been placed in the farm by other family members. Hower testified that based upon the farm's records, Thomas was not receiving any more benefits than other members; however, Thomas' additional benefits, including the home and the utilities, should have been reported and reflected in the tax returns.

Ronald Parsonage, the family attorney since 1968, testified that he was involved with the formation of the family LLC in connection with the farm. Parsonage testified that Thomas' father purchased the farmland and machinery in the name of the farm. It was determined that Thomas would farm the property as the operating employee and would be paid a guaranteed payment of $24,000 per year. Thomas would also receive indirect benefits of vehicles, utilities, and a new home built on the land. Parsonage explained that by 2002, Thomas had received approximately 23-percent ownership in the farm from his father. Parsonage testified that currently, the family marital skip generation trust holds 33.8-percent

ownership, the Thomas E. Keig Skip Generation Family Trust holds 35.3 percent, and Thomas holds 30.9 percent. Parsonage explained that the difference in the ownership percentages offered for Thomas is explained by a capital contribution made by Thomas' grandmother that diluted the shares and changed the percentages. Parsonage testified that there was no document specifically drafted to show those changes and that he found the percentage information in Thomas' father's tax returns prior to 2002.

Bryan Robertson, an attorney and accountant in the appraisal business, testified that he was retained by Thomas to make a determination of Thomas' direct interest in the farm. Robertson explained that he utilized the evaluation date, trial balance, income tax returns, 1065 tax documents for the LLC from 2004 through 2010, amended and restated operating agreement, guaranteed payment agreement, articles of organization, depreciation schedules, yield reports, and an appraisal completed by Mark Caspers. Robertson opined that Thomas held a 30.9209-percent ownership in the farm, but explained that he did not make any assertions regarding an alleged 40.189-percent beneficial interest in the Thomas E. Keig Skip Generation Family Trust. Robertson explained that his valuation discounted percentages, which accounted for the difference in value from the documents which showed the assignments made to Thomas.

Robertson testified that he made two primary discounts in his valuation, a 25-percent discount for lack of control and a 35-percent discount for lack of marketability. Robertson testified that the capacity of the interest holder to liquidate was a "big deal" in taking into account the interest holder's ability to liquidate the property and the actual cashflow available from the property's capital. Robertson testified that the property was "land rich and cash poor." Robertson explained that he utilized Caspers' appraisal that the real estate of the farm was valued at $2,789,000 and $758,000 in chattel, with an additional $437,000 for grain inventory, which equated to an approximate total value of $4,227,000. Robertson testified that once he had reached the valuation of $4,227,000, he made

adjustments for the noncontrolling interest. Robertson testified that he multiplied the $4,227,000 by Thomas' interest of 30.9 percent, then by 25 percent for lack of control and 35 percent for lack of marketability. Robertson opined that once those discounts were applied, the fair market value of Thomas' share was $637,000.

Two different appraisals of the farm were submitted at trial. Caspers, a certified real estate appraiser, completed an appraisal of the farm and farming equipment, which appraisal broke down the farm's total land into three tracts. Three approaches were used to estimate the market value, from which Caspers utilized a reconciled value from all three approaches. Caspers estimated the value of "Tract One" at $743,000, "Tract Two" at $1,134,000, and "Tract Three" at $912,000. The appraisal also contained an estimated fair market value of the farm's chattel property at $758,000.

A second appraisal, completed by another certified appraiser, was received into evidence. The appraisal values the home and the tracts of land of which the farm is composed. The appraisal values the home built on the farm at $310,000 and the tracts of land at a total of $3,098,000. The second appraisal did not contain an estimate of the value of any chattel.

At the conclusion of the proceedings, the court ordered Thomas and Erin to have joint legal custody of the children, with Erin to have physical care, custody, and control, subject to the reasonable rights of visitation by Thomas. The court ordered Thomas to pay $1,669.99 per month in child support for two children and $1,167.38 per month for one child, and each party was awarded one tax exemption until only one minor child remained, at which time the parties were ordered to alternate claiming said exemption. A child support calculation was attached to the dissolution decree.

The court then ordered Thomas to pay Erin $250,000 as a "*Grace* award" pursuant to *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986), as a division of a prime asset gifted to or inherited by Thomas as part of a large farming operation. The court ordered that Thomas be awarded the entire farm and all assets owned and used by the farming operations

and, further, that he be awarded each of the items he listed on one exhibit as nonmarital assets. Those items include Thomas' 30.92-percent interest in the farm, the four Wells Fargo investment accounts, the life estate in the Thomas E. Keig Skip Generation Family Trust, three vehicles, all of the life insurance policies, and some personal property items. Erin was awarded all of her personal property, certain furniture and household goods from the family home, the 2007 Chevrolet Silverado, and any other items in her possession. Thomas was ordered to pay the balance due on the Silverado.

Pursuant to the parties' stipulation, Thomas was ordered to pay Erin $750 per month in alimony for 6 years. The court further ordered:

> There are presently accounts established with Wells Fargo by Thomas . . . for the benefit of both minor children, . . . pursuant to the Uniform Gift[s] to Minors Act, and those accounts shall remain the property of the children, respectively, and shall not be considered as part of the marital estate, nor shall such accounts be subject to division by or between the parties.

Thomas was also ordered to pay Erin's attorney fees, the appraisal costs, and all court costs.

Thereafter, Thomas filed a motion for new trial, alleging that the child support calculation was not supported by the evidence regarding the incomes, expenditures, and health insurance deductions; that the order to pay attorney fees and appraisal costs was not justified; that the *Grace* award was excessive; that the "court's order restricting [Thomas] as to the use of the accounts established . . . for his daughters" exceeded the court's jurisdiction; and that he should have been awarded both tax exemptions. The district court overruled Thomas' motion for new trial, and Thomas has timely appealed to this court. Additionally, Erin has cross-appealed.

ASSIGNMENTS OF ERROR

Thomas assigns that the district court abused its discretion by awarding Erin a *Grace* award and by ordering that the educational accounts he established were property of the children.

Erin has cross-appealed, assigning that the district court erred in its child support calculation.

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 discretion. *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009).

[2] An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Davis v. Davis*, 275 Neb. 944, 750 N.W.2d 696 (2008).

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

ANALYSIS

Grace *Award*.

Thomas argues that the district court abused its discretion by awarding Erin a *Grace* award in the amount of $250,000.

[4-6] In a divorce action, the purpose of a property division is to distribute the marital assets equitably between the parties. *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002); Neb. Rev. Stat. § 42-365 (Reissue 2008). Equitable property division under § 42-365 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. *Tyma v. Tyma, supra*. 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*.

The crux of Thomas' argument both at the trial level and in his argument to this court is that everything and anything having to do with the farm is premarital and not subject to any valuation or distribution by the district court. Thomas contends everything connected with the farm is premarital because all of the land was purchased by his father and all of Thomas' interest was inherited or gifted from family.

We discussed the concept of a *Grace* award at length 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. Further, in *Medlock v. Medlock*, 263 Neb. 666, 679, 642 N.W.2d 113, 125-26 (2002), the Nebraska Supreme Court used the following description of its decision in *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986): "[W]e ordered a cash award as compensation for the inadequacy of the marital estate."

The concept of a *Grace* award was also explained in *Charron v. Charron*, 16 Neb. App. 724, 730, 751 N.W.2d 645, 650 (2008), which provided:

> 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.

We review de novo on the record for an abuse of discretion the district court's order that Thomas pay Erin a *Grace* award. Upon said review, we disagree with Thomas' contentions that the $250,000 award was an abuse of discretion.

Our review of the record indicates that the parties were married from 2004 through 2011. While the marriage was not of a long duration, the assets which were acquired during the marriage for the farm are substantial and include approximately $437,000 in grain stored on the farm, $314,000 in farm machinery and equipment, $43,850 of personal property, a $90,000 Morton building with drywall (for which the farm owed Thomas $44,000), and $327,000 in bank accounts, which equate to more than $1.1 million. Furthermore, Erin devoted her time during the marriage to running the household and caring for the children, in addition to working as needed for the farm. Thomas' labor was devoted to operating and managing the day-to-day operations of the family farming corporation, in which he holds a 30.92-percent member interest. Thomas and Erin both earned nominal cash salaries from the farm, in addition to numerous other benefits provided by the farm, such as building and paying for a $250,000 home for the family to reside in and paying for utilities, vehicles, fuel, and health insurance. Thomas testified that all of the capital earned by the farm was infused back into the farm, which clearly resulted in an inconsequential marital estate. Thomas testified that it was his belief that the marital estate consisted only of two vehicles and some furniture, despite knowing that the investments and capital of the farm, valued at over $4 million, were increasing each year and that his premarital trust accounts, in excess of $1 million, would continue to provide him with a substantial source of income.

Thomas argues that the *Grace* award was excessive because his share of the farm was valued at trial at only $637,000, which equates to Erin's receiving a 39.25-percent *Grace* award. In *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986), the husband owned an 18.14-percent share of an $8.3 million farming corporation, which share was worth about

$1.5 million. The wife was awarded $100,000, which was approximately 7 percent of the husband's total interest in the farming corporation.

In *Walker v. Walker*, 9 Neb. App. 834, 622 N.W.2d 410 (2001), the husband owned a 21.77-percent interest in the stock of a large farming corporation valued at $6.8 to $9.1 million, with that interest in the corporation valued at $265,492. The couple in *Walker* had also accumulated a marital estate of $130,000 over the span of their 30-year marriage. The wife was awarded a *Grace* award of $60,000, which was slightly less than 25 percent of the husband's nonmarital estate. In the opinion, this court indicated that the farming operation owned 745.42 acres of land, "all of which must be considered in determining the value of the corporation—which in turn determines the value of [the husband's] corresponding ownership of 21.77 percent of the stock of that corporation." 9 Neb. App. at 848, 622 N.W.2d at 420.

In the Keigs' case, the district court did not adopt any of the valuations given at trial regarding the value of the farm, nor were any specific valuations made in the dissolution decree. Nonetheless, the record contains sufficient evidence in order for us to determine whether the *Grace* award was appropriate or not. It was Robertson who opined that Thomas' share was worth $637,000. Robertson opined that the farm was valued at $4,227,000, which included the real estate, chattel, and grain inventory. Caspers valued the farm at $3,547,000, which valuation did not include the grain inventory, while a third appraisal valued the farm at $3,098,000, which valuation did not include any chattel. In addition to these valuations for the farm, the record also includes, as discussed above, the addition of a $90,000 Morton building and $327,000 in corporation bank accounts.

Another consideration is that, while it is undisputed by the parties that Thomas owns a 30.92-percent interest in the farm, Thomas also owns interest in the farm through a trust. Thomas testified that the remaining interest in the farm is held in two trusts, one of which is the Thomas E. Keig Skip Generation Family Trust, which Thomas' mother assigned a 40.189-percent interest to in July 2004. Thomas is the

beneficiary of said trust, which, at the time of trial, had a balance of $1,448,753.93. The trust is irrevocable, and, although he will receive only the life interest from that trust, the terms of the trust cannot change and we are obligated to consider that the trust has some value to him. However, in reviewing the valuations given to the farm, we are also mindful that, as Robertson explained in reaching his valuations, Thomas is entitled to a discount in his interest, because Thomas does not own a controlling interest and the portion of his interest in the trust is only a life interest.

[7] However, if we were to agree with Thomas' arguments that the award is unwarranted, we would essentially be allowing him to withhold, behind the cloak of the family business, any capital from the farm which may have been earned or reinvested for himself and Erin and which would have been considered part of the marital estate. Thomas is the only individual working the farm, and all of the income earned from the farm is through his efforts. Simply because any income or gains made by the farm were reinvested in the farm does not mean that income is excluded from consideration by the court in making an equitable division of property. In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held. *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002). After considering all of the evidence in the record and based on the totality of the circumstances which include the real estate, chattel, grain inventory, Morton building, bank accounts, and trust fund, we find that Thomas controls an interest in the farm of about $1 million. Therefore, we cannot say that it was an abuse of discretion for the district court to award Erin a $250,000 *Grace* award.

Educational Accounts.

Thomas contends that the district court was without authority to control the educational investment accounts which he funded with inheritance proceeds. Thomas agrees that the district court was correct in determining that these two educational accounts were premarital assets, but argues that the

accounts should be controlled by Thomas and "not setoff by the court." Brief for appellant at 15.

As set forth in the statement of facts, the district court ordered:

> There are presently accounts established with Wells Fargo by Thomas . . . for the benefit of both minor children, . . . pursuant to the Uniform Gift[s] to Minors Act, and those accounts shall remain the property of the children, respectively, and shall not be considered as part of the marital estate, nor shall such accounts be subject to division by or between the parties.

At trial, the court specifically stated that "the accounts that are presently in the children's names will remain in the children's names and cannot be withdrawn except for educational purposes for the children."

We have carefully reviewed the record and can find no indication that Thomas' authority to control the accounts was in any way removed or restricted by the district court, and there is nothing to indicate that the district court ordered the accounts set off, as Thomas argues. Thomas testified that those educational funds were funded through other trust fund accounts which were funded by inheritances and gifts he received. The district court found that the children's educational accounts were premarital and ordered only that the accounts could not be withdrawn except for educational purposes for the children, which was exactly what Thomas testified that the terms of the accounts require. Therefore, we find that the district court did not err in its determination regarding the educational accounts and that this assignment of error is wholly without merit.

Child Support Calculation.

In the dissolution decree, the district court ordered Thomas to pay $1,669.99 per month in child support for two children and $1,167.38 for one child. In her cross-appeal, Erin argues that the district court erred by setting the child support calculations below the Nebraska Child Support Guidelines. Erin contends that the district court should have taken into account the

in-kind benefits that Thomas received from the farm and also the stored crops which had not yet been sold.

[8,9] The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child. *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004). The main principle behind the Nebraska Child Support Guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes. Neb. Ct. R. § 4-201. See *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

The Nebraska Child Support Guidelines provide that in calculating the amount of child support to be paid, the court must consider the total monthly income, which is defined as the "income of both parties derived from all sources, except all means-tested public assistance benefits which includes any earned income tax credit and payments received for children of prior marriages" and includes income that could be acquired by the parties through reasonable efforts. Neb. Ct. R. § 4-204. If applicable, earning capacity may be considered in lieu of a parent's actual income.

[10,11] The Nebraska Supreme Court has not set forth a rigid definition of what constitutes "income," but has instead relied on a flexible, fact-specific inquiry that recognizes the wide variety of circumstances that may be present in child support cases. *Gangwish v. Gangwish, supra*; *Workman v. Workman*, 262 Neb. 373, 632 N.W.2d 286 (2001). Thus, income for the purpose of child support is not necessarily synonymous with taxable income. *Gangwish v. Gangwish, supra*; *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003).

[12,13] A flexible approach is taken in determining a person's "income" for purposes of child support, because child support proceedings are, despite the child support guidelines, equitable in nature. See *Gangwish v. Gangwish, supra*. A court is allowed, for example, to add "in-kind" benefits, derived from an employer or other third party, to a party's income. See, *Workman v. Workman, supra*; *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998).

In the case of *Gangwish v. Gangwish, supra*, one of the issues revolved around the child support calculation, which was challenged by the husband with regard to the trial court's decision to utilize the income of the husband earned by a family farming corporation and the in-kind benefits also received by the family from the farming corporation. The Nebraska Supreme Court determined that it would be inequitable for the children to suffer because of the husband's decision to take a nominal salary and instead build equity in the farm, and the matter was remanded to the trial court for a new calculation.

In this case, the district court imputed a total monthly income of $9,380 to Thomas, which equates to a yearly income from all sources of $112,560. The 2009 tax return indicates that the parties' total income was $97,760 ($13,362 of which is Erin's salary from the farm). The 2010 tax return indicates that Thomas earned a yearly income from all sources of $123,155. As far as Thomas is concerned, that amount includes $32,000 in interest earned; $38,000 in dividends; and partnership earnings of $53,358. Thomas' average earning during those 2 tax years equates to approximately $104,000.

Although in comments made at the conclusion of the proceedings the district court indicated that the $24,000 guaranteed payment was also included in the calculation, we are unable to determine how the court calculated Thomas' total income, because this amount is not entirely found in his tax returns. The district court did not go into any further detail and instead stated, "I'm just going to use the gross figure [$]9,380 for him and [$]1,205 for her." Thus, we are unable to determine how the monthly amount of income for Thomas was reached and what sources were included in the calculation. Clearly, some sources of income are not included in the calculation, but whether that income is the in-kind benefits, the stored grain inventory, or any of Thomas' various other sources of income such as dividend or interest income, partnership income, or the guaranteed salary payment from the farm, we cannot ascertain. Therefore, we reverse the child support determination and remand the matter for a new determination of Thomas' income. On remand, when determining Thomas' income, the trial court

should consider—in addition to looking to Thomas' reported income including interest, dividends, partnership income, and the guaranteed payment of $24,000 by the farm—the in-kind benefits that Thomas receives from the farm and the stored grain inventory.

CONCLUSION

In conclusion, we find upon our de novo review of the record that the district court did not abuse its discretion by awarding Erin a $250,000 *Grace* award and by determining that the children's educational accounts were premarital. However, with respect to the child support calculation, we conclude that the district court erred in its determination of Thomas' income, and we remand the matter for a new income determination in accordance with this opinion.

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

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL C. BARTLETT, APPELLANT.
825 N.W.2d 455

Filed December 4, 2012. No. A-12-080.

1. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Sentence vacated, and cause remanded with directions.

Michael J. Decker for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

INBODY, Chief Judge.

INTRODUCTION

Michael C. Bartlett appeals the sentence imposed upon him by the Douglas County District Court. For the following reasons, we find that the district court erred by denying Bartlett 101 days' additional credit for time served.

STATEMENT OF FACTS

On March 12, 2010, Bartlett was charged with theft by receiving stolen property, over $1,500. Bartlett was arrested on March 12 and remained incarcerated until June 20, for a total of 101 days in custody. On October 5, Bartlett was found guilty of the charged offense and was sentenced to 4 years' supervised probation. On April 25, 2011, the State filed an information charging Bartlett with violating his probation.

On June 4, 2011, Bartlett was arrested on a new charge of terroristic threats in a separate case. Bartlett was incarcerated for both the new charge of terroristic threats and the previous probation violation and remained incarcerated for both violations from the date of his arrest until sentencing on January 3, 2012, totaling 213 days in custody.

The sentencing hearing for these two cases was consolidated by the district court, during which hearing Bartlett's counsel requested that Bartlett be given credit for the 213 days he spent in custody following his most recent arrest and that he also be given credit for the 101 days he was incarcerated in 2010 between his arrest and sentencing in the theft case. Thus, Bartlett requested a total of 314 days' credit for time served.

In the theft by receiving stolen property case, the district court resentenced Bartlett to 3 to 5 years' imprisonment with 213 days' credit for time served. In the terroristic threats case, Bartlett was sentenced to 20 months' to 5 years' imprisonment with 0 days' credit for time served, to run concurrently with the sentence imposed in the initial case. The district court determined that Bartlett was not entitled to the additional 101 days previously spent in custody from March 12 through June 20, 2010, prior to the imposition of the original sentence of probation.

Bartlett timely appealed both cases to this court, and the two cases were also consolidated on appeal. The State filed a motion for summary affirmance in case No. A-12-081 (terroristic threats case) and a suggestion of remand in case No. A-12-080 (theft case) suggesting that in case No. A-12-080, Bartlett should have received an additional 101 days' credit for time served. Bartlett filed a reply to the State's motion and suggestion, indicating that he joined in the suggestion for remand and, should the court follow the suggestion for remand, he would not oppose the motion for summary affirmance in case No. A-12-081. This court unconsolidated the two cases, summarily affirmed case No. A-12-081, and reserved ruling on the State's suggestion for remand in this case.

ASSIGNMENT OF ERROR

Bartlett's sole assignment of error is that the district court failed to give him credit for time served in custody.

STANDARD OF REVIEW

[1] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

ANALYSIS

In accordance with Neb. Rev. Stat. § 83-1,106(1) (Reissue 2008), an offender shall be given credit "for time spent in custody as a result of the criminal charge for which a prison sentence is imposed." Section 83-1,106(1) further enumerates circumstances which "shall specifically include, but shall not be limited to, time spent in custody prior to trial, during trial, pending sentence," and other situations during which an offender spends time in custody. Although the specific circumstances which occurred in Bartlett's case are not specifically set out in the statute, clearly the statute does not limit the possibility of other circumstances under which an offender spends time in custody.

For example, in *State v. Becker*, 282 Neb. 449, 450, 804 N.W.2d 27, 28 (2011), the defendant pled guilty to one count of motor vehicle homicide and was sentenced to 5 years of

probation, which included a requirement that he participate in a "'work ethic camp.'" The defendant later violated his probation, and the district court eventually revoked probation and sentenced him to 5 years in prison. The district court gave the defendant credit for time served in jail, but not for the 125 days served at the work ethic camp. The Nebraska Supreme Court determined that the defendant was in custody pursuant to § 83-1,106(1) and held that in addition to the credit given for time served in jail, the defendant was also entitled to custody for the 125 days served at the work ethic camp.

In this case, the record is clear that Bartlett was in custody for 101 days prior to being sentenced to probation for the conviction in this case. The record is also clear that upon his arrest for the probation violation in this case, Bartlett spent an additional 213 days incarcerated until being sentenced. Thus, in accordance with § 83-1,106(1), the district court should have credited Bartlett with a total of 314 days for time served as requested at the sentencing hearing, instead of denying the remaining 101 days from time previously served.

Therefore, the State's motion for remand is well taken. We vacate the sentence and remand the cause to the district court with directions to grant Bartlett those additional 101 days' credit, for a total credit for time served of 314 days.

SENTENCE VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

JAN K. PLOG, APPELLEE, V.
TERRANCE L. PLOG, APPELLANT.
824 N.W.2d 749

Filed December 11, 2012. No. A-12-016.

1. **Divorce: Property Division: Appeal and Error.** In actions for the dissolution of marriage, the division of property is a matter entrusted to the discretion of the trial judge, whose decision will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion.
2. **Divorce: Property: Words and Phrases.** Dissipation of marital assets is one spouse's use of marital property for a selfish purpose unrelated to the marriage at the time when the marriage is undergoing an irretrievable breakdown.

3. **Divorce: Property Division.** Marital assets dissipated by a spouse for purposes unrelated to the marriage after the marriage is irretrievably broken should be included in the marital estate in dissolution actions.
4. ____: ____. 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.
5. ____: ____. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
6. **Divorce: Alimony: Property Division.** Although alimony and distribution of property have different purposes in marriage dissolution proceedings, they are closely related and circumstances may require that they be considered together.
7. **Real Estate: Contracts: Vendor and Vendee: Equity: Title.** Upon the execution of a contract for the sale of real estate, the equitable ownership of the property vests in the vendee, even though the seller retains the legal title as security for deferred installment payments of the purchase price.
8. **Divorce: Property Division.** The manner in which property is titled or transferred by the parties during the marriage does not restrict the trial court's ability to determine how the property should be divided in an action for dissolution of marriage.
9. **Divorce: Property Division: Proof.** The burden of proof to show that property is nonmarital remains with the person making the claim.
10. **Divorce: Property Division.** When awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the gift or inheritance and is not considered a part of the marital estate. An exception to the rule applies where both of the spouses have contributed to the improvement or operation of the property which one of the parties owned prior to the marriage or received by way of gift or inheritance, or the spouse not owning the property prior to the marriage or not receiving the gift or inheritance has significantly cared for the property during the marriage.
11. **Divorce: Property Division: Livestock.** The "disposable" nature of a cow does not, by itself, mean that a set-aside for cattle owned by a spouse before the marriage is not allowable.
12. **Divorce: Property Division: Alimony.** Although the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately.
13. **Divorce: Property Division: Alimony: Child Support.** Alimony, support, and property settlement issues must be considered together to determine whether a court has abused its discretion.
14. **Divorce: Attorney Fees: Appeal and Error.** In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.

Appeal from the District Court for Garden County: DEREK C. WEIMER, Judge. Affirmed in part, and in part reversed and remanded with directions.

Jeffrey S. Armour, of Lane & Williams, P.C., L.L.O., for appellant.

J. Leef, of Sonntag, Goodwin & Leef, P.C., for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

PER CURIAM.

I. INTRODUCTION

Terrance L. Plog appeals from a decree of the district court for Garden County, Nebraska, in which the court dissolved his marriage to Jan K. Plog, awarded alimony to Jan, and attempted to divide the parties' marital and nonmarital estate. Terrance alleges that the court erred (1) in its determination and division of the marital estate, (2) in finding that Jan did not dissipate marital assets, (3) in its award of alimony to Jan, (4) in its award of attorney fees to Jan, and (5) in its denial of Terrance's motion for new trial. Because we find that the trial court erred in its handling of the marital estate and in its award of alimony, we remand with directions for additional findings and correction of the errors we discuss herein.

II. FACTUAL BACKGROUND

Terrance and Jan were married on May 26, 1990. Terrance was 62 years old at the time of trial, and Jan was 59 years old. No children were born or adopted over the course of the parties' 20-year marriage. Jan had custody of a daughter from a previous marriage, who was age 6 when the parties married. At some point before graduating from high school, Jan's daughter, Corey, legally changed her last name to Plog. Although Terrance never legally adopted Corey, they claimed each other as father and daughter.

When the parties married, and continuing through the time of trial, Terrance was working as a veterinarian at a veterinary clinic he owned (vet clinic). The vet clinic and the trailer home which served as the parties' residence throughout their

marriage are located in Garden County on an approximately 70-acre tract of land, often referenced at trial and throughout this opinion as the "Home Place." In 1981, Terrance and his first wife entered into a purchase agreement to buy the Home Place for $75,000, with a downpayment of $15,000, 10-percent interest per year, and a payment period of 10 years. Terrance was awarded the Home Place in his first divorce in approximately 1984. Terrance testified that he made annual payments on the Home Place to an attorney in Ogallala, Nebraska, who acted as an escrow agent. The payments continued after his first divorce, and then he and Jan made the two final payments of $6,000 each after they were married. After the final payment, Terrance received a warranty deed for the Home Place titling the property in joint tenancy with Jan. Terrance's testimony was that he did not intend such to be a gift to Jan.

When Terrance and Jan were married in 1990, the trailer home and an older vet clinic building were present on the Home Place and Terrance had just completed construction of a newer vet clinic building on the property. Terrance received a small business loan before the parties' marriage to finance constructing the new vet clinic building. Terrance testified that the majority of the small business loan was paid off before his marriage to Jan and that the remaining balance was paid off after their marriage by borrowing against the value of his life insurance policy. The details such as amounts, dates, interest rates, payoff amounts, and dates thereof on both of such loans are not in the record. Improvements to the trailer home in which the parties lived during the marriage were completed by the parties during the marriage; however, the testimony was inconsistent as to the extent of such, except that there were no additions made to expand the structure.

There were a total of six parcels of real estate at issue in this case. The parties executed a joint property statement (JPS), which included designations for all six parcels of real estate. The Home Place was designated on the JPS as parcel "K5." Terrance and Jan purchased the five other parcels of real estate in Garden County during the course of their marriage, and on the JPS, they designated those five parcels of real estate as

parcels "E1" through "E5," listed in section "E," the real estate section of the JPS.

The legal description used in the JPS for parcel E3 is identical to that set forth in exhibit 42, a purchase agreement for a 3.27-acre tract adjacent to the parties' other real estate and conveyed jointly to Terrance and Jan in 1995 for a purchase price of $3,270. However, underneath the legal description for parcel E3 on the JPS, the following text appears: "House & Clinic (includes new clinic and improvements)." Jan testified that such text was her addition to the description of parcel E3 in the JPS. However, the overwhelming weight of the evidence is that the trailer home and both the old and new vet clinic buildings were located on the 70-acre Home Place property, designated on the JPS as parcel "K5," and were present and existing when the parties married. Therefore, these structures could not have been on the 3.27-acre parcel E3 purchased after the marriage. Jan's notation concerning parcel E3 in the JPS was a mistake on her part. In addition to the mistaken notation Jan made about parcel E3 containing the home and vet clinics, Jan assigned in the JPS a value of $133,085 to parcel E3. Terrance assigned parcel E3 a value of $3,000. Terrance's testimony reflected that parcel E3 was, indeed, the 3.27-acre parcel purchased after the parties' marriage.

As noted above, parcel K5, the Home Place, was purchased via land contract and largely paid for prior to this marriage. The evidence is that $96,000 of the $108,000 total paid (which we assume includes interest in addition to the purchase price of $75,000) was paid before Terrance and Jan were married. Two payments of $6,000 were made after the parties married, after which the Home Place was deeded to the parties in joint tenancy in 1991. Parcel K5 is listed in section "K" of the JPS, entitled "Assets of Husband at the Time of the Marriage."

There is no evidence to indicate how the parties paid for the parcels of land that they acquired during the marriage. In the JPS, Jan indicated that parcel K5 was "gifted to Husband and Wife from Husband." The JPS does not list either a "husband or wife" valuation for parcel K5, nor did the court make any finding of value for parcel K5. Terrance, on the other hand,

maintains that parcel K5, which the evidence shows to be the Home Place, is his separate premarital property.

The district court's decision includes the following:

> The parties have submitted a [JPS] to the Court. This [JPS] has been completed by the Court reflecting the allocation of the assets and debts reflected therein. This document also reflects the Court's rulings regarding the classification of disputed items of real and personal property. This is attached hereto as Attachment 2.

There was no document attached to the decree and labeled "Attachment 2," although there was an "Attachment 1." We assume that the court was referring to what is in our record as "Attachment 1." We note that the trial court made no findings on its "completed" version of the JPS that establish valuation of the parcel designated as parcel "K5," nor is parcel K5 specifically awarded to either party. In the trial court's "completed" version of the JPS, however, parcel E3 was awarded to Terrance and valued using Jan's JPS valuation of $133,085.

It appears that the trial court was mistaken, similarly to Jan's mistake noted above, in treating the parcel designated as parcel "E3" as the Home Place. As a result, the trial court's award specifically awarded parcel E3 to Terrance, but valued it as if it were parcel K5, and did not specifically award parcel K5 to anyone or value parcel K5. It appears that the court was attempting to award the Home Place (parcel K5) to Terrance and to value it at approximately $133,000; it is not clear how the court intended to dispose of the parcel of property that actually constituted parcel E3 or what value the court intended to attribute to the parcel that actually constituted parcel E3.

In addition to Terrance's veterinary practice, the parties conducted farming, ranching, and "calving" on the Home Place and their adjoining properties. Terrance testified that he had 1 or 2 registered cows at the time the parties married and about 8 to 10 unregistered cows. According to Terrance, the parties had at the time of separation 40 registered cows, 7 unregistered cows, 1 herd bull, and 1 yearling bull. Terrance and Jan were both involved with the calving, branding, and vaccination of

their own animals, and Jan maintained the vet clinic's and the agricultural operation's bookwork, excluding tax returns. Tax returns were completed by a paid preparer. There are copies in evidence of thousands of checks from the parties' farm account and vet clinic account from as far back as 2006. All of these checks were signed by Jan until May 21, 2010, when Terrance signed two checks. The parties separated and Jan left on May 3, 2010.

The parties converted approximately 30 acres of dryland farm ground located within the Home Place parcel to irrigated land in 2002. They did so by placing a four-tower pivot irrigation system on the property. The State condemned 4.68 acres of this irrigated farmland located within the Home Place tract in 2004 "for State highway purposes." Payment for the condemned property in the amount of $130,486 was made jointly to Terrance and Jan. The proceeds from the condemnation were used to pay off the small business loan Terrance took out to pay for the new vet clinic building. As noted above, we have no other details about the payoff, nor do we have other details about the loan at its inception. The condemnation proceeds were also used to purchase property for the farming/ranching business, including a feed wagon, a tractor, and a grain cart. Terrance testified that $30,000 to $40,000 remained from the condemnation proceeds after those expenditures and that he believed such funds were placed in one of the parties' joint bank accounts accruing interest.

Jan's educational background includes having graduated from high school and having taken courses in accounting and "office work" for a period of about a year. Prior to marrying Terrance, Jan worked at a school in Illinois where she "helped with the kids. [She] worked in the office, took attendance." She also did secretarial work in North Platte, Nebraska. After the parties' marriage, Jan worked for a local newspaper for about a year as a typist; thereafter, she was involved in the parties' farming/ranching operation and kept the books for it and the vet clinic. Terrance testified that Jan received $1,000 per month in wages for her work at the vet clinic from 1991 to 2007. Jan's testimony was that she received such wages for only 18 months during the parties' entire marriage. After

Social Security and Medicare were deducted from her $500 paycheck, $461 was deposited into the parties' farm account. Terrance testified that the vet clinic account was used to "sustain the vet clinic business" and "[t]o pay for the bills incurred by the vet clinic."

In Terrance's answer and counterclaim to Jan's complaint for dissolution of marriage, he alleged that Jan had dissipated approximately $250,000 of marital funds, which she expended on behalf of her brother, John Ready (John), and her daughter, Corey. Jan testified at trial that she gave $30,300 to Corey from approximately late 2006 to early 2010. Terrance testified that he was unaware of these transfers to Corey and that he would not have agreed with them had he known they were occurring. He testified that Corey struggled with substance abuse beginning in her last year of high school and continuing thereafter. He testified that he, Jan, and some other family members eventually paid for Corey to go to drug treatment, but that Corey left treatment early, after 6 months. Terrance testified that from 2003 until their separation, he and Jan "constantly" had disagreements about Jan's enabling Corey. Terrance testified that he "tried" to make it clear to Jan that they would give no more assistance to Corey. He testified that he was able to get bank statements dating back to 2006, which reflected money transfers and checks Jan made to Corey from 2006 through 2010, of which he had been unaware. He further testified that bank statements prior to 2006 are on microfilm and difficult to access.

Jan testified that she gave John $66,420 from late 2006 to early 2010. Jan's testimony was that John and his wife ran into personal and financial difficulties after John moved to Nebraska from Arizona to start his own plumbing business. With regard to the personal difficulties, John's wife was diagnosed with terminal cancer and had died by the time of trial, and there is evidence that John had issues with gambling and alcohol. Jan testified that she and Terrance helped John start a plumbing business through financial transfers. Jan testified that John did work on the parties' home and vet clinic, including repiping under their trailer home, remodeling their kitchen, working on their washer and dryer, putting rock in

the driveway of the clinic, and performing some work on the ventilation in the clinic. Jan testified that around $16,000 to $17,000 of the $66,420 she gave to John was to compensate him for the work he did and that the rest was for loans she took out to assist John and his wife. Terrance testified that he had to redo some of John's work because of its poor quality.

Terrance testified that he loaned John money on three separate occasions. Terrance testified that John repaid him for the first loan, in the amount of $1,000, but that John did not repay him for the other two loans, in the amount of $1,500 apiece. Terrance testified that he decided not to deal with John anymore after John failed to repay the second and third loans, because "[y]ou couldn't believe a word he said . . . ."

In the spring of 2010, the parties were moving cattle on their property when Jan injured her ankle. Terrance testified, "We were loading cattle and she was on the fence. She stepped off the fence to get in the pickup to go with us and she sprained her ankle." Jan testified that because they did not have health insurance, she did not get medical treatment for her ankle at that time. Shortly thereafter, on May 3, 2010, the parties separated and Jan moved to Utah to stay with Corey. Jan testified that she visited a doctor in Utah and was informed she had ligament damage to her ankle which required surgery, but that the doctor refused to repair it unless and until she had health insurance. She testified that she has been unable to work since she left the farm due to her ankle injury and that she has not sought employment.

III. PROCEDURAL HISTORY AND TRIAL COURT DECISION

Jan filed for dissolution of marriage on May 27, 2010. Trial on the dissolution action was held on July 21 and August 11, 2011. A decree of dissolution, parts of which we have already discussed, was filed in the district court on November 18. The property division section of the decree provides in part:

> The most difficult item to properly classify is the real estate that the Court will refer to as the "home place". [Footnote number omitted.] This property was in the possession (if not title) of [Terrance] at the time of the

> marriage. This was property on which his home and office were located. At the time of the marriage of the parties, [Terrance] had not yet completed the purchase of this real estate as he had additional payments to make pursuant to his first divorce. The parties jointly made the final payment after the marriage.

In a footnote to the decree, within the quote immediately above, the court mistakenly used the legal description of the 3.27-acre parcel, identified on the JPS as parcel E3, as the legal description for what the court indicated was the "home place." In the court's narrative, it is clear that when the court discussed the Home Place, it intended to reference the 70-acre parcel which was purchased via land contract and which Terrance was awarded in his first divorce. The district court found that it "cannot make a finding other than that [the Home Place] real estate is marital property," citing *Smith v. Smith*, 9 Neb. App. 975, 623 N.W.2d 705 (2001) (exception to separate property rule applies where both spouses contribute to improvement or operation of property which one spouse owned prior to marriage). The court reasoned that the purchase of the real estate was not completed until after the parties were married, title to the real estate did not transfer until the purchase was complete, and, when title did transfer, it transferred to both parties jointly. The court further reasoned that even if the court were to find that the Home Place property had been Terrance's premarital asset, Terrance failed to meet his burden of proving "its premarital value and the amount claimed now." The decree further recites:

> There is no question in the evidence that marital funds were used to pay off debts associated with this real estate and to improve the real estate. Whatever "value" the real estate had prior to the marriage that could conceivably be pre-marital, that value was consumed throughout the marriage by [the] use of marital funds to satisfy pre-marital debts associated with the real estate as well as the improvements/changes which took place: improvements to residence, condemnation action, and conversion to irrigated land.

The court, via attachment of its "completed" version of the parties' JPS, specifically awarded parcels E2 and E3 to Terrance and valued the two parcels at a total value of $276,085. The parties stipulated before trial that parcel E2 had a value of $143,000. To arrive at the figure of $276,085 for the value of these two parcels awarded to Terrance, the court would have to have used the stipulated value of parcel E2, $143,000, plus Jan's value assigned to parcel E3 of $133,085. This is consistent with our comments above that the trial court appears to have mistakenly relied on Jan's representation that parcel E3 was the Home Place, while the Home Place was actually parcel K5.

Next, the court discussed Terrance's claim that Jan dissipated approximately $250,000 in marital assets through gifts/loans to Corey and to John and his wife. In analyzing the expenditure of funds for Corey, the court found that these expenses—payment of telephone bills, gifts, et cetera—were consistent with a parent-child relationship and "d[id] not represent a quick withdrawal of funds to 'squirrel' money away in preparation for a divorce." Thus, the court found that the payments to Corey did not amount to dissipation of marital assets.

With respect to funds expended for John and his wife, the court found that most of those funds appeared to have been made in "an ultimately vain attempt to keep [John's] flagging [plumbing] business afloat." The court found that although Terrance claimed he would never have agreed with these expenses if he had been aware of them, there was no evidence that Terrance was unable to access the parties' finances anytime he saw fit. The court found that, in any event, there was no evidence these gifts/loans to John were made when the marriage was undergoing an irretrievable breakdown. The court concluded that "[c]learly [Jan's] efforts to assist [John] were misguided and unsuccessful. They were not, however, nefarious or designed to create some type of nest egg to fall back on in the event of a divorce." Therefore, the court rejected Terrance's claim that Jan dissipated marital assets at a time when the parties' marriage was irretrievably breaking down.

Regarding alimony, the district court found the fact that the parties had planned for and worked toward their retirement together favored an award of alimony. The court found that a history of contributions to the marriage by both parties was shown. This included the use of Terrance's knowledge of the farming/ranching industry and real estate investing to help the parties create wealth during their marriage, as well as Jan's work for the vet clinic and her assistance with the farming/ranching business. However, the court found that although Jan's contributions to the marriage were significant, the financial assistance she provided to John was detrimental to the parties and needed to be taken into consideration when evaluating her claim for alimony.

In terms of the parties' financial circumstances, the court found that neither party's situation was ideal. The court found that Jan was living out of state with Corey, that the temporary alimony of $500 per month from Terrance was her only income, and that she had no retirement or health insurance. The court further found that the evidence established Terrance's veterinary practice was slowing down and that his earning capacity was "clearly compromised by both [his] age and availability of work," because, as he testified, many of his clients were older and were retiring.

The court found that this was an appropriate case for alimony and awarded such to Jan for 10 years in the amount of $1,000 per month for a period of 24 months, $750 per month for a period of 36 months, and $500 per month for a period of 60 months, commencing December 1, 2011. A "Property Division and Debt Allocation" set forth in the decree resulted in an equalization payment of $33,000 from Terrance to Jan at a judgment interest rate of 2.061 percent per year.

On November 23, 2011, Terrance filed a motion for new trial on the issues of the court's determination and calculation of the marital estate, property division and distribution, conclusions regarding Jan's "significant financial transfers," and alimony. The motion alleged that the decree was "not sustained by the evidence and [was] contrary to law." Terrance's motion for new trial was denied on December 9, and Terrance now appeals.

IV. ASSIGNMENTS OF ERROR

Terrance assigns, restated, that the district court erred in (1) finding that Jan did not dissipate marital assets, (2) dividing the marital estate, (3) awarding alimony to Jan, (4) awarding attorney fees to Jan, and (5) denying his motion for new trial.

V. STANDARD OF REVIEW

[1] In actions for the dissolution of marriage, the division of property is a matter entrusted to the discretion of the trial judge, whose decision will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. See *Malin v. Loynachan*, 15 Neb. App. 706, 736 N.W.2d 390 (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.*

VI. ANALYSIS

1. Dissipation of Marital Estate

Terrance first asserts that the trial court erred in finding that the evidence was insufficient to prove that Jan had dissipated marital assets through her gifts/loans to Corey and to John and his wife. We agree with the trial court that Terrance's evidence was insufficient to prove dissipation of marital assets.

[2,3] The law concerning dissipation of marital assets is well settled. Dissipation of marital assets is one spouse's use of marital property for a selfish purpose unrelated to the marriage at the time when the marriage is undergoing an irretrievable breakdown. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001). Marital assets dissipated by a spouse for purposes unrelated to the marriage after the marriage is irretrievably broken should be included in the marital estate in dissolution actions. *Id.*

Exhibit 47, a spreadsheet offered by Jan, details her version of the payments to, or on behalf of, Corey, John, and John's wife. The exhibit covers a limited period of time, with August 2, 2006, being the earliest entry and May 10, 2010, being the

last. In that timeframe, Jan provided $30,300 to Corey or on her behalf, against Terrance's wishes, from the farm account or the vet clinic account. Jan wrote the checks and kept the books by entry in a ledger and on the computer. Jan alleges that Terrance was "aware" of these expenditures, because Terrance had "access" to the computer where the information was located. Jan testified that she did not directly inform Terrance of the expenditures. Terrance testified he was usually out tending to animals and was rarely in the office, and apparently, he was far from "computer savvy." After the separation, Terrance began studying the finances, although he had earlier inquired about why the parties frequently seemed to be out of money.

Jan's spreadsheet indicates that in the time period that it covers, $66,420.86 went to John. Jan admitted that she did not discuss with Terrance the money going to John, because she "knew the consequences," she "would have gotten in trouble," and she "knew exactly what would happen." We noted above Terrance's problems with and feelings about John. John had relocated to Garden County in 2007 and wanted to start a plumbing business. Jan assisted with John's business endeavor with farm account and vet clinic account moneys. There is no evidence to demonstrate that these transfers could reasonably be classified as loans, and thus marital assets.

With respect to Corey, the trial found that although she was not Terrance's biological or adopted daughter, Corey and Terrance had something approaching a father-daughter relationship, and that the money was used because Corey was struggling with addiction issues as well as being a mother at a young age. The court found that the funds spent on Corey were "consistent with a typical parent-child relationship" and that thus, the evidence did not show dissipation concerning the money that went to Corey.

The money that went to John and his wife was described by the trial court to be "ultimately [a] vain attempt to keep her brother's flagging business afloat." In finding that the evidence was insufficient to support a legal determination of dissipation, the court faulted Terrance for failing to keep his eye on the money, given that the information was accessible to him if he

had been concerned or interested and looked at the computer data. The trial court ultimately rejected the dissipation claim with the finding that Terrance failed to prove that at the time the money was going to John and his wife, the marriage was irretrievably broken. We agree that the evidence is insufficient to find that the marriage of Terrance and Jan was irretrievably broken at that point in time.

We agree with the trial court's conclusion on this issue, and we affirm the trial court's finding that Terrance's evidence was insufficient to prove dissipation of marital assets.

2. Division of Marital Estate

Next, Terrance alleges that the district court erred in its division of the marital estate. Specifically, he argues that the court failed to properly classify several of his premarital assets, "including without limitation, the Home Place, assets purchased with the Condemnation Money, and Vet Clinic assets such as the Vet Account." Brief for appellant at 31. Terrance further asserts that in consideration of the factors set forth in Neb. Rev. Stat. § 42-365 (Reissue 2008), an equal division of the marital estate was an abuse of discretion. Finally, he contends that the court erred in its mathematical calculation of the total marital estate by failing to include certain items of personal property awarded to Jan, thereby causing Jan to receive $62,773.86 worth of marital assets that were not figured into the 50-50 division.

[4-6] Under § 42-365, the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Malin v. Loynachan*, 15 Neb. App. 706, 736 N.W.2d 390 (2007). 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*. We further note that although alimony and distribution of property have different purposes in marriage dissolution proceedings, they are closely related and circumstances may require that they be

considered together. *Pendleton v. Pendleton*, 242 Neb. 675, 496 N.W.2d 499 (1993). We think this case has circumstances requiring that property division and alimony be considered together, to a degree.

(a) Did District Court Improperly Classify Assets?

(i) Home Place

First, Terrance claims that the Home Place should have been awarded to him as his separate nonmarital property which he brought into the marriage. We conclude that the trial court was correct in finding that the Home Place was a marital asset.

[7] The district court found that the property was not premarital, in part because Terrance lacked title when he was married to Jan. No authority was cited for this rationale, and in fact, it ignores well-established law that as the vendee under a land contract, Terrance had equitable title. See *Beren Corp. v. Spader*, 198 Neb. 677, 255 N.W.2d 247 (1977) (upon execution of contract for sale of real estate, equitable ownership of property vests in vendee, even though seller retains legal title as security for deferred installment payments of purchase price). Terrance argues that the property would have been titled in his name alone, except that the original deed to the property with his and his first wife's names on it was lost and he did not receive a new deed in his name alone after his first divorce. Thus, he contends that when he and Jan made the final $12,000 payment on the property and his attorney drafted a new warranty deed naming both Terrance and Jan as owners in joint tenancy, that designation of joint title was included only because a new deed had to be drafted and the parties happened to be married at that time. He argues that the fact that his and Jan's names both appear on the warranty deed should therefore not have any bearing on the characterization of the property. We do not agree with this broad proposition, but as will become apparent, how title was held is not determinative of this issue.

[8,9] The manner in which property is titled or transferred by the parties during the marriage does not restrict the trial court's

ability to determine how the property should be divided in an action for dissolution of marriage. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004). The burden of proof to show that property is nonmarital remains with the person making the claim, which in this case is Terrance. See *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003).

It is undisputed that Terrance entered into a purchase agreement with respect to the 70-acre Home Place property with his first wife in 1981 and that he was awarded the property in his first divorce. The purchase agreement provides for a $15,000 downpayment on the Home Place with annual interest of 10 percent due on the remaining $60,000, which "shall be payable in annual installments." An attachment to the purchase agreement provides a list of the principal and interest payments from 1981 through 1991, totaling $108,000. That total amount includes the $12,000 Terrance and Jan paid on the Home Place after their marriage, which amounts to approximately 11 percent of the purchase price. However, cost does not necessarily equal value. See *Hughes v. Hughes*, 14 Neb. App. 229, 706 N.W.2d 569 (2005) (it is elementary that cost or expenditure does not equate with value, and generally, we look to fair market value of asset). The trial court's decree further provides:

> There is no question in the evidence that marital funds were used to pay off debts associated with this real estate and to improve the real estate. Whatever "value" the real estate had prior to the marriage that could conceivably be pre-marital, that value was consumed throughout the marriage by [the] use of marital funds to satisfy pre-marital debts associated with the real estate as well as the improvements/changes which took place: improvements to residence, condemnation action, and conversion to irrigated land.

This language appears to allude to the *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982), exception to the rule that property acquired by a party before marriage is set off to that party in a dissolution action.

[10] When awarding property in a dissolution of marriage, property acquired by one of the parties through gift or

inheritance ordinarily is set off to the individual receiving the gift or inheritance and is not considered a part of the marital estate. The *Van Newkirk* exception applies where both of the spouses have contributed to the improvement or operation of the property which one of the parties owned prior to the marriage or received by way of gift or inheritance, or the spouse not owning the property prior to the marriage or not receiving the gift or inheritance has significantly cared for the property during the marriage. See *Van Newkirk v. Van Newkirk, supra*. There is little question that over the term of the nearly 20-year marriage, Terrance and Jan jointly operated and worked at the cattle, farming, and ranching business. In addition, at the least, the Home Place parcel was improved during the marriage by converting dryland farm ground to irrigated cropland by the purchase and installation of a pivot irrigation system. Accordingly, we agree with the trial court's conclusion that the evidence brings the *Van Newkirk* exception into play.

When applying the *Van Newkirk* exception, evidence of the value of the contributions and evidence that the contributions were significant are generally required. *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997). The weight of the evidence is that Jan's contributions to the parties' businesses were long-term and of consequence. But, other than the $500 a month salary she was paid for a disputed period of time (Terrance claims she was paid $1,000 a month from 1991 to 2007), which salary she put back into the parties' joint bank accounts, there is no direct evidence of the value of what she did over the many years of the marriage. See *id*.

In this case, however, we find *Tyler v. Tyler, supra*, to be distinguishable. That case involved a husband's discreet and definable work on a house in a brief timeframe by building a deck, carpeting and painting the family room, replacing kitchen countertops, and installing four ceiling fans. Applying the *Tyler* requirement of proof of value of contributions is, frankly, unrealistic and inequitable in the present sort of case, beyond requiring proof that the nonowning spouse's contributions were substantial. People in a marriage who work together to build what they envision as the marriage's

economic lifeblood do not keep timesheets or assign value to their efforts at building a successful economic future together. We think this is particularly true in a farming/ranching operation such as that which the parties operated. Moreover, people do not work together as Terrance and Jan did for many years with the thought of what they will have to prove if, after 20 years of working together for their joint economic benefit, the marriage unravels. The fact is that any value assigned to Jan's work and contribution, no matter by whom, would be speculative and arbitrary. Thus, for these reasons, we do not require proof of a dollar value of contributions that *Tyler* otherwise suggests is necessary.

Accordingly, given Jan's substantial efforts and work in the parties' businesses over a 20-year timeframe, we find that even if we were to say that the Home Place parcel, parcel K5, started as Terrance's nonmarital property, the *Van Newkirk* exception applies and the value of the Home Place, parcel K5, should be included in the marital estate because Jan's contributions to the parcel were substantial. See *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982). Accordingly, we find no abuse of discretion and affirm the trial court's decision that the Home Place should be included in the marital estate.

As noted above in the factual background, the trial court's decree did not specifically award parcel K5 to either party. The JPS included a notation by Jan related to parcel E3 indicating that she believed parcel E3 was the Home Place and valuing it at over $130,000, although the evidence clearly indicates that parcel E3 was not the Home Place, that parcel E3 was actually a parcel slightly larger than 3 acres purchased by the parties during the marriage for approximately $3,000, and that parcel K5 was actually the Home Place of more than 70 acres. As noted above, it appears that the trial court awarded parcel E3 to Terrance under the same mistaken belief that it was actually the Home Place, and valued it accordingly.

Although we agree with the trial court's conclusion that the Home Place should be considered a marital asset, we conclude that the trial court erred in not clearly and completely valuing and awarding both the smaller parcel of real estate designated

as parcel "E3" and the actual Home Place parcel designated as parcel "K5," and that such error merits remanding. On remand, the trial court is directed to specifically describe all six parcels of real estate, value them according to the evidence adduced at the prior dissolution trial, and clearly make an equitable award of them accordingly.

(ii) Parcel E3—3.27 Acres Acquired in 1995

Parcel E3, the 3.27-acre parcel, is clearly marital property because it was purchased by Terrance and Jan for $3,270 in 1995. The trial court awarded parcel E3 to Terrance and used Jan's valuation of $133,085 for parcel E3. However, as noted above, it is apparent that both Jan and the trial court mistakenly believed that parcel E3 was actually the Home Place, parcel K5, because there is no other reasonable explanation for Jan's having valued a parcel purchased for $1,000 per acre at over $40,000 per acre. As noted above, we direct that on remand, the trial court shall value parcel E3 using the existing trial record and award it equitably as part of the marital estate. Thus, we find that to the extent that the trial court by implication valued parcel E3 at $133,085, such valuation is reversed and vacated and shall be determined anew upon remand.

(iii) Condemnation Funds

Terrance also alleges that the funds from the condemnation award should have been awarded to him as his separate nonmarital property. The evidence was that the condemned property came out of the Home Place, which we have found to be marital property using the *Van Newkirk* exception as explained above. It follows that the condemnation funds, derived from that marital property, would also be marital property, and the district court did not abuse its discretion in so finding. We reject the claim of error that the condemnation funds should have been set aside to Terrance as his premarital property.

(iv) Vet Clinic Account

Additionally, Terrance asserts that the district court improperly classified as marital property the vet clinic account and a

2000 Chevrolet Silverado pickup purchased with funds from the vet clinic account. The evidence was that the parties' joint vet clinic account, which Terrance testified was in existence prior to the parties' marriage, was used to "sustain the vet clinic business" and "[t]o pay for the bills incurred by the vet clinic," as well as to pay utilities on the Home Place property. For the same reasons as those discussed with respect to the classification of the Home Place, above, we find that Jan's contributions to the vet clinic were substantial and that it was thus not an abuse of discretion for the trial court to include the vet clinic account, and the 2000 Silverado pickup purchased with earnings from the vet clinic account, in the marital estate. Accordingly, Terrance's claim of error in this regard is without merit.

(b) Calculation of Marital Estate

Terrance asserts that it was error under § 42-365 for the district court to order an equal division of the marital estate.

We begin this section of our analysis with the parcels of real estate. As noted above, the trial court did not specifically value or award the Home Place, parcel K5. As noted above, the court also did not properly value parcel E3. As we concluded above, it appears that the court did intend to value the Home Place at slightly more than $130,000 and did intend to award it to Terrance. Inasmuch as we decline to speculate further on whether that was, in fact, the court's intention, and inasmuch as we have already concluded above that the matter must be remanded and the trial court must specifically describe, value, and award each of the six parcels of real estate, we decline to further address this assertion. Until the court clearly and thoroughly values and awards the parcels of real estate, we cannot make a determination of whether the distribution will be equitable.

With respect to the value of parcel K5, we note that the parties' JPS contains no value for parcel K5 from either party. As noted above, it appears that Jan provided her opinion as to the value of the Home Place in her comments regarding parcel E3. At trial, Terrance testified that the value of the Home Place was "[w]hatever the assessed value is, . . . but I can't

recall what that was." Exhibit 45 is a series of Garden County assessor's records, and there is one designated as "Commercial Property Record" that has the same legal description and approximate size as the Home Place, taking into consideration the subtraction of several acres after the condemnation of land. That exhibit includes designations for the assessed value of the property for 2010. However, we note that Neb. Rev. Stat. § 77-201 (Reissue 2009) contains provisions that require that the Home Place—assuming that it is "agricultural land," as the evidence tends to prove—is to be assessed at 75 percent of "actual value." On remand, the trial court is specifically directed to take all of this evidence into consideration in its valuation of parcel K5.

We next address Terrance's argument that the district court failed to include two items of personal property awarded to Jan in its calculation of the total marital estate. Terrance asserts that the court neglected to include livestock valued at $24,500 and life insurance/retirement assets valued at $38,623.86. In the "Property Division and Debt Allocation" provisions in the decree, the trial court did not include in Jan's property award $38,623.86 in "Life Insurance and Retirement Plans" that the court awarded to her when it "completed" its version of the JPS attached to the decree. The same problem exists with respect to the "Miscellaneous Assets" section of the JPS, where the court "completed" the JPS by giving Jan $24,500 for half of the value of 38 registered cows and 1 herd bull. But again, that $24,500 is not added to Jan's award of assets on pages 15 and 16 of the decree. Thus, there is a mistake of $63,123.86 in the court's calculation of the total assets it previously awarded to Jan. However, because we are remanding the cause for what will be effectively a complete revision of the division of the marital property, we do not attempt to calculate what the net effect of this mistake might be. Rather, we direct the district court to include all marital assets and debts in its application of the three-step process, mentioned earlier, that must be used with respect to division of a marital estate.

[11] Moreover, we find that there is another error concerning the trial court's handling of the division and allocation of

the value of the cattle. The trial court made a specific finding in a footnote on page 10 of the decree that Terrance had a premarital cattle herd worth $24,000, that he was "entitled to a set-off against the value of the current cattle herd in that amount," and that $23,650 was the value of the remaining cattle after what is more properly referred to as a "set-aside" for Terrance's premarital cattle. Jan does not challenge this finding by cross-appeal. The trial court then purported to award each party $24,000 for his or her respective 50-percent share of the "40 registered cows at time of separation," finding specifically that said cows were worth "$24,000 premarital [and] $24,000 marital." Thus, in one instance, the court suggested that the total value of the herd was $47,650 ($24,000 premarital and $23,650 remaining), and in another instance, the court suggested that it was $48,000 ($24,000 premarital and $24,000 marital). There are more serious issues regarding the cows than the $350 difference in valuation amounts, however, because the trial court's methodology effectively negated the set-aside for the 20 head of cows the court found Terrance brought into the marriage. See *Shafer v. Shafer*, 16 Neb. App. 170, 741 N.W.2d 173 (2007) (holding that "disposable" nature of cow does not, by itself, mean that set-aside for cattle owned by spouse before marriage is not allowable). Despite its initial finding that $24,000 of the total herd (regardless of whether the total herd is valued at $47,650 or $48,000) was Terrance's premarital property and that Terrance was entitled to a set-aside for that, the court proceeded to divide as a marital asset the entire herd, not the $23,650 or $24,000 worth of cattle remaining after the set-aside. Terrance makes no specific assignment of error addressing this flaw, but it is clearly wrong and we find that such is plain error. Thus, upon remand, the court's property division should include only the value of the herd remaining as a marital asset after the $24,000 attributable to the premarital cows is set aside to Terrance and is excluded from the calculation and division of the marital estate.

We now turn to Terrance's claim that awarding possession and ownership to Jan of a large portion of the land is an inequitable and untenable property division because it materially and

adversely affects his farming/ranching operation, particularly at a time when his veterinary practice is waning. Terrance cites a number of factors for this decline in his veterinary practice, including the physical demands of a large-animal practice in light of his advancing age, competition from drug companies reducing his profits, and the age and fast-approaching retirement of many of his long-time clients. As we read the court's decree, it found this testimony credible. Remembering that Jan has now relocated to Utah and that it is simply unrealistic to expect a divorced couple located in two states to jointly, cooperatively, and successfully operate a smallish farming/ranching operation, we find some merit to Terrance's assertions. Additionally, it appears that there was no compelling evidence introduced that Jan should own land which adjoins land that Terrance intends to continue to use to earn his living and satisfy the financial obligations resulting from the divorce. In light of our conclusion above that the property distribution must be remanded, these are considerations that are ultimately more properly placed before the trial court for its consideration on remand.

[12] Finally, we address Terrance's claim that the trial court should not have ordered an equal division of the marital estate. According to § 42-365, although the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately. The purpose of a property division is to distribute the marital assets equitably between the parties. *Id*. In this case, we conclude, for a number of reasons, that the trial court abused its discretion in ordering what is essentially a pro forma 50-50 division of the marital property.

The record indicates that Terrance came into the marriage as a highly educated professional with an established veterinary practice and the substantial beginnings of a farming/ranching operation. Jan brought virtually no property into the marriage, and her work experience was limited. Although Jan contributed to the joint economic life of the couple and the financial success of the vet clinic and the farming/ranching operation, she also expended large sums of money on her brother and his wife without Terrance's knowledge. It appears

that the district court largely excused Jan's diversion to her family of substantial amounts of marital funds on the ground that Terrance could have merely looked through the parties' financial records and discovered the money transfers. It cannot be ignored that Terrance trusted Jan with the proper care and management of the money that he was largely responsible for producing through the vet clinic, and the fact that she "kept the books" was a basis for a finding that she substantially contributed to the Home Place and that the Home Place is marital property, which benefited Jan in the division of property. Clearly, Jan transferred substantial sums of money to her brother and his wife, and this is money which the record suggests is simply gone. We note in this regard that in her testimony, Jan references some of these outlays as "loans," but the parties' JPS contains no listing of such as assets, nor is there a suggestion in the record that these funds could be realistically treated as loans that are collectible or expected to be repaid. Therefore, we find that considering these circumstances, an equal division of the marital estate—as the trial court clearly tried to do, putting aside for the moment its mistakes discussed above—may not be equitable and reasonable and may constitute an abuse of discretion. Inasmuch as we have already found that we must remand for a new property distribution award, it is difficult to predict whether an equal division would necessarily be inequitable, but it would be appropriate for the trial court to consider the impact on the marital estate of Jan's transferring of money to her brother and his wife.

In light of our conclusions above that the trial court erred in not clearly and completely valuing real property, in not clearly and completely awarding real property, and in its treatment of some of the personal property, we have already concluded that the trial court, on remand, must redetermine the appropriate distribution of the marital estate, consistent with our previous findings. In so doing, the court is also directed to specifically take into account the impact that Jan's distribution of marital assets to her brother and his wife should have on the ultimate property distribution, and then make an appropriate division of the marital property consistent with

this state's jurisprudence concerning equitable distributions of marital estates.

3. Alimony

[13] Terrance alleges that the trial court's alimony award was also an abuse of discretion. We agree. Section 42-365 provides in pertinent 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 . . . .

As we have emphasized above, alimony, support, and property settlement issues must be considered together to determine whether a court has abused its discretion. *Olson v. Olson*, 195 Neb. 8, 236 N.W.2d 618 (1975). The crucial question in this case is whether Terrance can reasonably be expected to pay all of the amounts required. See *id*.

The trial court discussed each of the criteria from § 42-365 in its decree and then awarded Jan alimony of $1,000 per month for 24 months, $750 per month for 36 months, and $500 per month for 60 months—a total of $81,000 to be paid over 10 years. Terrance argues that the alimony award is excessive given his sparse earnings and the rather dire outlook for his veterinary practice, considering his age and the physical demands of a large-animal practice, in addition to the "drainage" of money by Jan for her brother and her adult daughter.

We first turn to the matter of Terrance's earnings, which he asserts are "only $1,088.00" averaged over a 6-year period, including his agricultural operations and the vet clinic. Brief for appellant at 46. Where this figure comes from and whether it is intended to be an annual figure is not clear. We have closely examined the information from the 2004 through 2009 income tax returns that are in evidence.

The tax returns reflect a total adjusted gross income over that time period indicating a loss of nearly $76,000. The depreciation evident on the tax returns during those years totals over $115,000. Subtracting the 6-year total loss evident in the adjusted gross income numbers produces income, in theory at least, of $39,706, or $6,617 a year. Study of the tax returns, even after adding back depreciation, reveals that Terrance's vet clinic income and agriculture income do not support the alimony awarded or demonstrate that he has the ability to pay the alimony awarded plus allow him to meet his own needs and service the debt he is responsible for. The trial court aptly detailed the economic challenges facing both parties; those challenges cannot be ignored and are borne out by the tax returns.

Terrance's earnings shown on 6 years of tax returns border on being negligible, and there is evidence that his future prospects are rather grim. Nonetheless, the record also demonstrates that despite the information on the tax returns reflecting very little income, the parties were able to sustain themselves and Jan was able to financially help her daughter, and her brother and his wife, with substantial transfers of money, all without Terrance's apparently being aware.

Jan is unemployed and has not sought employment since relocating to Utah. Jan claims that her injured ankle prevents her from working, and she testified that she has been unable to obtain medical treatment because of a lack of health insurance.

As we noted above in our discussion concerning the distribution of property on remand, when we consider Jan's contributions to the marriage, it is impossible to completely ignore her transfers of money to her adult daughter and to her brother and his wife in substantial amounts. The money she transferred to them could have come only from the parties' businesses. Even if we used only Jan's admitted transfers, Jan admits that these transfers were done without Terrance's knowledge. Jan was the one primarily responsible for managing the finances in their joint enterprise, but her management and transfer of funds to her family members, while not constituting dissipation of marital assets, has had an impact on Terrance's ability

to pay an alimony award as substantial as that awarded by the trial court. Therefore, we find that the award of alimony is unrealistic, is beyond Terrance's capacity to pay, and fails to fully factor in the impact of Jan's transfers of money to her family members.

As noted above, it is important to consider the property distribution and settlement, which we have remanded, along with alimony and support, in determining reasonableness. Inasmuch as the trial court will be reassessing the property distribution, it should also reassess the alimony award. Therefore, we reverse the trial court's award of alimony and remand the issue of the appropriate amount and duration of alimony to the trial court to determine on the trial record, taking into consideration our conclusions herein.

4. Attorney Fees

[14] Terrance assigns error to the trial court's award of an attorney fee of $1,500 to Jan's attorney. In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004). The fee awarded could be seen as rather inconsequential, given the size of the record and the complexity of the issues. We find no abuse of discretion in the fee award, and we therefore find this assignment of error to be without merit.

5. Motion for New Trial

While error is assigned to the denial by the trial court of the motion for new trial, we have already dealt with the claimed reasons meriting a new trial. Thus, it is unnecessary to discuss this claim further.

VII. CONCLUSION

We note that the trial court's use of attachments and footnotes in crafting the decree may have contributed to the errors we have found, because the final "Property Division and Debt Allocation" found on pages 15 and 16 of the decree does not correctly correspond to the footnotes or to "Attachment 1" of the JPS "completed" by the trial court. We remand the cause

for the entry of a new decree that divides the marital property in accordance with our opinion and determines an appropriate alimony award. On remand, the court shall address and remedy the errors in the original decree that we have discussed in detail in our opinion.

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

STATE OF NEBRASKA ON BEHALF OF KEEGAN M., A MINOR CHILD, APPELLEE, V. JOSHUA M., DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, AND AMY B., THIRD-PARTY DEFENDANT, APPELLANT.

824 N.W.2d 383

Filed December 11, 2012. No. A-12-074.

1. **Parties: Words and Phrases.** A necessary party to a suit is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.
2. **Courts: Parties: Jurisdiction.** The presence of necessary parties to a suit is a jurisdictional matter and cannot be waived.
3. **Motions for Continuance: Appeal and Error.** An appellate court reviews a judge's ruling on a motion to continue for an abuse of discretion.
4. **Trial: 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.
5. **Motions for Continuance.** The failure to comply with Neb. Rev. Stat. § 25-1148 (Reissue 2008) is a procedural defect that affects the technical rights of an opposing party. It does not affect the opposing parties' substantial rights.
6. **Motions for New Trial: Appeal and Error.** An appellate court reviews a judge's ruling on a motion for new trial for an abuse of discretion.
7. **Motions for New Trial.** Motions for new trial are entertained with reluctance and granted with caution, because of the manifest injustice in allowing a party to allege that which may be the consequence of the party's own neglect in order to defeat an adverse verdict, and, further, to prevent fraud and imposition.
8. ____. To grant a motion for a new trial, a court must also find that the injury materially affected a party's substantial rights.
9. **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.

10. **Child Custody.** The decision to award custody of a minor child must be based upon the best interests of the child.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Justin A. Quinn and Casey J. Quinn for appellant.

Karen S. Nelson, of Schirber & Wagner, L.L.P., for appellee Joshua M.

IRWIN, PIRTLE, and RIEDMANN, Judges.

RIEDMANN, Judge.

INTRODUCTION

Amy B. appeals an order of the district court for Douglas County granting Joshua M. custody of the parties' minor child, Keegan M. Because we find no error in the trial court's decision, we affirm.

BACKGROUND

Keegan, born in March 2003, is the biological child of Joshua and Amy. The State commenced an action to establish Joshua's paternity and compel child support. The court entered an order establishing paternity and compelling child support in December 2007. Amy retained custody of Keegan until the Nebraska Department of Health and Human Services (DHHS) removed him from her home. In November 2008, the separate juvenile court acquired jurisdiction over Keegan on the basis that Keegan lacked proper parental care under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). According to a DHHS court report, the juvenile court petition alleged that Amy "subjected Keegan . . . to inappropriate and excessive physical discipline" and that she "engaged in domestic violence with . . . her live-in boyfriend, in the presence of [Keegan]."

DHHS placed Keegan with Joshua for foster care. Joshua and Keegan initially lived in Carter Lake, Iowa, before moving to Council Bluffs, Iowa, less than 30 minutes from Amy. Keegan attends school in Council Bluffs, and Joshua's wife cares for Keegan when he is at their home. Joshua's child

support obligations terminated in March 2009 while Keegan was in his custody.

In October 2009, Joshua filed a motion to add Amy as a necessary party to the pending action in order to address unresolved custody and visitation issues between Amy and Joshua. In the motion, Joshua represented that neither the attorney for the State nor Amy's attorney had any objection to the motion.

After the court granted the motion, Joshua filed an application to modify support and to establish custody and visitation. Amy filed a responsive pleading, and by agreement of the parties, the matter was transferred to the juvenile court. The record presented does not indicate how, or if, the juvenile court ruled on Joshua's application, although a subsequent pleading filed by Amy alleges that the juvenile court terminated its jurisdiction over Keegan without resolving the pending issues.

In the meantime, Keegan flourished in Joshua's care, and in 2010, DHHS recommended terminating the juvenile case and awarding custody to Joshua. DHHS noted that Keegan "found stability in his relationships and in his school setting," but expressed concern about Amy's interactions with Keegan. In a report, DHHS noted that Amy resided with her boyfriend when their relationship was good. When she and her boyfriend were fighting, Amy lived with her mother. According to the above report, on one occasion, DHHS received a call that police had responded to a fight between Amy and her boyfriend, which fight occurred in front of Keegan, and that the police required Amy and Keegan to leave her boyfriend's home.

DHHS also reported that it had to suspend Amy's unsupervised visits with Keegan after Keegan reported that Amy made derogatory comments about Joshua's wife and threatened bodily harm to her. These conversations with Amy caused Keegan to be "stressed out." Although DHHS believed Amy had "made progress" participating in rehabilitative services, DHHS stated in its report that "it is also believed that [Amy] has not internalized what she has learned."

In August 2010, Joshua again filed a motion to add Amy as a necessary third party in order to seek custody of Keegan.

The motion was served upon "Douglas County Child Support Enforcement" and Amy. After the court granted the motion, Joshua filed a complaint to modify the order of support in the district court.

The juvenile court judge entered an order that was filed in the present action stating that the juvenile court case was terminated and that the juvenile court no longer had jurisdiction over either Keegan or this matter. That same day, Amy filed in district court a motion for temporary custody of Keegan. In that motion, she alleged she feared that Joshua would remove Keegan from Nebraska. Amy requested temporary care, custody, and control of Keegan as well as child support. The next day, the district court for Douglas County entered an order giving Joshua temporary custody of Keegan. In October 2010, the district court entered a further order clarifying Amy's and Joshua's respective temporary custody and visitation rights to Keegan.

In April 2011, Joshua filed a notice of trial, notifying Amy that the trial date for Keegan's custody determination was set for August 18. On June 15, Joshua filed an amended notice of trial setting a trial date of August 16. On July 11, Amy's attorney filed a motion to withdraw due to a breakdown in the attorney-client relationship. The motion was granted on July 20. The trial court continued the trial to September 22 because of a scheduling conflict. On August 17, Joshua filed another amended notice of trial reflecting the September trial date.

On September 22, 2011, the parties appeared for trial. Joshua was represented by counsel, and Amy appeared pro se. Amy requested a continuance so that she could obtain legal representation. She stated that she had not yet obtained new counsel because she believed the custody issue would be settled. She also requested a continuance because Joshua had not responded to outstanding interrogatories. Amy conceded that she had not compelled Joshua to answer the interrogatories, because she believed the case would be settled.

The court denied Amy's motion for a continuance, noting that Amy had known the case was scheduled for trial since June and had already received a month-long continuance because of the court's scheduling conflict.

At trial, Joshua testified to the history of the case, including DHHS' removal of Keegan from Amy's care and its recommendation that Joshua receive sole physical and legal custody. He testified that in December 2010, while Keegan was at Amy's house, a brick was thrown through Amy's window. This incident raised continuing concerns about Keegan's safety in Amy's custody. He also testified that Keegan had been "[p]sychiatrically hospitalized" and was experiencing hallucinations centering around Amy. Joshua asked that the court grant him sole physical and legal custody subject to visitation by Amy.

Amy argued that she should receive primary custody of Keegan because Joshua is frequently away from home on business and it is Joshua's wife, rather than Joshua, who takes care of Keegan during those times. Amy asked that she be given custody of Keegan at all times other than the "five to seven" days per month that she claimed Joshua was home.

Amy testified that she was concerned Keegan might have a detachment disorder or psychiatric issue because he is in the care of Joshua's wife and away from both of his biological parents for long periods of time. Amy admitted that Keegan has not been diagnosed with detachment disorder, but she said he has been diagnosed with a loss of reality, confusion, and suicidal tendencies. According to Amy, Keegan was admitted to a hospital for a psychiatric evaluation and she was upset that she was excluded from treatment decisions. Those decisions had been made by Joshua's wife.

Amy admitted that she had been a victim of domestic violence and that Keegan had witnessed domestic violence while in her care. She testified that DHHS removed Keegan from her care because of incidents that occurred between her and her ex-boyfriend and because DHHS had received numerous telephone calls from individuals reporting that Keegan was being abused and neglected. Amy testified that she called the 911 emergency dispatch service in December 2010 because someone had thrown a brick through her window. She testified that at the time, she believed it was her ex-boyfriend who had thrown the brick. Amy also testified that she was not paying child support, not providing Keegan with health insurance,

and not paying for Keegan's daycare because those needs were being met by Joshua and his wife. Amy testified that she does provide Keegan with food and clothes and also meets his other needs.

The court found that awarding custody to Joshua was in Keegan's best interests. Amy timely filed a motion for new trial, in which she argued that (1) Joshua's complaint to modify did not request removal of Keegan from Nebraska, and therefore the custody proceeding was inappropriately treated as a regular custody proceeding rather than a removal proceeding; (2) Joshua never served the State, a necessary party to the proceeding, and the lack of service created a void order; and (3) Joshua's failure to respond to Amy's interrogatories meant the trial needed to be continued so that proper discovery could take place.

The court denied Amy's motion for new trial, noting that Amy never objected to Joshua's failure to serve the State, and the court found that the State was not a necessary party, even though the State was notified of the proceedings at various times and appeared at some hearings. The court also found that the parties knew that Joshua resided in Council Bluffs, that it had been discussed at trial, and that the action was properly treated as a removal action. Lastly, the court held that Amy should have moved to compel Joshua to answer the interrogatories prior to trial.

ASSIGNMENTS OF ERROR

Amy assigns that the district court erred in (1) failing to dismiss on jurisdictional grounds because the State was a necessary party that had not been served, (2) denying Amy's motion to continue, (3) denying Amy's motion for new trial, and (4) granting Joshua custody of Keegan.

ANALYSIS

Failure to Serve State.

Amy argues that the trial court did not have jurisdiction to hear arguments about modifying Keegan's custody because the State was a necessary party and was not served process within 6 months as required by Neb. Rev. Stat. § 25-217 (Reissue

2008). Because we find that the State was not a necessary party, we find no merit in Amy's argument.

[1,2] A necessary party is synonymous with an indispensable party.

> [A] necessary party to a suit is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

American Nat. Bank v. Medved, 281 Neb. 799, 806, 801 N.W.2d 230, 237 (2011). The presence of necessary parties to a suit is a jurisdictional matter and cannot be waived. *Robertson v. School Dist. No. 17*, 252 Neb. 103, 560 N.W.2d 469 (1997).

To determine whether the State was a necessary party, we turn to the pleadings to determine the interests asserted. The State initiated an action to determine paternity and support for Keegan. The court issued an order for support requiring Joshua to make child support payments to Amy and provide health and medical insurance for Keegan. The State did not seek any action regarding Keegan's custody. After DHHS placed Keegan in Joshua's custody, the court terminated the support order. The only interests the State asserted were paternity, which had been established, and support, which had been terminated.

Joshua correctly points out in his modification complaint that the prior orders in this action did not award custody of Keegan to either Joshua or Amy. Joshua seeks an order granting him sole custody of Keegan, subject to Amy's reasonable visitation, and any further order that is in Keegan's best interests or that the court deems just and equitable.

Joshua's modification complaint deals solely with the issue of which parent should have custody of the minor child. This issue can be addressed without affecting any interest that the State previously had in the support of Keegan. The court was able to resolve the custody controversy without affecting the

State's interest, and therefore, the State was not a necessary party to the modification complaint.

We note that had the State not commenced the paternity and support action, Amy could have done so before the child's fourth birthday without the State's being named a party. See Neb. Rev. Stat. § 43-1411 (Reissue 2008). In such an action, the court could have awarded custody to either party, again, without the State's intervention. See, e.g., *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981) (stating that in actions to establish paternity, issues of custody and visitation rights are incidental to primary cause of action and district courts have jurisdiction to address them).

We find that the issue of custody could be finally adjudicated without affecting the State's interest and that therefore, the State was not a necessary party to the modification action. Since the State was not a necessary party, Joshua was not required to serve it with process in order to confer jurisdiction upon the district court.

Failure to Grant Continuance.

Amy argues that the trial court abused its discretion in failing to grant her oral motion to continue the trial. She argues that her lack of counsel and Joshua's failure to respond to interrogatories entitled her to a continuance. We disagree.

[3,4] An appellate court reviews a judge's ruling on a motion to continue for an abuse of discretion. See *Adrian v. Adrian*, 249 Neb. 53, 541 N.W.2d 388 (1995). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Id*.

[5] Neb. Rev. Stat § 25-1148 (Reissue 2008) governs the requirements for requesting a continuance. Section 25-1148 requires that the motion be in writing and supported by an affidavit. Although it is not determinative, an appellate court considers whether the moving party complied with § 25-1148 in determining whether the trial court abused its discretion in granting or denying a motion to continue a trial. See, *State v. Perez*, 235 Neb. 796, 457 N.W.2d 448 (1990); *In re Interest of*

Azia B., 10 Neb. App. 124, 626 N.W.2d 602 (2001). The failure to comply with § 25-1148 is a procedural defect that affects the technical rights of an opposing party. See *State v. Vela-Montes*, 19 Neb. App. 378, 807 N.W.2d 544 (2011). It does not affect the opposing parties' substantial rights. See *id.*

Because the failure to comply with § 25-1148 does not affect the substantial rights of an opposing party, we assess a motion to continue that does not fully comply with § 25-1148 "in the broader context of Nebraska jurisprudence focusing on the parties' substantial rights." *State v. Vela-Montes*, 19 Neb. App. at 386, 807 N.W.2d at 551. This focus leads us to "concentrate on whether the continuance was justified in light of [the moving parties'] representations of cause." *Id.* In *Adrian v. Adrian, supra*, the Nebraska Supreme Court overruled a trial court's decision to deny a motion to continue after finding (1) substantial gravity in the matter to be decided at the hearing sought to be continued, (2) the party had been granted only two previous continuances, and (3) the moving party did not intend to unnecessarily delay the proceedings.

In this instance, Amy argued that she needed a continuance in order to obtain counsel. The motion to continue was Amy's first motion to continue, although the trial had already been continued for 5 weeks due to the court's schedule. The matter to be determined at the hearing, child custody, was also a matter of substantial gravity. However, Amy waited until the morning of trial to request the continuance in order to obtain counsel after the trial had already been continued almost 5 weeks. Amy had been without counsel and had notice of an upcoming trial date for months prior to her request for a continuance. She did not need a continuance in order to have enough time to procure representation. The trial court determined that Amy already had sufficient time to obtain counsel and denied her motion to continue. In this case, we cannot say that the trial court abused its discretion in denying Amy's motion to continue, because her motion to continue did not comply with the requirements of § 25-1148 and the court's granting her motion to continue would have needlessly delayed trial.

Failure to Grant New Trial.

Amy argues that the trial court abused its discretion in failing to grant her motion for new trial, because Joshua's failure to answer her interrogatories deprived her of her right to full discovery and to a fair trial. We disagree.

[6] An appellate court reviews a judge's ruling on a motion for new trial for an abuse of discretion. See *Murray v. UNMC Physicians*, 282 Neb. 260, 806 N.W.2d 118 (2011). Neb. Rev. Stat. § 25-1142 (Reissue 2008) allows the trial court to grant a new trial on the following bases: "(1) Irregularity in the proceedings of the court, jury, referee, or prevailing party or any order of the court or referee or abuse of discretion by which the party was prevented from having a fair trial; (2) misconduct of the jury or prevailing party . . . ."

[7,8] Motions for new trial are "'entertained with reluctance and granted with caution, because of the manifest injustice in allowing a party to allege that which may be the consequence of his own neglect in order to defeat an adverse verdict, and, further, to prevent fraud and imposition . . . .'" *Smith v. Erftmier*, 210 Neb. 486, 494, 315 N.W.2d 445, 451 (1982). To grant a motion for a new trial, a court must also find that the injury materially affected a party's substantial rights. See *Phillips v. Industrial Machine*, 257 Neb. 256, 597 N.W.2d 377 (1999).

Amy's substantial rights were not affected by irregularities in the proceedings or misconduct by the jury or the opposing party. A party's failure to return an interrogatory alone does not make a proceeding irregular. Rather, the justice system has in place processes and procedures for discovery as well as processes and procedures for requesting sanctions for discovery violations. See *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987) (noting that discovery sanctions exist to punish parties for their attempts to neglect or frustrate discovery process). The Nebraska Rules of Discovery provide a process for compelling an opposing party to answer interrogatories. See Neb. Ct. R. Disc. § 6-337(a). These rules provided Amy with a sufficient avenue to compel answers to interrogatories. See *id.*

The proceedings in this case were not sufficiently irregular to warrant granting Amy a new trial, and Amy does not allege misconduct. Instead, Amy alleges a discovery violation that is so routine there is a standard process for addressing it. The fact that Amy did not take advantage of this process does not make the alleged discovery violation irregular. Furthermore, Amy did not prove how Joshua's failure to answer her interrogatories affected her ability to prepare for trial. Many of the interrogatory questions Amy served on Joshua seek information unrelated to the issues at trial, and it is unclear what type of information Amy hoped to develop. There is no evidence that Amy was prejudiced by Joshua's failure to answer her interrogatories.

The decision to grant a new trial is an extreme decision that places a significant burden on the parties. In this case, where Amy had the opportunity to compel discovery and made no specific allegations about how Joshua's failure to return the interrogatories affected her substantial rights, the trial court did not abuse its discretion in denying Amy's motion for new trial.

Custody Determination.

Amy assigns as error the trial court's award of primary custody in favor of Joshua. This assignment is without merit.

[9] 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. *Farnsworth v. Farnsworth*, 276 Neb. 653, 756 N.W.2d 522 (2008).

[10] The decision to award custody of a minor child must be based upon the best interests of the child. Neb. Rev. Stat. § 42-364(1)(b) (Cum. Supp. 2012). In determining the best interests of a minor child, a judge should consider the following factors:

> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;

> (b) The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning;
>
> (c) The general health, welfare, and social behavior of the minor child;
>
> (d) Credible evidence of abuse inflicted on any family or household member. . . .
>
> (e) Credible evidence of child abuse or neglect or domestic intimate partner abuse.

Neb. Rev. Stat. § 43-2923(6) (Cum. Supp. 2012).

The trial court heard evidence related to the factors listed in § 43-2923(6). The court was ultimately persuaded that granting custody to Joshua was in Keegan's best interests because Amy had been engaged in relationships where domestic violence was present. Section 43-2923(6)(e) requires a court to consider intimate partner abuse in determining the best interests of a child. Although there is no evidence that Amy is currently engaged in abusive behaviors or an abusive relationship, the trial judge properly considered her history of domestic violence, particularly in light of DHHS' concern that she had not internalized what she had learned from rehabilitative services.

The record contains additional evidence supporting the trial court's decision. The trial court heard evidence about Keegan's relationship with both parents, including the evidence as set forth in the DHHS report. The DHHS report reveals that DHHS removed Keegan from Amy's home due to allegations of abuse, neglect, and domestic violence. It further shows that after being placed with Joshua, Keegan began to achieve stability in his relationships at home and at school, and that Keegan felt comfortable in his present living arrangement. The evidence supports a finding that Keegan flourished more in the care of Joshua than in the care of Amy.

Although there was no testimony about Keegan's living preferences, the DHHS report indicated that Amy's interactions with Keegan caused concern. The report states that Keegan appeared to be "stressed out" by Amy's statements, and her unsupervised visitation had to be terminated because Keegan

reported that she made threats of bodily harm to Joshua's wife—Keegan's stepmother.

The DHHS report also suggests that Keegan's health and general welfare improved after being taken from Amy's custody and placed with Joshua. Given the evidence presented, the trial court did not abuse its discretion in finding that it was in Keegan's best interests to grant Joshua custody of Keegan.

CONCLUSION

The district court had jurisdiction of the case, despite the fact that Joshua did not serve the State. This is so because the State was not a necessary party to the case. The trial court did not err in denying either the motion to continue or the motion for new trial, nor did it err in determining that it was in Keegan's best interests to award custody to Joshua. We therefore affirm the judgment of the trial court.

AFFIRMED.

NICK LESSER, ALSO KNOWN AS KLAUS LESSER, APPELLANT, V. EAGLE HILLS HOMEOWNERS' ASSOCIATION, INC., APPELLEE.

824 N.W.2d 77

Filed December 11, 2012. No. A-12-268.

1. **Courts: Appeal and Error.** Neb. Rev. Stat. § 25-2733 (Reissue 2008) provides that when the district court is sitting as an appellate court, the district court shall review the case for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. ____: ____. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
4. **Judgments.** In the absence of a request by a party for specific findings, a trial court is not required to make detailed findings of fact and need only make its findings generally for the prevailing party.
5. **Trial: Judgments: Evidence: Appeal and Error.** If there is a conflict in the evidence, the appellate court in reviewing the judgment rendered will presume that the controverted facts were decided in favor of the successful party, and the findings will not be disturbed unless clearly wrong.

6. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.
7. **Courts: Appeal and Error.** An appellate court may consider issues not ruled upon by an intermediate appellate court; however, where the intermediate appellate court does not reach any of the appellants' assigned errors, it is proper to allow that court to consider those errors in the first instance.

Appeal from the District Court for Sarpy County, MAX KELCH, Judge, on appeal thereto from the County Court for Sarpy County, JOHN F. STEINHEIDER, Judge. Judgment of District Court reversed, and cause remanded for further proceedings.

Douglas W. Ruge, P.C., L.L.O., for appellant.

Steven G. Ranum and Scott D. Jochim, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellee.

IRWIN, PIRTLE, and RIEDMANN, Judges.

RIEDMANN, Judge.

INTRODUCTION

Nick Lesser, also known as Klaus Lesser, appeals from the order of the district court for Sarpy County affirming the county court's dismissal of his action. We find the district court erred, and we reverse, and remand for further proceedings.

BACKGROUND

Lesser filed a small claims action against Eagle Hills Homeowners' Association, Inc. (Eagle Hills), in the county court for Sarpy County for reimbursement of filing fees paid by Lesser to file amended homeowners' association bylaws. Eagle Hills denied Lesser's request for reimbursement because of a dispute as to the validity of the amended bylaws. After a hearing in county court, the court issued an order that stated, "Upon the [e]vidence, [Lesser's] claim should be dismissed at [his] cost."

Lesser appealed the decision to the district court for Sarpy County. On appeal, the district court took judicial notice of the bill of exceptions from the county court proceedings. After briefing and argument, the district court affirmed, finding that because the lower court's order did not set forth the reasoning for its decision, it had "no basis to determine whether

the [c]ounty [c]ourt based its decision on factual issues, legal issues, or a combination of both." The district court therefore concluded that there was insufficient evidence to find any error on the record. Lesser now appeals to this court.

ASSIGNMENTS OF ERROR

Lesser alleges that the district court erred in (1) not abiding by the proper standard of review in reaching its decision that Lesser failed to meet his burden, (2) failing to rule that the Eagle Hills' board of directors properly amended the bylaws, (3) failing to rule that Lesser should be reimbursed for recording the bylaws as provided in the amended bylaws, and (4) failing to rule that Neb. Rev. Stat. § 21-1962(b) (Reissue 2012) had no applicability to the vote of the Eagle Hills' board of directors or that, even if it did, it did not invalidate the other amendments to the bylaws.

ANALYSIS

The district court and higher appellate courts generally review appeals from the county court for error appearing on the record. *First Nat. Bank of Unadilla v. Betts*, 275 Neb. 665, 748 N.W.2d 76 (2008). Therefore, we must determine whether the district court erred in affirming the county court's decision.

District Court Review.

Lesser first asserts that the district court erred in failing to perform its appellate duty under Neb. Rev. Stat. § 25-2733 (Reissue 2008) to review for error appearing on the record. Lesser claims the district court should have determined whether the evidence in the record supported the county court's ruling. We agree.

[1-3] Section 25-2733 provides that when the district court is sitting as an appellate court, the district court shall review the case for error appearing on the record made in the county court. 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. *First Nat. Bank of Unadilla, supra*. In instances when an appellate court is

required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record. *Id.*

[4,5] In the absence of a request by a party for specific findings, a trial court is not required to make detailed findings of fact and need only make its findings generally for the prevailing party. *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993); *White v. Medico Life Ins. Co.*, 212 Neb. 901, 327 N.W.2d 606 (1982). See Neb. Rev. Stat. § 25-1127 (Reissue 2008). If there is a conflict in the evidence, the appellate court in reviewing the judgment rendered will presume that the controverted facts were decided in favor of the successful party, and the findings will not be disturbed unless clearly wrong. *C. Goodrich, Inc. v. Thies*, 14 Neb. App. 170, 705 N.W.2d 451 (2005).

The district court in this case concluded there was insufficient evidence to find any error on the record because the county court did not set forth the reasoning for its decision. The district court, therefore, found it had no basis to determine whether the county court based its decision on factual issues, legal issues, or a combination of both. The district court's failure to review the record to determine whether the decision conforms to the law and was supported by the evidence was error because the county court was required to make only a general finding in favor of the prevailing party.

In the present case, it is undisputed that neither party requested that the county court make specific findings. It was, therefore, permissible for the county court to make only a general finding in favor of Eagle Hills. While the Nebraska Supreme Court has noted that specific findings "are unquestionably desirable and helpful in focusing [appellate] review," an appellate court must nonetheless review the record for error. *Brooke v. Brooke*, 234 Neb. 968, 969, 453 N.W.2d 438, 439 (1990).

On appeal, the district court should have presumed that the county court decided all controverted facts in favor of Eagle Hills and analyzed the record to determine whether those findings were clearly wrong. In addition, the district court should have conducted a de novo review of the record on issues of

law. Accordingly, we find the district court erred in failing to review the record to determine whether the county court's order conforms to the law, is supported by the evidence, and is not arbitrary, capricious, or unreasonable. We reverse, and remand to the district court for a review of the record.

Remaining Assignments of Error.

[6,7] Having made the above determination, it is unnecessary for us to address Lesser's remaining assignments of error. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006). We recognize that an appellate court may consider issues not ruled upon by an intermediate appellate court; however, where the intermediate appellate court does not reach any of the appellants' assigned errors, it is proper to allow that court to consider those errors in the first instance. See *Debose v. State*, 267 Neb. 116, 672 N.W.2d 426 (2003). Furthermore, we note that § 25-2733 provides a level of appellate review to which the parties are entitled; to decide this case on the merits prior to review by the district court would deprive the parties of this statutory right.

Since the district court did not review the record for error, we find it appropriate that the district court must first perform its duty and address Lesser's remaining assignments of error. After the district court performs its appellate review function, either party is then free to appeal from all or part of the district court's ruling. Therefore, at this time, we are unable to review the remaining assignments of error and express no opinion as to their merit.

CONCLUSION

The district court erred in failing to review for error appearing on the record. We, therefore, reverse the decision of the district court and remand the cause to the district court for a review consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BRAUNGER FOODS, LLC, FORMERLY KNOWN AS TOBA OF IOWA, LLC, DOING BUSINESS AS BRAUNGER FOODS, APPELLANT, V. MICHAEL K. SEARS AND HUNGRY'S NORTH, INC., APPELLEES.

823 N.W.2d 723

Filed December 18, 2012. No. A-11-1109.

1. **Contracts: Parties.** An agreement to make a future contract is not binding upon either party unless all terms and conditions are agreed upon and nothing is left to future negotiation.
2. **Contracts: Parties: Time.** A contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangement.
3. **Contracts.** Where a purported agreement is subject to approval and such approval is not obtained, the document does not satisfy the legal requirements for a written agreement.

Appeal from the District Court for Dakota County: PAUL J. VAUGHAN, Judge. Affirmed.

Jeana L. Goosmann and Anthony L. Osborn, of Goosman Law Firm, P.L.C., for appellant.

Michael K. Sears, pro se.

IRWIN, PIRTLE, and RIEDMANN, Judges.

RIEDMANN, Judge.

INTRODUCTION

Braunger Foods, LLC, appeals from the order of the district court for Dakota County finding the personal guaranty unenforceable against Michael K. Sears. We affirm.

BACKGROUND

Sears is the owner of Hungry's North, Inc. (Hungry's). Braunger Foods sold food product supplies to Hungry's beginning in 2004 on an "open account." Hungry's began to fall behind on payments in September 2006 but resumed its timely payments in November. However, 36 sales between September 5 and November 14 remained unpaid.

In October 2009, Hungry's began falling behind on payments again. As a result, on November 16, "Kevin," a sales

representative from Braunger Foods, asked Sears to sign a credit application, which included a guaranty provision purporting to personally obligate Sears for all obligations of Hungry's. Sears signed the application and guaranty.

Braunger Foods filed suit against Sears and Hungry's to recover the amount of the unpaid invoices. After trial, the court entered judgment against Hungry's for the unpaid invoices plus interest. The trial court found, however, that the personal guaranty was unenforceable against Sears because the agreement was incomplete and never signed or approved by anyone from Braunger Foods. Braunger Foods appeals.

ASSIGNMENT OF ERROR

Braunger Foods assigns that the trial court erred in finding that the personal guaranty is not enforceable against Sears.

STANDARD OF REVIEW

A guaranty is interpreted using the same general rules as are used for other contracts. *Builders Supply Co. v. Czerwinski*, 275 Neb. 622, 748 N.W.2d 645 (2008). The meaning of a contract is a question of law, and an appellate court must reach its conclusions independently of the decisions made by the trial court. See *id.*

ANALYSIS

Braunger Foods argues that the trial court erred in refusing to enforce the personal guaranty against Sears. The trial court found the guaranty unenforceable because the agreement was incomplete, as the terms were never approved by anyone from Braunger Foods.

[1-3] An agreement to make a future contract is not binding upon either party unless all terms and conditions are agreed upon and nothing is left to future negotiation. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). A contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangement. *Id.* We have previously found that where a purported agreement was subject to approval and such approval was not obtained, the document did not satisfy the legal requirements for a written

agreement. See *First Nat. Bank of Osceola v. Gabel*, No. A-01-968, 2003 WL 21146098 (Neb. App. May 20, 2003) (not designated for permanent publication). While we recognize *Gabel* was an unpublished opinion, we find it persuasive for the action before us.

We agree with the trial court that no contract was formed here, because the guaranty was incomplete. The first two pages of the credit application state that the personal guaranty is on "terms that are approved." Thus, before the agreement could be finalized, the terms were to be approved by a representative of Braunger Foods.

There are several locations on the credit application where Braunger Foods could have indicated its approval but which were left blank. The upper right-hand corner of the first page has a section which states, "Approved By:" with a blank line next to it, but there is no name filled in as to who had given approval. Similarly, the bottom of the first page indicates "OFFICE USE ONLY: TERMS APPROVED," with a blank line next to it, but this space was also left blank. There are spaces on the second page for the signature of a Braunger Foods representative under the section containing the terms and conditions and under the section containing the guaranty, but both of those spaces were left blank as well.

The upper right-hand corner of the first page indicates that the salesperson connected with the credit application was "Kevin," but there is no indication that he approved the terms of the application. Therefore, we agree that because the terms were never approved by anyone from Braunger Foods, the agreement is incomplete. Accordingly, the personal guaranty is not binding upon Sears.

CONCLUSION

The trial court was correct in finding that the personal guaranty was unenforceable against Sears, because there is no indication it was ever approved by anyone from Braunger Foods.

AFFIRMED.

JUDY RADA LENZ AND RUSSELL G. LENZ, APPELLANTS, V. DAVID HICKS, APPELLEE.

824 N.W.2d 769

Filed December 18, 2012. No. A-12-064.

1. **Affidavits: Appeal and Error.** Denial of in forma pauperis eligibility is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court.
2. **Actions: Words and Phrases.** For purposes of Neb. Rev. Stat. § 25-2301.02 (Reissue 2008)—the statute governing applications to proceed in forma pauperis—a frivolous legal position is one wholly without merit, that is, without rational argument based on the law or on the evidence.
3. **Actions: Appeal and Error.** Principles of liberal construction apply to the review of a denial of a motion to proceed in forma pauperis upon the ground that the complaint was frivolous.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Reversed and remanded for further proceedings.

Judy Rada Lenz, pro se.

Russell G. Lenz, pro se.

No appearance for appellee.

IRWIN, PIRTLE, and RIEDMANN, Judges.

PIRTLE, Judge.

INTRODUCTION

Judy Rada Lenz and Russell G. Lenz appeal from the order of the district court for Douglas County denying their motion for leave to proceed in forma pauperis with their action against attorney David Hicks. We find the district court erred in holding that Judy and Russell asserted a legal position which was frivolous or malicious and in denying the motion.

BACKGROUND

Judy and Russell hired Hicks to handle Russell's voluntary petition for chapter 13 bankruptcy. Judy and Russell were unsatisfied with Hicks' representation and produced a handwritten document titled "Civil action In forma Pauperis

request," as well as a financial affidavit. The "Civil action" document was dated December 28, 2011. It stated that Judy and Russell sued Hicks for "Wa[i]ving All Plaintiffs[']s Rights in Bankruptcy Court" and requested $100 million in damages.

The district court filed an in forma pauperis order on January 18, 2012, stating that the court "on its own motion pursuant to *Neb. Rev. Stat.* § 25-2301.02, objects on the grounds that the applicant is asserting legal positions which are frivolous or malicious, and the application to proceed *in forma pauperis* is denied for the following reasons," after which was handwritten "no cause of action pled."

On January 24, 2012, Judy and Russell subsequently filed a handwritten document titled "Notice of APPEAL & in Forma Pauperis Request," as well as another financial affidavit. The notice stated that Judy and Russell intended to appeal the district court's order denying them in forma pauperis status in the civil action. The district court granted in forma pauperis status for the appeal.

ASSIGNMENT OF ERROR

Judy and Russell assert the district court should have granted them leave to proceed in forma pauperis in the civil action.

STANDARD OF REVIEW

[1] Denial of in forma pauperis eligibility is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court. *Tyler v. Natvig*, 17 Neb. App. 358, 762 N.W.2d 621 (2009). See Neb. Rev. Stat. § 25-2301.02 (Reissue 2008).

ANALYSIS

The issue on appeal is whether the district court erred in denying in forma pauperis status in this case.

Nebraska's in forma pauperis statutes, Neb. Rev. Stat. § 25-2301 et seq. (Reissue 2008), enacted in 1972, are based substantially on the federal in forma pauperis statute at 28 U.S.C. § 1915 (2006). The federal version was designed to ensure that indigent litigants have meaningful access to the federal courts and to ensure equality of consideration for all litigants. *Neitzke v. Williams*, 490 U.S. 319, 109 S. Ct. 1827,

104 L. Ed. 2d 338 (1989). The federal statute authorizes federal courts to dismiss a claim filed in forma pauperis "'if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.'" 490 U.S. 319 at 324. See 28 U.S.C. § 1915.

Nebraska's statute, § 25-2301.02, allows the court to object on its own motion to an application to proceed in forma pauperis "on the grounds that the applicant is asserting legal positions which are frivolous or malicious."

The definition of a "malicious" action is not well settled; however, the decisions which have addressed the issue show that it is appropriate to consider the number and kinds of cases instituted, and the extent to which the conduct of the litigant constitutes an abuse of the judicial process. *Pratt v. Houston*, Nos. A-96-049, A-96-050, 1997 WL 119561 (Neb. App. Mar. 18, 1997) (not designated for permanent publication). The conduct of Judy and Russell does not fit within this definition, so we next consider whether the petition should have been dismissed on the ground that the legal position asserted was "frivolous."

[2] For purposes of § 25-2301.02—the statute governing applications to proceed in forma pauperis—a frivolous legal position is one wholly without merit, that is, without rational argument based on the law or on the evidence. See *Tyler v. Nebraska Dept. of Corr. Servs.*, 13 Neb. App. 795, 701 N.W.2d 847 (2005).

In this case, the district court objected on its own motion and filed an order stating that Judy and Russell asserted legal positions which were frivolous or malicious and their application was denied for "no cause of action pled." However, in *Neitzke v. Williams*, the U.S. Supreme Court reasoned that to conflate the standards of frivolousness and failure to state a claim would deny indigent plaintiffs the "practical protections against unwarranted dismissal generally accorded paying plaintiffs under the Federal Rules." 490 U.S. at 330. The U.S. Supreme Court ultimately held that a complaint filed in forma pauperis is not automatically frivolous simply because it fails to state a claim. This court cited *Neitzke*, while acknowledging that the statute gives the court authority to dismiss as frivolous

a claim that is based on an indisputably meritless legal theory. See *Pratt v. Houston, supra*.

[3] This court has held that principles of liberal construction apply to the review of a denial of a motion to proceed in forma pauperis upon the ground that the complaint was frivolous. See *Tyler v. Nebraska Dept. of Corr. Servs., supra*. Liberally construed, Judy and Russell's petition claims their attorney committed malpractice in his representation of them in a bankruptcy case. While this claim may ultimately prove meritless, the district court erred in its finding that the petition was frivolous or malicious on its face and in denying in forma pauperis status for failure to plead a cause of action.

CONCLUSION

We conclude that the district court erred in denying Judy and Russell's motion to proceed in forma pauperis. We therefore reverse the judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
JUNEAL DALE PRATT, APPELLANT.
824 N.W.2d 393

Filed January 8, 2013. No. A-11-760.

1. **DNA Testing: Appeal and Error.** A motion for DNA testing 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.
2. ____: ____. Under the DNA Testing Act, an appellate court will uphold a trial court's findings of fact unless such findings are clearly erroneous.
3. **DNA Testing.** Second, or successive, motions for DNA testing are permissible pursuant to the DNA Testing Act.
4. **Res Judicata: DNA Testing.** Res judicata principles would operate to bar a successive motion for DNA testing if the exact same issue was raised in both motions.
5. **Res Judicata.** The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if the former judgment was on the merits.

6. **DNA Testing.** Under the DNA Testing Act, a court is required to order DNA testing if it finds that (1) testing was effectively not available at the time of the trial, (2) the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and (3) such testing may produce noncumulative, exculpatory evidence relevant to the defendant's claim that he or she was wrongfully convicted.
7. **Postconviction: Appeal and Error.** An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.
8. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.
9. **DNA Testing.** When a defendant files successive motions for DNA testing pursuant to the DNA Testing Act, a court is required to first consider whether the DNA testing sought was effectively not available at the time of the trial; if it was not, the court must then consider whether the DNA testing was effectively not available at the time the previous DNA testing was sought by the defendant.
10. **Actions: Appeal and Error.** The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit.
11. ____: ____. An exception to the law-of-the-case doctrine applies if a party shows a material and substantial difference in the facts on a matter previously addressed by an appellate court.
12. **Collateral Estoppel: Words and Phrases.** Collateral estoppel means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties or their privies in any future lawsuit.
13. **Collateral Estoppel.** There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
14. **Criminal Law: Collateral Estoppel: Double Jeopardy.** Collateral estoppel in a criminal proceeding has its basis in the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution.
15. **Criminal Law: Collateral Estoppel: Double Jeopardy: Proof.** A criminal defendant relying on collateral estoppel does so in relation to the constitutional protection against double jeopardy, and the defendant has the burden to prove that the particular issue sought to be relitigated is constitutionally foreclosed by the Double Jeopardy Clause.
16. **DNA Testing.** In cases of successive motions for DNA testing, the district court must make a new determination of whether the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, but such determination shall be limited to a review of the evidence occurring since the last motion for DNA testing.

Appeal from the District Court for Douglas County: W. RUSSELL BOWIE III, Judge. Reversed and remanded for further proceedings.

Tracy Hightower-Henne, of Hightower Reff Law, L.L.C., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

Amy A. Miller for amicus curiae American Civil Liberties Union Foundation of Nebraska.

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

INBODY, Chief Judge.

I. INTRODUCTION

Juneal Dale Pratt appeals the decision of the Douglas County District Court denying his second motion for DNA testing.

II. STATEMENT OF FACTS

In 1975, Pratt was convicted by a jury of sodomy, rape, and two counts of robbery and was sentenced to terms of incarceration on each of the convictions. These convictions and sentences were affirmed on direct appeal in *State v. Pratt*, 197 Neb. 382, 249 N.W.2d 495 (1977) (*Pratt I*). Thereafter, Pratt sought postconviction relief, which was denied, and which denial was affirmed in *State v. Pratt*, 224 Neb. 507, 398 N.W.2d 721 (1987) (*Pratt II*).

In June 2004, Pratt filed his first motion for DNA testing to have items still in evidence from the sexual assault tested for DNA. The motion was granted, and the clothing that had been worn by the victims at the time of the attack was tested at the University of Nebraska Medical Center for biological material. Pratt filed a motion to vacate his convictions or, in the alternative, a motion for new trial. Following a hearing, the district court denied Pratt's request to vacate his convictions or grant a new trial, citing the fact that the evidence was stored in such a way that it was impossible to tell how or when the DNA was deposited on the clothing. This decision was affirmed on appeal by the Nebraska Supreme Court.

See *State v. Pratt*, 277 Neb. 887, 766 N.W.2d 111 (2009) (*Pratt III*). In *Pratt III*, the Nebraska Supreme Court summarized the facts as follows:

> The facts of the case can be found in our prior decisions, but because Pratt is now arguing that the DNA evidence is at least exculpatory, we revisit the pertinent facts here. The victims in this case both testified at trial that they had separately picked Pratt out of a three-man lineup. Each victim also identified Pratt in a voice lineup, without any visual contact with the persons participating in the voice lineup. Both victims testified that they recognized Pratt's shoes during the lineup as the shoes of the man who had assaulted them. One victim testified that the shoes were distinctive because they were black patent leather with "suede in the middle." In addition, Pratt was wearing a ring at the lineup that both victims testified belonged to one of them.
>
> Another robbery victim testified that approximately 1 week after the first attack, Pratt had robbed her in the same hotel where the first attack took place. Several police officers testified regarding the chase and apprehension of Pratt after the second robbery.
>
> Pratt testified in his own defense and gave an alibi for the sexual assault. Pratt claimed to have had an injured leg at the time and therefore had been physically incapable of the attack. Pratt also testified that he was at home on the evening of the attack. This testimony contradicted statements Pratt gave to police at the time of his arrest. Both Pratt's mother and his live-in girlfriend testified in his defense, confirming his alibi. Pratt's sister testified that the ring he had been wearing was her ring and not the victim's ring. She further testified that Pratt often wore her clothing and jewelry. Pratt claimed that he was at the hotel at the time of the second robbery, because he was renting a room in order to have sex with a different girlfriend.
>
> On June 9, 2004, Pratt filed an amended motion under the [DNA Testing] Act to have items still in evidence from the sexual assault tested for DNA. The motion

was granted, and the clothing that had been worn by the victims at the time of the attack was tested for biological material. After the testing was conducted, Pratt sought a certification from the Douglas County District Court for a subpoena duces tecum to compel a DNA sample from one of the victims. Pratt claimed that with the victim's DNA, the DNA testing laboratory would be able to construct a complete profile that would result in his exoneration.

The district court granted the certification, and the State appealed, claiming that Pratt did not have the right to compel the victim to give a DNA sample under the [DNA Testing] Act. We determined that we did not have jurisdiction because the certification from the district court was not a final, appealable order and dismissed the case. Two concurring opinions suggested that Pratt did not have the right to obtain the victim's DNA through a subpoena duces tecum under the [a]ct.

After the case was sent back to the district court, the certification was vacated and a hearing was held on Pratt's motion to vacate his convictions under the [DNA Testing] Act or, in the alternative, motion for new trial. Pratt claimed that the DNA evidence, considered along with his alibi defense from trial, was sufficient to warrant vacating his convictions or, alternatively, to award him a new trial. Pratt claimed that the lineup in which he participated was highly suggestive and that the victims' identification, both in court and in the lineup, could not be trusted.

Kelly Duffy, a medical technologist, testified regarding the DNA results. Duffy stated that the results were inconclusive, that it was impossible to know when or how the DNA was deposited on the shirts, and that there was no evidence that any of the DNA was contributed from sperm, although it could have been. Duffy also testified that seven items of clothing, including both victims' clothing as well as Pratt's clothing, were stored in the same box. The clothing was not separately packaged or bagged in the box. Duffy testified that the DNA detected

could be from epithelial cells and that handling the clothing could be enough to deposit the DNA.

After preliminary testing, the two shirts worn by the victims at the time of the attack were found to have "stains" that might contain DNA. None of the stains were found to be presumptively from semen. The stains, although invisible to the naked eye, fluoresced under a particular kind of light used during the testing of the clothing. A red, white, and blue shirt worn by one victim at the time of the attack had eight different stained areas, labeled B1 through B8. A yellow flowered shirt worn by the other victim had five stained areas, C1 through C5a.

Two of the areas on the red, white, and blue shirt, B4 and B7, showed the presence of male DNA, and one area, B1, was inconclusive as to whether male DNA was present. Area B4 may or may not have been a mixture of one or more individuals, and if it was not a mixture, then Pratt would be excluded. Area B7 was a mixture of more than one individual's DNA, and at least one of those individuals was male. The results were inconclusive as to how many males contributed to the mixture, but at least one of those males was not Pratt.

Partial DNA profiles were obtained from all five stained areas on the yellow flowered shirt. Area C4 showed the presence of male DNA, while area C5 showed the possible presence of male DNA. Area C4 was a mixture of at least two people, one of them male, and Pratt could not be excluded as a contributor. Area C5 was also a mixture of at least two people, possibly more than one female and/or more than one male. Pratt could not be excluded as a contributor at area C5.

After the hearing, the district court denied Pratt's motion to vacate his conviction[s] as well as his motion for new trial. In its order, the district court cited the fact that the evidence was stored in such a way that it was impossible to tell how or when the DNA was deposited on the clothing. The district court found that the results of the DNA testing were largely inconclusive

> and that while the testing did not conclusively show that Pratt was a contributor, neither did it eliminate him as a contributor.

277 Neb. at 889-92, 766 N.W.2d at 113-15. In *Pratt III*, the Supreme Court affirmed the district court's determination that the DNA evidence was inconclusive because Pratt could not be excluded or included as a donor, and likewise affirmed the district court's denial of Pratt's motion to vacate his convictions and motion for new trial.

In June 2011, Pratt filed his second motion for DNA testing pursuant to the DNA Testing Act, Neb. Rev. Stat. § 29-4116 et seq. (Reissue 2008). Pratt's motion alleged that new technology for DNA testing had recently become available and "could lead to exculpatory evidence." In support of his motion, Pratt submitted an affidavit from Brian Wraxall, chief forensic serologist at the Serological Research Institute in Richmond, California. Wraxall's affidavit set forth that the analysis of the items of evidence submitted for testing was incomplete due to the limitations of the testing previously performed by the University of Nebraska Medical Center and to the improvements in technology that have occurred since 2005. Wraxall asserted that although no semen was detected on the two items tested, the test used (presumptive acid phosphatase test) reacts to an enzyme which is not stable, whereas the test he suggests using (P30 test) targets a protein which is very stable and makes it possible to detect sperm in older samples. Wraxall's affidavit further set forth that although only partial DNA profiles were obtained through the previous DNA testing, current techniques ("Identifiler Plus" and "Minifiler" kits) exist which were not available in 2005 and which can be used to increase the ability to obtain full DNA profiles in small, old, and degraded samples. Wraxall's affidavit explained that it is possible to attempt to obtain DNA samples of the victims by testing the clothing that had come in contact with the wearer's skin. Wraxall proposed reexamination of the samples to "possibly identify the source of the biological stains (e.g., semen or saliva)"; extract stains for DNA content and quantitate for the presence of male DNA; type any male stains using the

Identifiler Plus and Minifiler kits in order to obtain a male profile for potential searching in local, state, or national databases; and perform male DNA typing as necessary for possible inclusion or exclusion purposes.

The district court denied Pratt's second motion for DNA testing, finding that (1) the materials to be tested were not retained under circumstances likely to safeguard the integrity of their original composition, which finding was previously affirmed by the Nebraska Supreme Court in *Pratt III*; (2) it is possible that the clothing had further deteriorated or been further handled in a manner to deposit still more unidentified DNA; and (3) testing would not produce noncumulative, exculpatory evidence relevant to the claim that Pratt was wrongfully convicted. The district court specifically noted that contrary to claims contained in Pratt's motion, the affidavit from Wraxall did not claim that further testing would conclusively establish the source of the male DNA on the clothing sought to be tested. Further, the court summarized the strength of the case presented by the State at Pratt's trial, which included identifications of Pratt by three eyewitnesses, whose identifications were "thoroughly and exhaustively detailed to the jury," and the fact that at the lineup, Pratt was wearing a ring that he had stolen from one of the victims. Pratt appeals the denial of his second motion for DNA testing.

III. ASSIGNMENTS OF ERROR

On appeal, Pratt contends that the district court erred in denying his second motion for DNA testing. Pratt argues that the district court's finding that the biological material was not retained under circumstances likely to safeguard the integrity of its original physical composition was erroneous, because (1) the district court is bound by the law-of-the-case doctrine in making the determination and (2) the district court erred in failing to apply res judicata and/or collateral estoppel in making the determination. He also argues that the district court erred in finding that DNA testing would not likely produce noncumulative, exculpatory evidence relevant to his claim of wrongful conviction.

IV. STANDARD OF REVIEW

[1,2] A motion for DNA testing 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. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010); *State v. Winslow*, 274 Neb. 427, 740 N.W.2d 794 (2007). Under the DNA Testing Act, an appellate court will uphold a trial court's findings of fact unless such findings are clearly erroneous. *State v. Parmar*, 283 Neb. 247, 808 N.W.2d 623 (2012).

V. ANALYSIS

[3-5] Nebraska's DNA Testing Act allows for postconviction motions for DNA testing if the biological material at issue "[w]as not previously subjected to DNA testing or can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results." § 29-4120(1)(c). Thus, second, or successive, motions for DNA testing are permissible pursuant to the DNA Testing Act. However, we note that res judicata principles would operate to bar a successive motion for DNA testing if the exact same issue was raised in both motions. See *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007) (although strict doctrine of res judicata does not apply to postconviction actions, res judicata principles are applied in determining whether issues are procedurally barred). The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if the former judgment was on the merits. *Id.*

[6] Under the DNA Testing Act, a court is required to order DNA testing if it finds that (1) testing was effectively not available at the time of the trial, (2) the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and (3) such testing may produce noncumulative, exculpatory evidence relevant to the defendant's claim that he or she was wrongfully convicted. § 29-4120(5); *State v. Haas, supra*. Thus, we address each of these factors in turn, incorporating into our analysis the assignments of error raised by Pratt.

1. Testing Effectively Not Available at Time of Trial

The district court found, and the parties agree, that the DNA testing sought by Pratt was not available at the time of his trial, which occurred in the 1970's. However, we note that this is Pratt's second motion for DNA testing and the fact that there are continuing advances in DNA technology increases the likelihood that courts will be asked more frequently to consider successive motions for DNA testing filed by defendants. Our research has not uncovered a Nebraska appellate court opinion addressing the issue of a successive motion for DNA testing. But see *State v. Burdette*, No. A-07-1223, 2008 WL 4635849 (Neb. App. Oct. 21, 2008) (selected for posting to court Web site) (although court held second hearing on issue of DNA testing, record is unclear whether hearing was result of new motion for further DNA testing or previously filed motion).

[7,8] In the context of motions for postconviction relief, the Nebraska Supreme Court has held that an appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion. *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009). The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity. *Id.* This rule preserves a defendant's ability to file claims, but mandates that a defendant raise issues at the first available opportunity.

[9] Applying this reasoning to successive motions for DNA testing would serve to maintain a balance of preserving defendants' rights to establish their innocence through DNA testing while acknowledging the need for finality in the criminal process. Therefore, we hold that when a defendant files successive motions for DNA testing pursuant to the DNA Testing Act, a court is required to first consider whether the DNA testing sought was effectively not available at the time of the trial; if it was not, the court must then consider whether the DNA testing was effectively not available at the time the previous DNA testing was sought by the defendant.

As we previously stated, both Pratt and the State concur that the DNA testing requested was not available at the time of his trial in the 1970's. The question then becomes whether the DNA testing was effectively not available at the time that Pratt filed his previous motion for DNA testing. Wraxall's affidavit set forth that improvements in technology have occurred since 2005, and he recommended performing certain DNA testing, such as the Identifiler Plus and Minifiler kits, which can be used to increase the ability to obtain full DNA profiles in small, old, and degraded samples. Additionally, Wraxall's affidavit suggests using the P30 test to attempt to detect sperm in the samples; whereas the test used in 2005, the presumptive acid phosphatase test, reacts to an enzyme which is not stable. Although Wraxall's affidavit does not specifically state that the P30 test was unavailable in 2005, at the time of Pratt's previous motion for DNA testing, the affidavit does make this inference. Thus, Pratt has sufficiently established that the DNA testing requested was not available at both the time of his trial and at the time of his previous motion for DNA testing.

2. Biological Material Retained Under Circumstances Likely to Safeguard Integrity of Original Physical Composition

The next issue is whether the biological material was retained under circumstances likely to safeguard the integrity of its original physical composition. Pratt argues that the district court's finding that the biological material was not retained under circumstances likely to safeguard the integrity of its original physical composition was erroneous, because (1) the district court is bound by the law-of-the-case doctrine in making the determination and (2) the district court erred in failing to apply res judicata and/or collateral estoppel in making the determination.

(a) Law-of-the-Case Doctrine

Pratt contends that the district court's previous ruling on his first motion for DNA testing, which ruling authorized DNA testing, necessitated a finding that the biological material had been retained under circumstances likely to safeguard the

integrity of its original physical composition; he contends that therefore, the court is barred by the law-of-the-case doctrine from reconsidering this issue.

[10,11] The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit. *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011); *Dowd Grain Co. v. County of Sarpy*, 19 Neb. App. 550, 810 N.W.2d 182 (2012). An exception to the law-of-the-case doctrine applies if a party shows a material and substantial difference in the facts on a matter previously addressed by an appellate court. *County of Sarpy v. City of Gretna*, 276 Neb. 520, 755 N.W.2d 376 (2008); *Dowd Grain Co. v. County of Sarpy, supra*.

Although Pratt does correctly point out that his previous motion for DNA testing was granted by the district court, following the completion of the DNA testing, a hearing was held wherein the medical technologist testified that the DNA results were inconclusive, that "it was impossible to know when or how the DNA was deposited on the shirts, and that there was no evidence that any of the DNA was contributed from sperm, although it could have been." *Pratt III*, 277 Neb. at 891, 766 N.W.2d at 114. Following this hearing, the district court found that the "evidence was stored in such a way that it was impossible to tell how or when the DNA was deposited on the clothing." *Id.* at 892, 766 N.W.2d at 115. The Nebraska Supreme Court, in affirming the denial of Pratt's motion to vacate his convictions and motion for new trial following his first motion for DNA testing, affirmed the lower court's factual finding that

> the evidence was not stored in such a way as to preserve the integrity of any DNA evidence. Although male DNA that might not be from Pratt was found on the clothing, . . . it was impossible to tell when or how the DNA was deposited on the clothing. The articles of clothing were stored in a box without being separately packaged. Evidence stickers were present on the clothing. . . . DNA may have come from epithelial cells deposited after handling the clothing.

Id. at 895, 766 N.W.2d at 117.

Although the district court must have initially determined that the biological material had been retained under circumstances likely to safeguard the integrity of its original physical composition, since such a finding was inherent in the court's decision to grant Pratt's first motion for DNA testing, the district court subsequently found that the evidence was not stored in such a way to preserve the integrity of any DNA evidence, which finding was affirmed by the Nebraska Supreme Court. Thus, we reject Pratt's claim that the law-of-the-case doctrine required the district court to find, in the course of his second motion for DNA testing, that the biological material in this case had been retained under circumstances likely to safeguard the integrity of its original physical composition.

(b) Collateral Estoppel and/or Res Judicata

Next, Pratt argues that the district court erred in failing to apply res judicata and/or collateral estoppel in making its finding that the biological material was not retained under circumstances likely to safeguard the integrity of its original physical composition.

(i) Collateral Estoppel

[12-15] The Nebraska Supreme Court has stated:

> "Collateral estoppel" means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties or their privies in any future lawsuit. There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.

State v. McCarthy, 284 Neb. 572, 576, 822 N.W.2d 386, 389 (2012). Collateral estoppel in a criminal proceeding has its basis in the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution. *State v. Lynch*, 248 Neb. 234, 533

N.W.2d 905 (1995). A criminal defendant relying on collateral estoppel does so in relation to the constitutional protection against double jeopardy, and the defendant has the burden to prove that the particular issue sought to be relitigated is constitutionally foreclosed by the Double Jeopardy Clause. *Id.*

Pratt's collateral estoppel argument does not relate to his constitutional protection against double jeopardy; therefore, his claim is more properly considered under res judicata principles.

(ii) Res Judicata

Res judicata principles would operate to bar a successive motion for DNA testing if the exact same issue was raised in both motions. See *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007) (although strict doctrine of res judicata does not apply to postconviction actions, res judicata principles are applied in determining whether issues are procedurally barred). The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if the former judgment was on the merits. *Id.*

[16] In cases such as the instant case, where a defendant has filed successive motions for DNA testing, the district court is statutorily required to consider whether the "biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition." § 29-4120(5). Although a court must consider the question anew each time a defendant files a motion for DNA testing, we believe that limiting the review to evidence occurring since the last motion for DNA testing, regardless of the court's previous determination on the issue, is sound judicial policy and consistent with the principle of res judicata. Therefore, in cases of successive motions for DNA testing, the district court must make a new determination of whether the "biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition," but such determination shall be limited to a review of the evidence occurring since the last motion for DNA testing. Thus, if the prior determination was that the biological material had been retained

under circumstances likely to safeguard the integrity of its original physical composition, the district court will consider whether, in the intervening time period between the successive motions for DNA testing, the DNA sample continued to be retained under circumstances likely to safeguard the integrity of its original physical composition. Conversely, if the prior determination was that the biological material had not been retained under circumstances likely to safeguard the integrity of its original physical composition, the district court will need to consider if advances in DNA technology would affect this determination.

Although Pratt acknowledges that there has been a prior finding by the district court, which was upheld by the Nebraska Supreme Court, that the biological evidence was not stored in such a way as to preserve the integrity of DNA evidence, he contends that the same finding is not compelled in this case because of advances in DNA technology. Although the record reflects that DNA testing was performed on the two articles of clothing in 2005, which testing detected no semen on the clothing, Pratt argues that due to advancements in DNA technology, the evidence can now be tested to attempt to identify the biological source of the DNA evidence, i.e., skin cells, saliva, or semen. Pratt contends that if the new testing detects the presence of a DNA sample solely consisting of semen, that sample would meet the second requirement as having been retained under circumstances likely to safeguard the integrity of its original physical composition, because the presence of semen on the evidence would have come only from the perpetrator of the sexual assault, unlike skin cells or saliva samples which could possibly have been deposited through handling of the samples or through cross-contamination when the items of evidence were stored together.

Restated, Pratt's argument is that it is undisputed there is biological evidence on the clothing and that, even though prior DNA testing returned negative results for semen, due to advancements in the field of DNA testing, a retesting of the samples may be able to identify whether the biological source of the DNA is semen. If, in fact, further DNA testing proves that the source of one or more of the biological stains is semen,

it is unlikely that the stain would have been deposited at any time other than the commission of the offense. As such, the identification of the biological source as semen would establish that the samples had been retained under circumstances likely to safeguard the integrity of the original physical composition; if not, semen would not be able to be identified as the source of the biological stain.

We agree with Pratt. Although Wraxall's affidavit does not conclusively establish that further testing will absolutely be able to identify the source of the biological stains, he states that it may "possibly identify" the source. This case presents a unique factual situation where, until the DNA testing is conducted and it is determined whether the biological source of the stains can be identified, it is unknown with absolute certainty whether the samples were retained under circumstances likely to safeguard the integrity of their original physical composition. Although this may seem to be somewhat of a "fishing expedition," the statutory framework appears to authorize precisely such an expedition in order to allow wrongfully convicted persons the opportunity to establish their innocence through DNA testing. See § 29-4117. See, also, *State v. Smith*, 34 Kan. App. 2d 368, 372, 119 P.3d 679, 683 (2005) (district court's conclusion that absence of allegations contained in defendant's motion for DNA testing rendered motion "'purely a fishing expedition by the defendant' proved an unfortunate choice of phrase, given the subsequent Supreme Court endorsement of the statute's apparent scope as permitting precisely such an expedition").

3. Testing May Produce Noncumulative, Exculpatory Evidence

The final issue is whether the DNA testing requested by Pratt may produce noncumulative, exculpatory evidence relevant to his claim that he was wrongfully convicted. If the DNA testing that Pratt has requested is able to determine that the biological stains are from semen and the DNA does not match his DNA, this testing clearly meets the requirement that testing may produce noncumulative, exculpatory evidence relevant to his claim that he was wrongfully convicted.

See *State v. Winslow*, 274 Neb. 427, 740 N.W.2d 794 (2007) (where DNA testing could exclude defendant as contributor to semen sample, potential test results would be noncumulative, exculpatory evidence and relevant to claim of wrongful conviction). Additionally, some of the stains on the victims' shirts contained a mixture of male and female DNA and, because the victims' DNA was not available, prior DNA testing was unable to separate the mixed stains in order to exclude Pratt as a contributor and full profiles were not able to be obtained. Wraxall's affidavit states that using new DNA techniques which were not available in 2005, he may be able to produce a 16-marker profile. Wraxall's affidavit also proposes using DNA testing procedures which may identify the victims' DNA by testing areas of the shirts that came into contact with the wearer's body; this would allow male-only DNA typing which would allow Pratt to be either included or excluded from the mixtures. Additionally, Wraxall states that any full DNA profiles could be used for searching databases which Pratt contends can be used to obtain a hit matching the specific profile of the true perpetrator of the offense. This also meets the requirement that testing may produce noncumulative, exculpatory evidence relevant to his claim that he was wrongfully convicted.

VI. CONCLUSION

We find the district court erred in determining that the biological material was not retained under circumstances likely to safeguard the integrity of its original physical composition and that DNA testing would not produce noncumulative, exculpatory evidence. As such, the court abused its discretion when it denied Pratt's second motion for DNA testing. Therefore, we reverse the denial and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IVERNA M. HARMS, BY AND THROUGH NANCY D. FANGMEIER, HER ATTORNEY IN FACT AND NEXT FRIEND, APPELLANT, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEE.

824 N.W.2d 772

Filed January 8, 2013. No. A-12-170.

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 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 not arbitrary, capricious, or 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. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
5. **Administrative Law: Appeal and Error.** An appellate court accords deference to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Reversed and remanded with directions.

Daniel L. Werner, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and John L. Jelkin for appellee.

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

MOORE, Judge.

INTRODUCTION

The Nebraska Department of Health and Human Services (DHHS) determined that Iverna M. Harms was required to contribute $665.38 per month toward her medical care under Medicaid. The district court affirmed the determination of DHHS, and Harms appeals. For the following reasons, we

reverse the judgment of the district court and remand the cause with directions.

BACKGROUND

In 1992, Harms and her husband, who is now deceased, conveyed their farm property to their daughter, Nancy D. Fangmeier, subject to a life estate. At that time, Harms and her husband were living in the house on the farm. Under the terms of the life estate, Harms and her husband were responsible for the payment of taxes, insurance, upkeep, and repairs. The legal description of the property includes farmland, a house, a grain bin, and miscellaneous outbuildings.

In 2001, Harms and her husband negotiated a lease of the farmland while they remained in the home. The lease provided that the tenant could occupy and use for agricultural purposes 160 acres of farmland and 85 acres of pasture. It also provided that "the grain bin on the property is considered" part of the agreement and could be used by the tenant. The house and other outbuildings are not specifically mentioned in the lease; however, throughout the relevant time period, the tenant used the land surrounding the house to enter the property, park farm machinery, and obtain access to the toolshed and barn. The land was leased at $60 per acre for farm ground and $1,000 for the pasture. The lease required the tenant to spray the pasture for noxious weeds and keep the fences surrounding the pasture in good condition.

In 2009, Harms moved to an assisted living facility, and the house has since remained unoccupied. Harms depleted her other investments, and she applied for Medicaid benefits on May 11, 2010. Her application was approved on June 1. To calculate Harms' 2009 net income, DHHS took the $10,600 Harms received in cash rent from the lease and deducted her expenses for insurance in the amount of $644 and property taxes in the amount of $3,799.65. After factoring in Harms' Social Security income, the cost of her room and board at the assisted living facility, and an amount for her personal needs, DHHS determined that Harms was eligible for Medicaid assistance and that her share of the cost was $665.38 per month.

DHHS did not deduct all of the expenses Harms had listed on her 2009 federal tax return for the farm. These additional expenses included $84 for machine work, $1,465 for depreciation of a lawnmower and trailer to mow the grass around the buildings, $382 for gasoline for mowing and Fangmeier's drive to the property to perform maintenance and repairs, $500 for labor paid to Fangmeier, $598 for repairs and maintenance of the lawnmowers and toolshed, $381 for supplies such as parts and rodent control, and $30 for truck expenses. Harms also requested that the following expenses not included on the 2009 tax return be deducted: $1,026.82 for 2009 electrical expense paid in January 2010 for the outside yardlight and grain bin, $252 for extermination, $240 for tax preparation, and any legal fees. The additional expenses total approximately $4,958.82.

An administrative hearing was conducted on August 27, 2010, in which Harms requested that the additional expenses noted above be deducted from the rental income.

Fangmeier, who is Harms' attorney in fact through a power of attorney, testified that the disallowed expenses related to the upkeep of the farm premises, not to the upkeep of the house, and should have been deducted from Harms' income. Fangmeier testified that the expenses Harms requested be deducted were necessary for the production of farm income and that if Harms is not allowed to deduct these expenses, then she will not be able to afford to pay for the upkeep of the farm premises in addition to her portion of Medicaid.

Fangmeier testified regarding the various expenses sought to be deducted. She indicated that the $1,026.82 paid for electricity in 2009 resulted in part from the use of an outside light which prevents vandalism of the buildings and in part from electricity used in the grain bin by the tenant. The DHHS social service worker testified that she was not aware that the electricity was, in part, used by the tenant for the drying of grain. However, she testified that because the lease does not indicate that electricity will be provided to the tenant, she probably would not deduct that expense even though use of the grain bin is specified in the lease.

Fangmeier's testimony indicated that the expenses for mowing and gasoline enable Harms to keep the property in good repair, provide areas for the tenant to park equipment on the farmsite, and keep the property safe. Fangmeier and her husband mow the property around all of the buildings, which takes "over an hour and a half" to complete with two mowers. Fangmeier estimated that if any of the cost is attributable to the mowing of the yard which is by the house, it would be a minor amount.

Fangmeier testified that the cost of repairs made to the machine shed was necessary because the insurance company would not insure the building unless it was repaired. The shed is available for use by the tenant.

Finally, Fangmeier testified that rodent control and extermination were required on the property because of rodents drawn to the grain bin. The tenant complained about rats in the barn and around the grain bin. Harms paid for poison, and eventually, she needed to hire someone to spray for rodents.

Following the administrative hearing, the hearing officer affirmed DHHS' original calculation method and Harms' share of the Medicaid costs. Harms appealed to the district court for Lancaster County. A hearing was held on October 26, 2011, and the district court affirmed the decision of DHHS on January 30, 2012. The court found that the tenant paid rent only for the use of the pasture and farmland. The court found that the other parts of the property do not produce income, despite the tenant's "occasional use" of the yard, grain bin, and outbuildings. The court also found that Harms' duty to maintain the house, yard, and outbuildings as part of her life estate is unrelated to her rental income and should not be deducted.

ASSIGNMENT OF ERROR

Harms assigns, consolidated and restated, that the district court erred when it failed to deduct certain expenses relating to her life estate.

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. *Liddell-Toney v. Department of Health & Human Servs.*, 281 Neb. 532, 797 N.W.2d 28 (2011). 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 not arbitrary, capricious, or unreasonable. *Id.* 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. *Id.*

[4,5] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.* An appellate court accords deference to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent. *Id.*

ANALYSIS

Under the Nebraska Administrative Code, income resulting from a life estate is considered unearned income and expenses specified as a condition of the life estate are deducted from gross income. See 469 Neb. Admin. Code, ch. 2, § 010.01H (2009). The amount of net income in turn determines the level of Medicaid benefits to which an applicant is entitled. See 469 Neb. Admin. Code, ch. 2, § 010 (2009). In this case, the deed conveying the farm real estate to Fangmeier reserved a life estate interest for Harms subject to the payment of taxes, insurance, upkeep, and repairs. In its calculation of Harms' net income, DHHS deducted expenses only for insurance and property tax from the income received from the lease.

Harms argues that additional expenses should have been deducted from the lease income for maintenance, repairs, and electricity, which she is required to provide as a condition of the life estate and as part of her responsibilities under the lease. DHHS argues that these expenses may not be deducted because they do not relate to the lease income.

The example that DHHS relied upon comes from a page of the "[DHHS] Manual," which page was entered as an exhibit and states in part as follows:

> Example 1: Client in a nursing home has a life estate interest in a farm and a house in town. The house in town is not being rented out, but a grandson is living there rent free. The farm is being rented out for an annual cash rent total of $8,000. There is a copy of this cash rent agreement in the case file. The real estate taxes on the farm are $1,500 per year. The insurance on the farm is $500 per year.
>
> We do not allow any expenses on the house in town because it is not producing any income. The farm net income is:
>
> $8,000 cash rent – $2,000 (taxes and insurance) = $6,000 divided by 12 = $500 per month.
>
> Total countable monthly unearned life estate income is $500 per month.

In the foregoing example, there are two separate and distinct pieces of property that are situated at different locations: one that is subject to a lease and another that is not. In the present case, the property lines are not so distinct. The farmland is one contiguous piece of property, consisting of the farm ground, pasture, house, and various outbuildings.

The real estate taxes allowed as a deduction by DHHS are for the entire tract of real estate. Likewise, the property insurance, allowed as a deduction by DHHS in its entirety, includes coverage for the house, barn, toolshed, garage, and grain bin. The grain bin is specifically included as part of the lease, and there was evidence presented that the barn, toolshed, garage, and surrounding land were also used by the tenant. The electricity does not power the house, but, rather, is used to provide outside lighting to the property, including part of the land in the lease, to protect it from vandalism. The electricity also is used in the grain bin which is used by the tenant per the lease.

Additionally, the mowing and related expenses include upkeep for the land used by the tenant, and Fangmeier testified that any amount which is related to the house is minimal.

Additionally, the cost of the extermination and related expenses were directly linked to the tenant's use of the land and were completed at the request of the tenant. There was no evidence presented which contradicted these assertions.

In reaching its decision, DHHS partially relied upon the fact that the allocation of these additional expenses was not contained in the lease as support for its determination that they were unrelated to the rental income. However, this focus is misplaced. Clearly, Harms as lessor was paying for these additional expenses as associated costs of maintaining the premises as a whole for the benefit of the lessee. Although the lease does not specify who is responsible for these expenses, it is clear that Harms has implicitly agreed to do so and has, in fact, done so for a number of years.

While deference is to be given to DHHS' interpretation of the regulation in question, we find that its interpretation of the regulation based upon the example in the manual is clearly erroneous, because the example is not consistent with the facts presented in the instant case. In this case, the evidence shows that the expenses submitted by Harms are specified as a condition of the life estate granted to Harms and are reasonably necessary to maintain the income-producing portion of her life estate. Further, DHHS' own approach to the expenses in this case is inconsistent, because it allowed some expenses associated with the entire premises, not just the farm ground and pasture, while disallowing other such expenses. Specifically, the deduction for real estate taxes and property insurance allowed by DHHS was for the entire premises, including the house and outbuildings. The failure to allow a deduction for expenses for maintenance, repairs, and electricity for the premises which are utilized by and for the benefit of any tenants is inconsistent and arbitrary. Accordingly, we find that the district court erred in affirming the determination by DHHS that expenses for maintenance, repairs, and electricity should not be deducted from Harms' lease income.

CONCLUSION

The district court erred when it affirmed DHHS' determination that Harms' expenses for maintenance, repairs, and

electricity should not be deducted from her income when computing her share of medical expenses under Medicaid. The judgment of the district court is reversed, and the cause is remanded with directions to reverse the determination made by DHHS and to remand the cause to DHHS for a determination of benefits consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

ESTATE OF DONNA MAE HANSEN, BY AND THROUGH ITS SPECIAL ADMINISTRATOR, PEGGY ANN WIMER, AND ESTATE OF GEORGE ALFRED HANSEN, BY AND THROUGH ITS SPECIAL ADMINISTRATOR, PEGGY ANN WIMER, APPELLANTS, V. DONALD L. BERGMEIER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ALBERTA J. BERGMEIER, DECEASED, APPELLEE.

825 N.W.2d 224

Filed January 8, 2013. No. A-12-186.

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. **Judgments: Appeal and Error.** To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
3. **Decedents' Estates: Claims.** The Nebraska Probate Code provides two methods of presenting a claim against a decedent's estate: Under Neb. Rev. Stat. § 30-2486(1) (Reissue 2008), a claim can be presented by filing a written statement thereof with the clerk of the probate court, or under § 30-2486(2), a claim can be presented by commencing a proceeding against the personal representative in any court which has jurisdiction.
4. **Decedents' Estates: Liability: Damages.** The potential liability of a decedent, without establishment of liability and amount of damage, does not constitute a direct legal interest in the estate of the deceased.
5. **Decedents' Estates: Limitations of Actions: Insurance.** The time limits under Neb. Rev. Stat. § 30-2485 (Cum. Supp. 2012) for presentation of claims are not applicable when the recovery sought is solely limited to the extent of insurance protection.
6. **Decedents' Estates: Limitations of Actions: Liability: Insurance: Notice.** A claimant who has a claim for the proceeds of a decedent's liability insurance under Neb. Rev. Stat. § 30-2485(c)(2) (Cum. Supp. 2012) is entitled to have the

estate reopened for the limited purpose of service of process in the civil action filed to establish liability and liability insurance coverage.

7. **Decedents' Estates: Executors and Administrators: Statutes.** A personal representative is not a natural person, but, rather, an entity created by statute through a court order of appointment.
8. **Decedents' Estates: Executors and Administrators: Claims: Insurance.** A closed estate, with a discharged personal representative, must be reopened and a personal representative appointed (or reappointed) before suit can be filed, even when seeking only liability insurance proceeds.
9. **Decedents' Estates: Limitations of Actions: Executors and Administrators.** Neb. Rev. Stat. § 30-2485(c)(2) (Cum. Supp. 2012) does not allow the institution of proceedings against a discharged personal representative while the estate is closed.
10. **Courts: Jurisdiction: Decedents' Estates: Claims: Executors and Administrators.** The county court, upon an alleged creditor's request, has the jurisdiction to appoint a personal representative for the purpose of the proper presentation of a claim against a decedent whose estate has been previously closed and the personal representative discharged.
11. **Limitations of Actions: Waiver: Pleadings.** The benefit of the statute of limitations is personal and, like any other personal privilege, may be waived and will be unless pleaded.

Appeal from the District Court for Gage County: PAUL W. KORSLUND, Judge. Affirmed.

Steven H. Howard, of Dowd, Howard & Corrigan, L.L.C., for appellants.

Colin A. Mues, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

SIEVERS, Judge.

On January 9, 2006, an automobile accident occurred in Beatrice, Gage County, Nebraska. One vehicle was driven by Alberta J. Bergmeier and the other by George Alfred Hansen, with his wife, Donna Mae Hansen, in the passenger seat. A lawsuit for the Hansens' predeath personal injuries was filed January 7, 2010, in the district court for Gage County. At the time the suit was filed, Alberta, George, and Donna were all deceased from causes unrelated to the automobile accident. The issue before us is whether Donald L. Bergmeier—who was previously the personal representative of the estate of

Alberta, his mother—was timely and properly sued for the Hansens' personal injuries resulting from the automobile accident. Donald filed a motion for summary judgment, which was sustained, and the suit was dismissed. The district court found that the lawsuit was time barred after consideration of the statutory procedures applicable to the filing of a claim against a deceased person's closed estate and the discharged personal representative. Peggy Ann Wimer, the Hansens' daughter, has appealed as the special administrator of each of her parent's estates. For ease of discussion, we will refer to Wimer in this opinion as the sole appellant.

FACTUAL AND PROCEDURAL BACKGROUND

The following pertinent facts in this case are undisputed. Alberta died on May 25, 2007, and Donald was appointed personal representative of her estate on August 20. In that estate, notice by publication was given to known creditors on August 20, stating that all claims must be filed with the court no later than October 29 or be forever barred. Additionally, on August 29 and again on September 5 and 12, notice to creditors of the estate was published in a local newspaper pursuant to the Nebraska Probate Code. See Neb. Rev. Stat. § 30-2483 (Reissue 2008).

On August 30, 2007, the attorney for Alberta's estate mailed a copy of the registrar's statement of informal probate and notice to creditors to the known creditors of the estate. Diligent investigation and inquiry by the estate's attorney did not identify George or Donna as having any direct legal interest in the estate, and accordingly, neither was mailed a notice to creditors. Wimer does not claim that there was anything improper about such notice to creditors, nor does she assert that either she or the Hansens had a "direct legal interest" in Alberta's estate which would entitle them to personal notice. See Neb. Rev. Stat. § 25-520.01 (Reissue 2008).

On February 5, 2008, the county court for Gage County found that Donald had properly collected and managed the assets of the estate, filed an inventory and final accounting, paid all lawful claims against the estate, and performed all

other acts required under Nebraska law. Donald was ordered by the county court to deliver the estate's assets according to the distribution schedule. The court also approved and ratified distributions that Donald had previously made on behalf of the estate. On September 18, the county court terminated Donald's appointment as personal representative of Alberta's estate and further discharged him "from further claim or demand of any interested person." While the estate was open and under administration, neither George nor Donna, nor anyone acting on their behalf, filed a claim against Alberta's estate. Nor did George or Donna, while the estate was open and being administered, file any lawsuit against Donald as personal representative of Alberta's estate for injuries arising out of the accident of January 9, 2006.

However, on January 11, 2010, the estates of George and Donna filed a statement of claim in the county court against the estate of Alberta for personal injury arising out of the January 9, 2006, accident. A joint stipulation was filed in the county court on May 4, 2010, to "stay all further Probate proceedings until such time as there is a judicial determination in the separate civil case presently pending" in the Gage County District Court involving the accident of January 9, 2006. On May 6, 2010, the county court entered an order staying all further probate court proceedings until there had been a judicial determination in the district court as to whether the Hansen estates were "legally entitled to recover damages from Alberta" as a result of the automobile accident of January 9, 2006.

The district court action referenced in the stay is the instant lawsuit that was first filed on January 7, 2010, by Wimer as the special administrator of the Hansen estates, which was followed by an "amended complaint" on January 11. The only material difference between the two complaints is that the amended complaint added two specifications of negligence. This suit was filed against Donald, designating him as "personal representative" of Alberta's estate, seeking damages for personal injuries sustained by George and Donna in the January 9, 2006, automobile accident. It is this district court case that is now before us.

Donald's answer was filed in district court on April 15, 2010. Donald alleged that he was the duly appointed personal representative of Alberta's estate, but that the estate was formally closed and a decree of final discharge of the personal representative was entered by the county court on September 18, 2008, at which time his appointment terminated and he was discharged from further claims or demands of any interested persons. The answer admitted the occurrence of the accident on January 9, 2006, alleged that the complaint failed to state a claim upon which relief could be granted, denied that Alberta was negligent, alleged contributory negligence of George, and stated that the claims asserted in the lawsuit were barred by the applicable statute of limitations and the provisions of Neb. Rev. Stat. § 30-2485 (Cum. Supp. 2012).

On September 8, 2011, Donald filed a motion for summary judgment in the district court case, alleging that there was no genuine issue of material fact and that he was entitled to judgment as a matter of law. The district court rendered its decision on the motion for summary judgment on February 6, 2012. The court first articulated that, despite argument and briefing on other timing issues related to the presentation of a claim in the estate by written statement pursuant to Neb. Rev. Stat. § 30-2486(1) (Reissue 2008), the case before the court involved only whether, under Nebraska law, "a claimant may present and enforce a claim by commencing a proceeding under [§] 30-2486(2) against a discharged personal representative." Therefore, the court limited its decision to whether the district court lawsuit was proper under § 30-2486(2) and declined to comment upon or discuss a potential claim presented under § 30-2486(1) in the estate proceeding in the county court.

The district court cited our decision in *Mach v. Schmer*, 4 Neb. App. 819, 550 N.W.2d 385 (1996), for its conclusion that a potential claimant cannot bring a claim against a former personal representative while the estate remains closed. The special administrator of the Hansen estates, Wimer, now appeals.

ASSIGNMENTS OF ERROR

Wimer's assignments of error, restated, are (1) that the district court erred in granting summary judgment; (2) that the district court erred in determining that reopening Alberta's estate and the appointment of a successor personal representative were conditions precedent to the filing of this case in district court; (3) that the district court erred in determining that a claim filed against the estate was necessary, when the only recovery sought was from Alberta's automobile liability insurance carrier and not from any assets of her estate; (4) that the district court erred in determining that the claim filed in the probate case was untimely and inappropriate; and (5) that the district court erred in determining that Alberta's estate was not reopened, when it should have found that it was merely "inactive."

STANDARD OF REVIEW

[1] 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. *Marksmeier v. McGregor Corp.*, 272 Neb. 401, 722 N.W.2d 65 (2006).

[2] To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below. *Griess v. Griess*, 9 Neb. App. 105, 608 N.W.2d 217 (2000).

ANALYSIS

The pertinent facts are undisputed, and we see this appeal as purely a question of law. The claim in Alberta's estate was filed after Alberta's estate was closed and the personal representative was discharged. The district court suit was filed against the discharged personal representative without Alberta's estate being reopened, and the operative amended complaint in district court does not limit the recovery sought to only the available automobile insurance coverage that Alberta had in effect at the time of the accident.

[3,4] With this procedural posture in mind, the broad issue and proper starting point for the analysis of this appeal is whether Wimer has ever properly presented her deceased parents' personal injury claims against Alberta's estate. The Nebraska Probate Code provides two methods of presenting a claim against a decedent's estate: Under § 30-2486(1), a claim can be presented by filing a written statement thereof with the clerk of the probate court, or under § 30-2486(2), a claim can be presented by commencing a proceeding against the personal representative in any court which has jurisdiction. See *Mach v. Schmer*, 4 Neb. App. 819, 550 N.W.2d 385 (1996). Section 30-2485 contains the general time limitations within which a claimant must present the claim against an estate. If the personal representative complies with the notice provisions of §§ 25-520.01 and 30-2483, a claim must be presented within 2 months after the date of the first publication of notice to creditors. Wimer makes no argument that notice was not proper, or that her parents had a direct legal interest in the estate which would have entitled them to notice. See *Farmers Co-op. Mercantile Co. v. Sidner*, 175 Neb. 94, 120 N.W.2d 537 (1963) (potential liability of decedent, without establishment of liability and amount of damage, does not constitute direct legal interest in estate of deceased). It is undisputed that neither the Hansens, while still living, nor Wimer, as their estates' appointed representative, presented any claim under § 30-2486(1) within the time limits found in § 30-2485. The claim that was filed in Alberta's estate was filed long after Alberta's estate was closed and Donald was discharged as personal representative.

[5] Wimer's claim presentation under the alternative procedure under § 30-2486(2), the instant case, was accomplished on January 7, 2010, when she filed this lawsuit against Donald as personal representative of Alberta's estate, although Alberta's estate had not been reopened, nor had Donald been reappointed as personal representative. We note that the time limits under § 30-2485 for presentation of claims are not applicable when the recovery sought is solely limited to the extent of "insurance protection," see § 30-2485(c)(2), but no allegation limiting the claim to liability insurance is found in the

complaint filed January 7 or in the amended complaint filed 4 days later.

[6] Nebraska law is quite clear that a claimant who has a claim for the proceeds of a decedent's liability insurance under § 30-2485(c)(2) is entitled to have the estate reopened for the limited purpose of service of process in the civil action filed to establish liability and liability insurance coverage. See *Tank v. Peterson*, 214 Neb. 34, 332 N.W.2d 669 (1983). We applied *Tank* in *Mach, supra*, where Dean E. Mach and Carolyn Mach presented their personal injury claims flowing from the alleged negligence of the decedent, Floyd S. Schmer, almost a year after Schmer's estate was closed and the personal representative had been discharged. However, the Machs did not seek to have the Schmer estate reopened, as *Tank* clearly allows and requires, but, rather, the Machs simply filed suit against the estate's former personal representative, just as occurred in the present case. In *Mach*, we made note of the *Tank* court's holding that neither the probate claims statute, § 30-2485, nor the closing of the estate can bar a claim. This proposition needs the caveat that the deceased was protected by liability insurance, assuming that the applicable statute of limitations has not run. We then said:

> *Tank* does not, however, provide that a claimant may institute proceedings against a discharged personal representative while the estate is closed. According to the Supreme Court's holding in *Tank*, a claimant who possesses a claim for the proceeds of liability insurance under § 30-2485(c)(2) is entitled to have the estate reopened for the limited purpose of service of process in the civil action to establish liability and liability insurance coverage. [The Machs] did not proceed to have the estate reopened, however, and instead attempted to proceed while the estate remained closed.

Mach v. Schmer, 4 Neb. App. 819, 829, 550 N.W.2d 385, 392 (1996).

[7] Therefore, we found that Schmer's personal representative was entitled to summary judgment because she had previously been discharged and her appointment had terminated. We then said that any claims the Machs had, other than a

claim under § 30-2485(c)(2), were barred by the time limits of § 30-2485, often referenced as "the nonclaim statute." As in *Tank, supra*, Alberta's estate has never been reopened, meaning that Donald was not the personal representative of Alberta's estate when he was sued in this case. In *Mach*, we affirmed the trial court's summary judgment for the former personal representative of Schmer's estate. Accordingly, it would appear that the same result as in *Mach* is required in the instant case. The unstated rationale behind the result in *Mach* is that a personal representative is not a natural person, but, rather, an entity created by statute through a court order of appointment. See *Pilger v. State*, 120 Neb. 584, 585, 234 N.W. 403, 404 (1931) ("[e]xecutors and administrators in Nebraska are creatures of statute"). Thus, it naturally follows that when the estate is closed and the personal representative is discharged, there is no viable entity or person to sue, because the tort-feasor is deceased, his or her estate is closed, and there is no longer a personal representative.

However, for completeness, we turn to the arguments offered by Wimer as to why the trial court erred in granting the summary judgment. Wimer offers three arguments as to why summary judgment against her is wrong under the rubric of her five assignments of error: (1) There was automobile liability insurance coverage, no assets of the estate are affected, and therefore her claim is not barred; (2) Wimer is entitled to her day in court on the merits of the tort claims; and (3) Alberta's estate had "active and ongoing proceedings" at the time the summary judgment was granted. Brief for appellants at 7.

Presence of Automobile Liability Insurance.

[8] Wimer's brief asserts that this action was filed within the 4-year statute of limitations for torts found in Neb. Rev. Stat. § 25-207 (Reissue 2008). We agree that this suit was filed within 4 years of the accident. We also agree that the evidence shows that on the date of the accident, Alberta had in full force and effect a policy of automobile liability issued by State Farm Mutual Automobile Insurance Company (State Farm) with

limits of $100,000 per person and $300,000 per occurrence. Wimer's brief states: "The Hansen Estates' claims against [Alberta's] Estate were specifically limited to that State Farm automobile liability insurance coverage. . . . The only dollars at risk are those belonging to State Farm." Brief for appellants at 8. In the record is the Gage County Court transcript of the proceedings and filings in Alberta's estate. Included therein is a statement of claim filed January 11, 2010, by which the estates of George and Donna each assert a claim of $300,000 against Alberta's estate for "[c]laims arising out [sic] automobile accident on 1/9/06." Also filed on the same date in the closed estate was a "Notice of Claims" by Wimer as administrator of the estates of "now deceased" George and Donna. The notice provides: "Claims are hereby made for an amount to be determined by a Court of Law to the extent of, and equal to available automobile insurance coverage." But, contrary to those claims in the estate, the lawsuit with which we are dealing in this opinion fails to allege that the claims being asserted are limited to recovery of only liability insurance coverage. That shortcoming in the complaint would seem to be fatal when one is seeking to avoid the rather rigorous claims deadline in estate proceedings by limiting the recovery sought to only liability insurance as allowed by § 30-2485(c)(2). However, we need not decide that issue, because the law is that a closed estate, with a discharged personal representative, must be reopened and a personal representative appointed (or reappointed) before suit can be filed, even when seeking only liability insurance proceeds. In short, the procedural posture of this case provides a complete resolution. *Mach v. Schmer*, 4 Neb. App. 819, 550 N.W.2d 385 (1996), has the identical procedural facts as the instant case with respect to the claim against the estate filed in district court, because there, the personal representative was discharged and the estate was closed, just as is true here. Therefore, in *Mach*, we held: "Accordingly, [Schmer's personal representative] was entitled to judgment as a matter of law in that the probate code does not authorize [the Machs] to bring the present claim against a *former* personal representative while the estate remains closed." 4 Neb. App. 828, 550 N.W.2d 391-92.

[9] Our opinion in *Mach* then explored the "what if" situation in dicta. We said that the personal representative of Schmer's estate had provided proper notice and that as a result, the Machs' claim was barred by the nonclaim statute, § 30-2485, unless the exception stated in § 30-2485(c)(2) was applicable. In that situation, the general time limitations of the nonclaim statute do not apply to a proceeding to establish liability of the decedent or personal representative for which there is liability insurance. Nonetheless, we found in *Mach* that the § 30-2485(c)(2) exception does not allow the institution of proceedings against a discharged personal representative while the estate is closed, citing *Tank v. Peterson*, 214 Neb. 34, 332 N.W.2d 669 (1983). Thus, we affirmed the summary judgment that dismissed the suit filed against Schmer's discharged personal representative. Clearly, this is exactly the posture of the district court case now before us.

To summarize, this lawsuit is a proceeding contemplated by § 30-2485(c)(2), when the nonclaim statute has barred a direct claim against the estate. But, given that Alberta's estate was still closed and there was no personal representative, this lawsuit is not a valid presentation of the claim, even if the claim was intended to be limited to recovery against Alberta's automobile liability insurer—although there is no such allegation in the amended complaint. Therefore, the holdings of *Tank, supra*, and *Mach, supra*, are on point, and seemingly controlling.

Wimer as Personal Representative Is Entitled to Day in Court.

The answer to this argument against the summary judgment is relatively straightforward. Certainly, Wimer is entitled to her day in court, but like many instances in the law, one's "day in court" is subject to certain predicate procedural steps being properly completed. In this case, those steps were the reopening of Alberta's closed estate and the reappointment of Donald as personal representative, or a successor. As such steps were not accomplished, this argument is unavailing.

Was Alberta's Estate Opened "By Activity," or Was There Waiver of Reopening Requirement?

Wimer argues that the fact that responsive pleadings and court orders were filed in the estate after her claim was filed means that there was a "de facto reopening of [Alberta's] Estate." Brief for appellants at 9. The filings were a disallowance of the claim by Donald to the extent that Wimer's claim sought assets of the estate and an "Objection to Petition For Allowance" by State Farm, designating itself as an "interested party" because it issued an automobile liability policy to Alberta. Wimer and State Farm filed a joint stipulation for the county court to stay "further Probate proceedings until such time as there is a judicial determination in the separate civil case" in the district court as to whether the Hansen estates are entitled to recover damages and, if so, the amount thereof. Wimer further points to the order of the Gage County Court providing that "the Petition for Allowance shall come on for consideration . . . on the 4th day of May, 2010," as well as the county court order of May 6, 2010, staying the claim proceedings per the parties' stipulation pending judicial determination by the district court of the "separate civil case," i.e., this district court case. Thus, Wimer concludes that "[Alberta's] Estate remains open and subject to further proceedings specifically based upon the out[come of] proceedings in [the] district court of Gage County." Brief for appellants at 11.

No authority is cited for such a "de facto reopening" of a closed probate estate, nor do we know of any. While the case before us is the dismissal of the district court case, it was dismissed on the ground that suit cannot be filed against a discharged personal representative in a closed estate. Thus, to this extent, the status of Alberta's estate is in issue. That said, all that happened in response to Wimer's attempt to file a claim was that the former personal representative denied the claim if it sought any recovery from estate assets, and State Farm asserted that any recovery by the Hansen estates was dependent on the district court proceeding—which is now this appeal. Finally, as quoted above, Wimer acknowledges in her brief that

anything that happens in the estate is ultimately dependent on what happens with the instant case.

The filings by Donald and State Farm were merely "protective" and meant to ensure that the final resolution of the personal injury claims would occur in the district court, given that the estate was closed, and in any event, the nonclaim statute's time limits barred asserting any claim in the estate. As to the court orders, the county court would not have jurisdiction, i.e., the power, to enter substantive orders in a closed estate, unless and until there was a motion or application to reopen the estate. Thus, the attempt to assert a claim against a closed estate and its discharged personal representative is a nullity, and so were the county court's orders.

[10] As support for this conclusion, and our ultimate affirmance of the district court's grant of summary judgment and dismissal of the district court case, we briefly discuss the Nebraska Supreme Court's decision in *Babbitt v. Hronik*, 261 Neb. 513, 623 N.W.2d 700 (2001). In *Babbitt*, the appellant, Barbara A. Babbitt, was involved in an automobile collision with Blanche M. Hronik, who died of unrelated causes shortly after the collision. Hronik's estate was closed, and the personal representative of the estate was discharged. On September 9, 1998, after the personal representative's discharge, Babbitt sued Hronik individually without seeking reappointment of the personal representative. Babbitt appealed the district court's order which granted the personal representative's motion for summary judgment. The Supreme Court affirmed for at least three reasons. The court noted that the personal representative of Hronik's estate had been discharged over 3 years before the suit was filed, and held that the Nebraska Probate Code provides the procedure for bringing a claim against an estate. Specifically, Neb. Rev. Stat. § 30-2404 (Reissue 2008) provides in part:

> 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.

The *Babbitt* court then reasoned that under § 30-2404, Babbitt's claim against Hronik's estate could not have been commenced before the county court reappointed the personal representative on February 4, 1999, which was nearly 5 full months after the suit was filed in district court. In support of this rationale, the Supreme Court cited *Tank v. Peterson*, 214 Neb. 34, 332 N.W.2d 669 (1983), and *Mach v. Schmer*, 4 Neb. App. 819, 550 N.W.2d 385 (1996), which we have discussed previously at length, as well as our decision in *In re Estate of Wilson*, 8 Neb. App. 467, 594 N.W.2d 695 (1999) (affirming county court's emergency appointment of special administrator, without notice, in order that claimants would be able to file claim when statute of limitations on claim was to run in 12 days). *In re Estate of Wilson* stands for the proposition that the county court, upon an alleged creditor's request, such as Wimer, has the jurisdiction to appoint a personal representative for the purpose of the proper presentation of a claim against a decedent whose estate has been previously closed and the personal representative discharged.

[11] In this district court action, Wimer has sued Donald, designating him as personal representative of Alberta's estate, and claims that the defendant is Alberta's estate. This was a closed estate when the suit was filed, and insofar as the record shows, the estate has never been reopened for purposes of this lawsuit. "The benefit of the statute of limitations is personal and, like any other personal privilege, may be waived and will be unless pleaded." *Vielehr v. Malone*, 158 Neb. 436, 439, 63 N.W.2d 497, 501 (1954). Donald filed an answer by counsel which alleges as an affirmative defense that the action is "barred by the applicable statute of limitations and by the provisions of Neb. Rev. Stat. §30-2485." There is no statutory or case law authority for "de facto reopening" of an estate, or waiver of the applicable limitations statutes, and the defense was affirmatively alleged. Thus, there is no waiver of the defense. This ground for reversal of the district court's decision is without merit. It is abundantly clear that the authority cited and discussed throughout our opinion fully supports the grant of summary judgment and dismissal of the lawsuit.

CONCLUSION

Therefore, we affirm the district court's decision in all respects. We note that the provision for "subsequent administration" after the closure of an estate, Neb. Rev. Stat. § 30-24,122 (Reissue 2008), contains an express provision that "no claim previously barred may be asserted in the subsequent administration." It goes without saying that Wimer's claim on behalf of her deceased parents arising out of the automobile accident of January 9, 2006, is forever barred, given that, at the time of oral argument of this case, some 6 years and 10 months had elapsed since the accident and the applicable statute of limitations is 4 years.

AFFIRMED.

IN RE INTEREST OF DIANA M. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MARIA C., APPELLANT.

825 N.W.2d 811

Filed January 15, 2013. No. A-12-151.

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. **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 tribunal from which the appeal is taken.
4. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which 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 judgment is rendered.
5. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a "special proceeding" for appellate purposes.
6. **Juvenile Courts: Parental Rights: Final Orders.** 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.

7. **Juvenile Courts: Final Orders: Time: Appeal and Error.** In juvenile cases, where an order from a juvenile court is already in place and a subsequent order merely extends the time for which the previous order is applicable, the subsequent order by itself does not affect a substantial right and does not extend the time in which the original order may be appealed.
8. **Juvenile Courts: Appeal and Error.** A dispositional order which merely continues a previous determination is not an appealable order.
9. **Juvenile Courts: Minors.** The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests, and the code must be construed to assure the rights of all juveniles to care and protection.
10. **Juvenile Courts: Jurisdiction: Child Custody.** Juvenile courts are accorded broad discretion in determining the placement of an adjudicated child and to serve that child's best interests.
11. **Juvenile Courts: Minors: Proof.** The State has the burden of proving that a case plan is in the child's best interests.

Appeal from the Separate Juvenile Court of Douglas County: VERNON DANIELS, Judge. Affirmed.

Bilal A. Khaleeq, of Khaleeq Law Firm, L.L.C., for appellant.

Christine P. Costantakos, Special Prosecutor, for appellee.

Lynnette Z. Boyle, of Tietjen, Simon & Boyle, guardian ad litem.

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

INBODY, Chief Judge.

INTRODUCTION

Maria C., the biological mother to four minor children, appeals the order of the Douglas County Separate Juvenile Court changing the permanency plan objective for three of her four children from reunification to guardianship/adoption.

STATEMENT OF FACTS

On November 30, 2009, the State filed an amended petition alleging that Diana M., born in 1994; Daniel M., born in 1996; Eduardo M., born in 1998; and Melissa M., born in 2000, were children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) as a result of Mauro M.'s subjecting Diana to inappropriate sexual contact. Maria and Mauro are not legally

married, and Mauro is Melissa's biological father, but he is not the biological father of the other three children. The petition further alleges that all of the children reside together in the family home with Mauro and that Maria had failed to protect Diana from the inappropriate sexual contact. On November 13, 2009, the children were removed from the home, and they were eventually adjudicated on February 23, 2010, as children within the meaning of § 43-247(3)(a).

Maria was ordered to complete a psychological evaluation, and Mauro was ordered to complete a sex offender evaluation. On April 7, 2010, a case plan and court report was received which indicates that the permanency objective for the family was reunification, with guardianship as an alternative for Diana and adoption as an alternative for the other children. The Nebraska Department of Health and Human Services (DHHS) provided the family with numerous services, including family support, visitation, foster care, individual therapy, family therapy, case management, psychological testing, transportation, and vouchers. Mauro was ordered to have no contact with any of the children, while Maria exercised visitation with all four children twice a week for 2 hours each visit. At that time, because Maria had not acknowledged the sexual abuse, supervised home visitations were recommended pending Mauro's release from incarceration for driving under suspension.

On June 2, 2010, the court adopted its previous orders, but added that the court was to be provided with progress reports from Maria's therapy regarding her "insight and appreciation that [Diana] was sexually abused by Mauro." In July, Maria began having supervised visitation with the children at her home. Progress reports indicate that visitations continued to occur without issue, but that Maria continually failed to understand sexual abuse and did not accept Diana's claim that Mauro had sexually abused her. Mauro similarly denied that he sexually abused Diana at any time.

The March 31, 2011, case plan and court report, adopted by the juvenile court, indicates that Maria had unlimited, unsupervised visitation because the children had all been placed

with her, while Mauro still was not receiving any visitation per the juvenile court's order. DHHS continued to provide services, and the primary permanency plan of family preservation remained intact.

In July 2011, Maria's therapist reported that although Maria participated in therapy every single week without fail, she continued to refuse to accept the findings of the juvenile court that Mauro had subjected Diana to inappropriate sexual contact and was continuing to maintain a relationship with Mauro. As a result of Maria's lack of progress, she was unsuccessfully discharged from therapy with no further recommendation. Also in July, reports indicating that Mauro was having significant contacts with Maria through telephone calls to the family home during visitation, that Mauro had been sitting outside the home in his car, and that Diana was increasingly fearful as a result of Maria's continual defense of Mauro led again to the children's removal from Maria's home. On July 27, the juvenile court ordered Maria to have supervised visitation with Daniel, Eduardo, and Melissa and therapeutic visitation with Diana.

On January 6, 2012, a hearing was held during which numerous exhibits were received. An updated report from a DHHS case manager indicates that in July 2011, there were numerous concerns regarding Maria's involvement with Mauro and her repeated statements that she was going to "'fight for'" Mauro to be a part of the family again. The case manager reported that Diana refused to participate in family therapy because Maria did not believe Diana's allegations of sexual abuse and continued to maintain contact with Mauro. A June 2011 report from the "Douglas County Child Abuse and Neglect 1184 Treatment Team" was also received. The team found that there were several treatment issues preventing the case from moving forward, including Maria's continued contact with Mauro and the fact that Mauro's biological child, Melissa, did not know the reason for his leaving the home, which placed the children at risk of emotional harm; Maria's increasingly defensive stance regarding Mauro and continual minimization of the sexual abuse; the fact that Diana was not ready for family therapy

with Maria; and the lack of therapeutic goals for Mauro as a result of his denial that he sexually abused Diana. The treatment team recommended continued therapy for Diana, no contact between Maria and Mauro in order to ensure that Diana feels safe and ready to begin therapy with Maria, no contact between Mauro and Melissa, individual therapy for Melissa to reveal why Mauro was not in the home, family therapy, and individual therapy for Maria and Mauro focusing on intrafamilial sexual abuse. In December, the team again reviewed the case and found that even though the case had been open for 2 years, there was a "great deal of work" that needed to be done with Maria before reunification could ever be considered. The team opined that it supported moving the permanency goal for the family to a goal of guardianship. At the hearing, the guardian ad litem for the children also recommended that the permanency plan for all four children be guardianship.

Mauro's individual therapist from July 27, 2010, through June 30, 2011, reported that Mauro addressed the issue of his "strained relationship" with Diana, but denied any sexual contact or sexual intent. Meanwhile, on November 1, 2011, Diana's individual therapist diagnosed Diana with adjustment disorder with depressed mood and anxiety. The therapist indicated that the juvenile court had ordered family therapy in July, but that the first session was suspended because Maria "was being extremely disrespectful and aggressive" to both Diana and the therapist. The therapist reported that Diana continued to feel intimidated by Maria's violent and aggressive responses in the past and also felt vulnerable because Maria still refused to acknowledge that Diana had been sexually abused.

The January 3, 2012, case plan and court report was also received and indicated that Daniel, Eduardo, and Melissa were participating in fully supervised visitations with Maria at her home for a total of 9 hours each week, while Diana had refused to have any contact with Maria, and that all of the children had no contact with Mauro. The report indicates that although Maria has kept the children away from Mauro, she herself continues to see him and allows him to provide her with

financial support and transportation. The report recommended that Diana's primary permanency plan be changed to guardianship with adoption as an alternative and that the other three children remain in a plan of reunification.

A report by the State Foster Care Review Board was received, which recommended that there was a continued need for out-of-home placement of the children. The board opined that the return of Daniel, Eduardo, and Melissa to Maria and Mauro was "likely or possible" and that Diana's return was not likely. The board recommended that Diana's permanency objective be changed to guardianship or some other permanent living arrangement other than adoption.

On January 23, 2012, the juvenile court ordered that all previous orders remain in full force and effect, except that the permanency plan be modified to "guardian/adoption" with no further reasonable efforts provided to Maria or Mauro to bring about reunification. It is from this order that Maria has timely appealed to this court, but only as to Daniel, Eduardo, and Melissa.

ASSIGNMENTS OF ERROR

Maria assigns, rephrased and consolidated, that the juvenile court erred by modifying the permanency objective for Daniel, Eduardo, and Melissa and by failing to elicit testimony from the children. We note that throughout her brief, Maria randomly raises other arguments regarding a myriad of other issues, but has failed to assign any error as to any of those issues. Furthermore, based upon our review of the record, many of those issues were never presented to the juvenile court. Accordingly, we shall not address any of those issues. See *State v. Albrecht*, 18 Neb. App. 402, 790 N.W.2d 1 (2010) (absent plain error, issue raised for first time in appellate court will be disregarded inasmuch as trial court cannot commit error regarding issue never presented and submitted for disposition in trial court). See, also, *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011) (in order to be considered by appellate court, alleged error must be both specifically assigned and argued in brief of party asserting error).

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 Taylor W.*, 276 Neb. 679, 757 N.W.2d 1 (2008).

ANALYSIS

Jurisdiction.

In this case, Maria appeals the juvenile court's order changing the permanency plan for all four children from reunification to guardianship/adoption. The appealability of such an order is not always clear.

[2,3] 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*. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken. *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006).

[4-6] The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which 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 judgment is rendered. *Id*. A proceeding before a juvenile court is a "special proceeding" for appellate purposes. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). "[W]hether 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." *In re Interest of R.G.*, 238 Neb. 405, 415, 470 N.W.2d 780, 788 (1991), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998).

[7,8] In juvenile cases, where an order from a juvenile court is already in place and a subsequent order merely extends the time for which the previous order is applicable, the subsequent

order by itself does not affect a substantial right and does not extend the time in which the original order may be appealed. *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000). Thus, a dispositional order which merely continues a previous determination is not an appealable order. *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999).

Maria appeals from the January 23, 2012, order following a review and permanency plan hearing. The court found that all previous orders should remain in full force and effect, except for five additions to those orders: (1) The permanency plan shall change to guardianship/adoption; (2) Diana shall participate in independent living skills; (3) all the children shall undergo updated psychological evaluations; (4) Melissa shall complete a pretreatment assessment; and (5) "[b]ased upon the evidence as set forth on the record, no additional reasonable efforts shall be provided to [Maria and Mauro] to bring about reunification." To determine whether the order can be appealed in this case, it is necessary to consider the nature of the order and what parental rights, if any, the order affected. See, *In re Guardianship of Rebecca B. et al., supra*; *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

In *In re Interest of Sarah K., supra*, the Nebraska Supreme Court examined orders from October 22 and December 22, 1998. The October 22 order approved the case plan, which provided for long-term foster care for the child, supervised visitation by the parents, and reunification as the goal. The December 22 order adopted the State's permanency plan of long-term foster care transitioning to independent living, which plan provided for the possibility of reunification. On appeal, the Supreme Court stated that the terms of the December order "merely repeat the essential terms" of the October order, that "[t]here is nothing inconsistent with the December 22 order compared to the plan approved by the court in its October 22 order," and that "[t]he parents were not disadvantaged by the juvenile court's order of December 22, nor were their substantial rights changed or affected thereby." *Id.* at 58, 601 N.W.2d at 785. The court further stated that the December order

"effects no change in the parents' status or the plan to which the parents and [child] were previously subject." *Id.* at 59, 601 N.W.2d at 785.

In *In re Interest of Tayla R., supra*, the mother appealed from a review order in which the permanency plan goal changed from reunification to adoption. This court stated that in determining whether this provision affected a substantial right of the mother, a pertinent inquiry was whether there was still a plan allowing her to take steps to reunite with the children. *Id.* This court determined that the order at issue in that case implicitly provided the mother with an opportunity for reunification by complying with the terms of the rehabilitation plan, which terms had not changed from the previous order, and concluded that the order did not affect a substantial right. *Id.*

In this case, the juvenile court's modification of the permanency goal from reunification to guardianship/adoption, coupled with the order to cease all reasonable efforts, clearly affects Maria's right to reunification with the children. The order does not appear to include any rehabilitation plan which provides Maria an opportunity for reunification. See *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998) (initial dispositional order which did not include rehabilitation plan for parents deprived them of opportunity for reunification and affected substantial right). Therefore, we conclude that the January 23, 2012, order affects a substantial right and is a final, appealable order.

Change in Permanency Objective.

Maria argues that the juvenile court erred by changing the permanency objective for Daniel, Eduardo, and Melissa from reunification to guardianship/adoption.

First, we point out that in her brief, Maria spends a considerable amount of time arguing that her rights have been terminated and raises numerous arguments in that light. However, the record before the court does not contain any petition for termination of Maria's parental rights and the order from which Maria appealed has nothing to do with the termination of her parental rights. Therefore, we do not address any

of Maria's contentions regarding termination. See *State v. Albrecht*, 18 Neb. App. 402, 790 N.W.2d 1 (2010) (absent plain error, issue raised for first time in appellate court will be disregarded inasmuch as trial court cannot commit error regarding issue never presented and submitted for disposition in trial court).

[9-11] The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests, and the code must be construed to assure the rights of all juveniles to care and protection. *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012). Once a child has been adjudicated under § 43-247(3), the juvenile court ultimately decides where a child should be placed. *Id.* See Neb. Rev. Stat. § 43-285(2) (Cum. Supp. 2012). Juvenile courts are accorded broad discretion in determining the placement of an adjudicated child and to serve that child's best interests. See *In re Interest of Karlie D., supra*. The State has the burden of proving that a case plan is in the child's best interests. *In re Interest of Ethan M.*, 19 Neb. App. 259, 809 N.W.2d 804 (2011). Therefore, the questions in this case become whether the State met its burden to show that reunification was not in the children's best interests and whether the juvenile court's decision to change the permanency objective was supported by the evidence.

The evidence indicates that DHHS became involved with Maria and the children in November 2009, after allegations that Mauro had sexually abused Maria's oldest child, Diana, who was 15 at the time, over a period of 2 years in the family home. All four of the children were removed and eventually adjudicated as children within the meaning of § 43-247(3)(a) as a result of Mauro's sexual abuse of Diana and Maria's failure to protect the children. The record indicates that Maria and Mauro are not married and that Mauro is the biological father of only Melissa and not the other three children. The permanency objective for all of the children, until the January 23, 2012, order, had been reunification. Since the children's initial removal from the home, DHHS had provided the family with family support, visitation, foster care, individual therapy, family therapy, case management, psychological testing, sex

offender evaluation, service coordination, and transportation. Maria was ordered to obtain and maintain safe, stable housing and a legal, stable source of income and to participate in individual therapy to gain insight regarding intrafamilial sexual abuse and its effect on Diana.

Initially, Maria was ordered reasonable rights of supervised visitation with the children. On November 19, 2010, the juvenile court ordered that the children could be placed in Maria's home under certain conditions, including that she not allow any contact between Mauro and the children "in any manner whatsoever" and participate in family therapy with Diana. However, numerous reports and concerns regarding contact with Mauro arose in July 2011, and the children were again removed from Maria's home and have remained placed outside of the home since that time.

The record is evident that the main issue in this case, which led to the juvenile court's determination to change the permanency plan from reunification to guardianship/adoption, revolves around Maria's repeated and continual denial that Mauro sexually abused her oldest child, Diana. The record is replete with evidence that Maria did not believe any such abuse occurred and that she repeatedly minimized or dismissed Diana's contentions, eventually leading up to Maria's being violent and aggressive toward Diana at family therapy. Throughout the proceedings, the juvenile court was very clear that the main concern was that Maria gain "insight and appreciation that [Diana] was sexually abused by Mauro."

The reason for the children's initial removal was the sexual abuse perpetrated upon Diana. Nonetheless, Maria defended Mauro throughout the case and continued to allow Mauro to have contact with the children by allowing him to call the home when the children, including Diana, were home, in direct violation of the juvenile court's orders. Maria was unsuccessfully discharged from individual therapy for her constant denial of the sexual abuse and was further not allowed to participate in family therapy because she did not believe Diana. The record contains numerous therapy reports for Diana which describe the detrimental effect that this has had on Diana and

indications that Melissa had no knowledge of why Mauro had been removed from the home.

Essentially, this case has stood stagnant for over 2 years, waiting only on Maria's acceptance that sexual abuse occurred in her home by Mauro. Maria was given time, resources, and numerous opportunities to address and correct that one main issue. She failed to do so until the hearing on January 6, 2012, when it was quite clear that the juvenile court had had enough and her counsel indicated that Maria "now believes that there was inappropriate contact, and she is willing to follow the Court's recommendation."

In sum, after our de novo review of the record, we find that the State met its burden to show reunification was not in the children's best interests and that the juvenile court's decision to change the permanency objective is likewise clearly supported by the evidence. For over 2 years, Maria has been unable or unwilling to rehabilitate herself, and Daniel, Eduardo, and Melissa should not be suspended in foster care to await Maria's uncertain parental maturity. See *In re Interest of Sunshine A. et al.*, 258 Neb. 148, 602 N.W.2d 452 (1999). Therefore, we find that the juvenile court did not err by changing the permanency objective from reunification to guardianship/adoption. This assignment of error is without merit.

Juvenile Court's Explanation.

Maria argues that the juvenile court's order is invalid because it does not explain the "[e]xtreme [s]teps" taken. Brief for appellant at 27.

Maria has provided no authority to this court in support of her argument. However, even if Maria had set forth any authority, we find that it is quite clear that the juvenile court made its reasoning for a possible change known to counsel at the January 6, 2012, hearing. The juvenile court stated that with respect to Maria, "given the length of time that it's taken, the Court feels it would be justified in calling time. There's been enough time provided to do something. [Maria] has persisted in a denial, and we're over two years in this case. . . . [T]he Court has implemented a plan." Furthermore, given our

determination in the previous section, based upon our careful de novo review of the record, we find that there is sufficient explanation as to why the permanency plan was modified. This assignment of error is wholly without merit.

Testimony of Children.

Maria contends that the best interests of the children were limited because they were never able to testify. This assignment of error is both specifically raised and is also argued, although no authority is set forth in support of Maria's contention. However, as noted in the assignments of error section, this issue is one of many which do not appear to have been raised at any time at the trial court level. Upon our review of the record, we can find no instance where either one of the parties attempted to call any of the children to testify or that the district court entered any orders denying any testimony by the children. Therefore, we find no plain error and, as such, shall not address this issue for the first time on appeal. See *State v. Albrecht*, 18 Neb. App. 402, 790 N.W.2d 1 (2010) (absent plain error, issue raised for first time in appellate court will be disregarded inasmuch as trial court cannot commit error regarding issue never presented and submitted for disposition in trial court).

CONCLUSION

In conclusion, we find that the juvenile court's order changing the permanency plan objective is a final, appealable order. Upon our de novo review of the record, we also find that the record supports the juvenile court's order changing the permanency plan from reunification to guardianship/adoption and that such order is in the children's best interests. Therefore, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. PATRICK J. COUPENS, APPELLEE.

825 N.W.2d 808

Filed January 15, 2013. No. A-12-857.

1. **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.
2. ____: ____. The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.
3. **Criminal Law: Judgments: Appeal and Error.** In the absence of specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.
4. **Prosecuting Attorneys: Judgments: Jurisdiction: Appeal and Error.** Strict compliance with Neb. Rev. Stat. § 29-2315.01 (Reissue 2008) is required to confer jurisdiction.
5. **Prosecuting Attorneys: Judgments: Appeal and Error.** Neb. Rev. Stat. § 29-2315.01 (Reissue 2008) does not permit an appeal by the State from any interlocutory ruling of the trial court in a criminal proceeding.
6. **Criminal Law: Final Orders.** An order entered during the pendency of a criminal cause is final only when no further action is required to completely dispose of the cause pending.

Appeal from the District Court for Box Butte County: TRAVIS P. O'GORMAN, Judge. Appeal dismissed.

K.J. Hutchinson, Box Butte County Attorney, for appellant.

No appearance for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

The State of Nebraska brought this error proceeding pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 2008), seeking review of an order of the district court granting a motion to discharge count II of the two-count information filed against the defendant, Patrick J. Coupens. Count I remains pending in the district court. We conclude that this court lacks jurisdiction to hear the State's appeal, and accordingly, we dismiss the appeal.

STATEMENT OF FACTS

The State's application for leave to docket an appeal in this court provides the following procedural history. A complaint charging Coupens with misdemeanor domestic assault was filed in county court on August 22, 2011. A felony charge of strangulation was filed on November 17. Following a preliminary hearing, the felony charge was bound over to the district court. The county court dismissed without prejudice the assault charge, after which the State filed the strangulation charge along with the assault charge in district court. Thereafter, Coupens filed a motion for discharge as to the assault charge on the ground that his right to a speedy trial was violated. On August 30, 2012, the district court granted the motion and dismissed count II of the information. The court stated that trial would proceed on count I. The State subsequently perfected an error proceeding to this court, asserting that the district court erred in granting Coupens' motion for discharge as to count II.

STANDARD OF REVIEW

[1,2] 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. Penado*, 282 Neb. 495, 804 N.W.2d 160 (2011). The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court. *Id.*

ANALYSIS

[3,4] In the absence of specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case. *State v. Penado, supra*. Section 29-2315.01 grants the State the right to seek appellate review of adverse criminal rulings and specifies the special procedure by which to obtain such review. *State v. Penado, supra*. The Nebraska Supreme Court has consistently maintained that strict compliance with § 29-2315.01 is required to confer jurisdiction. *State v. Penado, supra*. See, e.g., *State v. Hall*, 252 Neb. 885, 566 N.W.2d 121 (1997); *State v. Wieczorek*, 252 Neb. 705, 565 N.W.2d 481 (1997). Section 29-2315.01 provides in relevant part:

> The prosecuting attorney may take exception to any ruling or decision of the court made during the prosecution of a cause by presenting to the trial court the application for leave to docket an appeal with reference to the rulings or decisions of which complaint is made. Such application shall contain a copy of the ruling or decision complained of, the basis and reasons for objection thereto, and a statement by the prosecuting attorney as to the part of the record he or she proposes to present to the appellate court. Such application shall be presented to the trial court within twenty days *after the final order is entered in the cause*, and upon presentation, if the trial court finds it is in conformity with the truth, the judge of the trial court shall sign the same and shall further indicate thereon whether in his or her opinion the part of the record which the prosecuting attorney proposes to present to the appellate court is adequate for a proper consideration of the matter. The prosecuting attorney shall then present such application to the appellate court within thirty days *from the date of the final order*.

(Emphasis supplied.)

[5,6] Section 29-2315.01 does not permit an appeal by the State from any interlocutory ruling of the trial court in a criminal proceeding. *State v. Penado, supra*. This is consistent with the longstanding principle of avoiding piecemeal appeals arising out of one set of operative facts. *Id*. See *State v. Wieczorek, supra*, in which the Nebraska Supreme Court held that because the State filed its application for review of the dismissal of three counts of a four-count information before the defendant had been sentenced on the one count for which he was convicted, the application was filed before entry of a final order and was, therefore, untimely and insufficient to confer appellate jurisdiction. The court held that "an order entered during the pendency of a criminal cause is final only when no further action is required to completely dispose of the cause pending." *Id*. at 710, 565 N.W.2d at 484.

In the instant case, the State filed its application for leave to docket an appeal before Coupens had been tried and sentenced on the remaining count pending before the district court. The

order granting the motion to discharge count II did not completely dispose of the action and does not constitute a final order under § 29-2315.01. This court therefore lacks jurisdiction to hear the State's appeal.

CONCLUSION

Because the State did not appeal from a final order as required by § 29-2315.01, this court lacks jurisdiction over the appeal and the appeal must be dismissed.

APPEAL DISMISSED.

SUSAN JURGENS, APPELLEE, V. IRWIN INDUSTRIAL TOOL COMPANY, FORMERLY KNOWN AS AMERICAN TOOL CO., INC., APPELLANT, AND STATE OF NEBRASKA, WORKERS' COMPENSATION TRUST FUND, APPELLEE.

825 N.W.2d 820

Filed January 22, 2013. No. A-12-184.

1. **Workers' Compensation: Appeal and Error.** Neb. Rev. Stat. § 48-185 (Cum. Supp. 2012) provides that on an appeal of an award by the Nebraska Workers' Compensation Court, the award made by the compensation court shall have the same force and effect as a jury verdict in a civil case.
2. ____: ____. A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
3. **Workers' Compensation: Proof.** Neb. Rev. Stat. § 48-141 (Reissue 2010) provides that a party may apply for a modified award on the ground of increase or decrease of incapacity due solely to the injury. This is a two-part test. The moving party must prove (1) a change in incapacity and (2) that the change is due solely to the original work-related injury.
4. ____: ____. To establish a change in incapacity under Neb. Rev. Stat. § 48-141 (Reissue 2010), an applicant must show a change in impairment and a change in disability.
5. **Workers' Compensation: Words and Phrases.** In a workers' compensation context, impairment refers to a medical assessment whereas disability relates to employability.
6. **Workers' Compensation.** There is no requirement that an employee reach maximum medical improvement prior to modification of a workers' compensation award.

7. **Workers' Compensation: Proof.** A party seeking to modify a workers' compensation award because of increased depression must show that the party's depression increased solely because of the work-related injury.
8. **Workers' Compensation.** An injury is not compensable for workers' compensation purposes if it results solely from the process of compensation or litigation.
9. **Workers' Compensation: Judgments: Evidence: Appeal and Error.** Workers' Comp. Ct. R. of Proc. 11(A) (2006) requires the Workers' Compensation Court to write decisions that provide the basis for a meaningful appellate review. In particular, rule 11(A) requires the judge to specify the evidence upon which the judge relies.
10. **Workers' Compensation: Rules of Evidence: Appeal and Error.** The Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence; it has discretion to admit evidence, and its decision to admit or exclude evidence will not be reversed upon appeal absent an abuse of discretion.
11. **Workers' Compensation: Witnesses: Appeal and Error.** The Workers' Compensation Court has discretion to determine whether or not a witness is qualified to state his opinion, and its determination will not be disturbed on appeal absent an abuse of discretion.
12. **Evidence: Expert Witnesses.** An expert's opinion is relevant if it makes any fact of consequence more likely than it would be without the evidence.
13. ____: ____. An expert's opinion lacks foundation unless it has a factual basis and assists the trier of fact to understand the evidence or determine a fact in issue.
14. **Expert Witnesses: Testimony.** An expert witness may testify to facts outside the field of his specialty if he shows he is familiar with the specialties and the treatments provided.
15. **Expert Witnesses: Physicians and Surgeons: Testimony.** A physician need not examine a patient in order to provide testimony so long as the testimony is based on scientific, technical, or other specialized knowledge and assists the trier of fact to understand the evidence or to determine a fact in issue.

Appeal from the Workers' Compensation Court. Affirmed.

Bryan S. Hatch, of Stinson, Morrison & Hecker, L.L.P., for appellant.

Anne E. Winner, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellee Susan Jurgens.

IRWIN, PIRTLE, and RIEDMANN, Judges.

RIEDMANN, Judge.

I. INTRODUCTION

Irwin Industrial Tool Company, formerly known as American Tool Co., Inc. (Irwin Industrial), appeals the Workers' Compensation Court's further award of benefits to Susan

Jurgens. Irwin Industrial claims the court erred in making a further award because Jurgens failed to prove (1) a material change in the incapacity of her left shoulder and (2) a material change in incapacity in her "situational depression" due solely to her work-related injury. Irwin Industrial also argues that the court failed to issue a well-reasoned opinion and committed evidentiary errors. Because we find no merit to these claims, we affirm.

II. BACKGROUND

1. Procedural History

In 2002, Jurgens suffered two work-related injuries for which she sought workers' compensation benefits. In March of that year, she injured her right hand and upper extremity; in August, she injured her left hand, shoulder, and upper extremity.

In 2005, the Workers' Compensation Court entered an award, finding that these injuries occurred while Jurgens was working in the course and scope of her employment with Irwin Industrial. The court also found that Jurgens' injuries caused a compensable aggravation of preexisting depression that was not work disabling. The court awarded permanent partial disability benefits, past and future medical expenses, and vocational rehabilitation.

2. Vocational Rehabilitation Attempts and Continued Pain

In 2006, Jurgens began a vocational rehabilitation program in business administration, but she switched to early childhood education because of physical difficulties. Despite her continued pain, Jurgens enjoyed the program and excelled in it. By early 2009, however, her left shoulder pain was so severe that it prevented her from sleeping and from attending some of her classes.

Shortly thereafter, Jurgens began treating with Dr. Scott Strasburger, who administered cortisone shots and aqua therapy. In April 2009, after conservative treatment failed, Dr. Strasburger performed surgery on her left shoulder. The surgery did not reduce her pain, but according to Dr. Strasburger,

no further treatment options were available. Jurgens testified that when her shoulder did not heal, she felt sad and was not sure whether she was "going to get through it."

After taking time off to recover from surgery, Jurgens returned to the early childhood education program. She had "two quarters of school" left and needed to complete only three classes and a graduation seminar to finish the program.

The first quarter, Jurgens took one 8-hour class for which she received an A. The second quarter, she enrolled in three classes for a total of 17 credit hours. The heavy courseload required Jurgens to leave her home in Beatrice at 6:30 a.m. for an 8 a.m. class in Lincoln. Some days she did not return home until after 10:30 p.m. According to Jurgens, she was in constant pain and felt overwhelmed. As a result, she completed only one of the classes and dropped out with 11 credit hours left to complete the program.

3. Jurgens Seeks to Modify Her Prior Award

After dropping out of the vocational rehabilitation program, Jurgens sought a modification of her award, claiming an increase in incapacity due solely to her work-related injuries. Irwin Industrial and the State of Nebraska, Workers' Compensation Trust Fund, opposed the modification. Representatives for the trust fund have notified this court that no responsive brief or further participation would be undertaken with regard to the appeal.

At the modification hearing, Irwin Industrial objected to several medical reports and depositions. It sought to exclude Dr. Dean Wampler's report and portions of his deposition, arguing that Dr. Wampler testified outside the scope of his expertise when he discussed "fear avoidance." It also sought to exclude Dr. Walter Duffy's report and the treatment notes of his nurse practitioner. The trial court overruled the objections.

The parties introduced substantial medical evidence from several doctors, including Drs. Strasburger, Duffy, and Wampler and Dr. Jim Andrikopoulos. Dr. Strasburger's responses in correspondence with Jurgens' counsel stated that Jurgens' injuries

resulted from her work at Irwin Industrial. Dr. Strasburger testified by deposition that he began treating those injuries in 2003. He stated that he performed surgeries on both of Jurgens' shoulders and that Jurgens continues to report very high levels of pain. According to Dr. Strasburger, Jurgens' pain is the primary limitation on her functional abilities.

Dr. Wampler testified by deposition that he is a medical doctor and not a psychologist or psychiatrist. He treats patients with work-related injuries, including musculoskeletal injuries. He saw Jurgens in June 2010 for an independent medical evaluation and reviewed reports from both Dr. Duffy and Dr. Andrikopoulous.

Dr. Wampler opined that Jurgens' increase in incapacity was due to the work-related injury. He explained in a June 28, 2010, report that Jurgens' "chronic pain has further aggravated her anxiety and depression, leading to avoidance of activity and her physical exam evidence of progressive deconditioning." Although he believed that Jurgens may be exaggerating her pain, he explained that people with chronic pain lose perspective on the severity of their pain. He testified that Jurgens exhibited fear avoidance behavior, which is a pattern of behavior displayed in individuals with chronic pain, depression, and anxiety, wherein the individual starts avoiding activities for fear of more pain. Dr. Wampler testified that although fear avoidance is not a diagnosis, he has observed this behavior while treating patients over the past 4 or 5 years.

Dr. Duffy, a psychiatrist, and his nurse practitioner both treated Jurgens. Dr. Duffy testified that Jurgens exhibited symptoms of depression when he first met with her in April 2010. She was having difficulty sleeping at night, which she attributed to her pain. According to Dr. Duffy, Jurgens said she felt hopeless because she was unable to continue her classes in early childhood education. Jurgens cried throughout the session and was unmotivated.

Dr. Duffy opined that Jurgens' depression decreases her energy, interest, and motivation; therefore, it interferes with her ability to "function on a[n] optimal level on a daily basis." He concluded, with a reasonable degree of medical certainty, that "Jurgens has experienced an exacerbation of her

depressive symptoms associated with not being able to finish her classes and work in the area of Early Childhood education due to the increasing pain that relates back to her initial work-related injuries."

Dr. Andrikopoulous testified that he conducted an independent medical evaluation of Jurgens in September 2010. He opined that Jurgens' symptoms were either "exaggerated or factitious" and that she was likely malingering. According to Dr. Andrikopoulous, Jurgens displayed a level of cognitive impairment equivalent to that of an individual with a severe head injury. He stated that Jurgens would have been unable to complete her school if the symptoms she reported were true. He diagnosed her with malingering and stated, "Her prognosis seems poor due to lack of desire versus any objective evidence of any medical condition that might predict a poor prognosis."

Jurgens testified that she was treated for depression during the vocational rehabilitation program and continues to battle the disease. Jurgens believes that she is depressed. She testified, "[S]ome days I just don't care, and I'm sad and I don't — I don't have no motivation." She testified that she does not make the effort to do things she used to enjoy and that these feelings became worse after her shoulder surgery failed to alleviate her pain. Her husband confirmed that she became more depressed after the failed surgery.

The Workers' Compensation Court found that Jurgens suffered an increase in her incapacity due solely to the work-related injuries and had suffered periods of both temporary total disability and temporary partial disability. The court further found that Jurgens had not yet reached maximum medical improvement (MMI) for her depression and awarded benefits accordingly. The workers' compensation review panel affirmed.

III. ASSIGNMENTS OF ERROR

Irwin Industrial assigns, condensed and restated, that the trial court erred in (1) finding Jurgens suffered a material and substantial change in incapacity in her left shoulder and in her situational depression due solely to her work-related injury,

(2) failing to provide a well-reasoned decision under Workers' Comp. Ct. R. of Proc. 11(A) (2006), and (3) admitting opinion testimony from both Dr. Duffy and Dr. Wampler.

IV. STANDARD OF REVIEW

[1,2] On an appeal of an award by the Nebraska Workers' Compensation Court, the award made by the compensation court shall have the same force and effect as a jury verdict in a civil case. Neb. Rev. Stat. § 48-185 (Cum. Supp. 2012). A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Id*.

V. ANALYSIS

1. Increase in Incapacity Caused Solely by Work-Related Injury

Irwin Industrial's argument is twofold: It argues that a modification was not warranted (1) for Jurgens' left shoulder, because she failed to prove a material and substantial change in incapacity, and (2) for her situational depression, because she failed to prove a material and substantial change in incapacity due solely to the work-related injury. A change in incapacity for either condition is a sufficient basis for a modification if the change is due solely to the work-related injury. The trial court did not specifically state upon which condition it was modifying the award, which is the reason for Irwin Industrial's rule 11 argument discussed below. However, given the trial court's focus on Jurgens' depression, it is apparent the trial court based its further award on that condition. We will, therefore, limit our analysis to Jurgens' depression.

In its 2005 award, the court found that Jurgens suffered an aggravation of her preexisting depression and awarded benefits

for its treatment. The parties stipulated that at the time, it was not work disabling.

In her petition to modify the award, Jurgens claims that she "suffered an increase in her incapacity due solely to the injuries for which compensation was awarded." She did not plead any specifics. A review of the record indicates, however, that Jurgens claimed that the pain in her left shoulder had increased, causing an aggravation of her preexisting depression that had now become disabling. The trial court agreed, and we affirm.

[3] Neb. Rev. Stat. § 48-141 (Reissue 2010) provides that a party may apply for a modified award "on the ground of increase or decrease of incapacity due solely to the injury." This is a two-part test. The moving party must prove (1) a change in incapacity and (2) that the change is due solely to the original work-related injury. *McKay v. Hershey Food Corp.*, 16 Neb. App. 79, 740 N.W.2d 378 (2007).

(a) Jurgens Established Change in Incapacity in Her Situational Depression

Jurgens claimed that she suffered a change in incapacity due to her depression. The trial court found that her depression had become disabling and that she had not reached MMI and awarded temporary benefits. Irwin Industrial argues that a finding of incapacity cannot be made prior to the employee's reaching MMI. This contention is incorrect.

[4,5] Section 48-141 allows the Workers' Compensation Court to modify any agreement or award payable periodically at the request of either party "on the ground of increase or decrease of incapacity due solely to the injury." To establish a change in incapacity, an applicant must show a change in impairment and a change in disability. See *Bronzynski v. Model Electric*, 14 Neb. App. 355, 707 N.W.2d 46 (2005). Impairment refers to a medical assessment whereas disability relates to employability. See *id.*

Dr. Wampler reported that Jurgens had suffered a worsening of her anxiety and depression over time, which was manifested by increasing difficulty with sleep, by progressively worsening

tolerance of her pain, and by increasing fear avoidance behaviors. He further reported that her "incapacity has increased over the past 1-1/2 to 2 years." This evidence is sufficient to establish a change in impairment.

[6] Dr. Duffy iterated Dr. Wampler's opinions and further stated that before "reintroducing" Jurgens to the workforce, she would require reconditioning. Since Jurgens' depression had not previously been work disabling, Dr. Duffy's statements regarding the need for depression treatment prior to "reintroduction" to the workplace establish the necessary change in disability. The evidence is sufficient to establish a change in incapacity. There is no requirement that an employee reach MMI prior to modification of the award. See, *Hohnstein v. W.C. Frank*, 237 Neb. 974, 468 N.W.2d 597 (1991); *Hubbart v. Hormel Foods Corp.*, 15 Neb. App. 129, 723 N.W.2d 350 (2006) (remanding award of temporary total disability benefits for further factual findings unrelated to duration).

In *Hohnstein, supra*, the Nebraska Supreme Court affirmed the Workers' Compensation Court's further award, granting temporary total disability benefits under § 48-141. The court was not required to find the plaintiff suffered a permanent injury to prove a change in incapacity. Addressing the "'increase in incapacity'" requirement, the court stated that the applicant must "prove by a preponderance of the evidence that 'there now exists a material and substantial change for the worse in the applicant's condition—a change in circumstances that justifies a modification, distinct and different from that for which an adjudication had been previously made.'" *Hohnstein*, 237 Neb. at 979-80, 468 N.W.2d at 602.

Likewise, in *Bronzynski, supra*, the employee sought a modification of a prior award. Although the employee had reached MMI, his modification petition requested temporary total disability benefits that he incurred prior to reaching MMI. Addressing this claim, the court stated:

> [The employee's] request for further temporary total disability benefits would have properly been the subject of an application for modification when he became aware of the need for further medical treatment. An application to modify the original award is essential before a

> determination can be made as to the merit of a claim for further temporary benefits. As such, temporary total disability benefits cannot be awarded retroactively prior to the date on which the application to modify was filed in this case.

Bronzynski, 14 Neb. App. at 368, 707 N.W.2d at 58.

As evidenced by *Hohnstein* and *Bronzynski*, § 48-141 does not require that the employee reach MMI prior to a modification. In fact, *Bronzynski* instructs that an employee cannot receive temporary total disability benefits retroactively prior to the date on which the application for modification is filed. Therefore, if an employee is seeking temporary total disability benefits, the employee must file a petition for modification as soon as the employee becomes totally disabled.

In the present action, Jurgens presented testimony that she had suffered an increase in incapacity. The trial court accepted the testimony of Drs. Duffy and Wampler and awarded benefits accordingly. It was not necessary for Jurgens to prove she had reached MMI prior to modification of the original award.

(b) Finding That Jurgens' Depression Related Solely to Her Work-Related Injury

Irwin Industrial argues that the trial court erred in finding that the change in incapacity in Jurgens' situational depression was due solely to her work-related injury. Irwin Industrial first alleges that Jurgens' poor course-management skills caused her to leave the early childhood development program, which leaving made her depressed. Second, Irwin Industrial argues that Jurgens could not establish a change in incapacity without showing a permanent disability. We find no merit to either argument.

[7,8] A party seeking to modify a workers' compensation award because of increased depression must show that the party's depression increased solely because of the work-related injury. See *Hubbart v. Hormel Foods Corp.*, 15 Neb. App. 129, 723 N.W.2d 350 (2006). An injury is not compensable if it results solely from the process of compensation or litigation. *Sweeney v. Kerstens & Lee, Inc.*, 268 Neb. 752, 688 N.W.2d 350 (2004).

Irwin Industrial contends that *Sweeney* requires a finding in its favor. In *Sweeney*, the Nebraska Supreme Court held that an individual who became depressed after hearing an expert testify as to his projected lost earnings could not attribute his depression to the work-related injury. The court refused to make the causal connection, stating that the depression "'was not triggered . . . by pain or disability, but rather, by unhappiness with a court ruling.'" *Id.* at 759, 688 N.W.2d at 355.

Irwin Industrial's reliance upon *Sweeney* is misplaced. Unlike that in *Sweeney*, the record in this case shows that Jurgens' depression was related solely to her injury. Dr. Wampler responded to an e-mail inquiry from Jurgens' attorney, specifically stating that the change in incapacity was due solely to the work-related injury. Dr. Duffy opined that the exacerbation of depressive symptoms was associated with the inability to finish the early childhood education program and that the increased pain that caused this inability related back to the work-related injury. Jurgens continually stated that her increased pain caused her depression. Both Dr. Duffy and Dr. Wampler concurred that Jurgens' depression increased because of pain from her injury, and Jurgens' husband testified that she became hopeless after surgical treatment failed to alleviate her pain. Furthermore, Dr. Duffy, Dr. Wampler, and Jurgens all stated that Jurgens had to leave the early childhood education program because of the pain she experienced while working to complete it.

The record contains sufficient evidence to affirm the trial court's finding that Jurgens' depression increased due solely to her work-related injury. This argument is without merit.

2. Well-Reasoned Opinion Under Rule 11

Irwin Industrial argues that the trial court failed to provide a well-reasoned opinion under rule 11 because the court blurred the analysis between Jurgens' left shoulder injury and her situational depression. See rule 11(A). We find no merit to the assigned error.

[9] Rule 11(A) requires the Workers' Compensation Court to write decisions that "provide the basis for a meaningful

appellate review." In particular, rule 11(A) requires the judge to "specify the evidence upon which the judge relies."

The trial court specifically discussed the evidence it relied on to support its finding that Jurgens suffered an increase in incapacity due solely to her work-related injury. Although the court did not separately address both the left shoulder and the depression, it is apparent from the further award that the court was awarding benefits for the depression. The award provided a basis for meaningful appellate review and was, therefore, sufficient for purposes of rule 11(A).

3. Receipt of Medical Evidence

[10] Irwin Industrial assigns error to the trial court's decisions to receive medical evidence provided by Drs. Duffy and Wampler. We find no merit to this assigned error. The Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence; it has discretion to admit evidence, and its decision to admit or exclude evidence will not be reversed upon appeal absent an abuse of discretion. Neb. Rev. Stat. § 48-168(1) (Reissue 2010); *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007).

[11] The Workers' Compensation Court also has discretion to determine whether or not a witness is qualified to state his opinion, and its determination will not be disturbed on appeal absent an abuse of discretion. See *Bristol v. Rasmussen*, 249 Neb. 854, 547 N.W.2d 120 (1996).

(a) Admitting Dr. Duffy's Opinion

Irwin Industrial argues that the trial court erred in admitting portions of Dr. Duffy's reports. In particular, Irwin Industrial argues that Dr. Duffy makes no objective medical findings, simply repeats Jurgens' subjective complaints, and does not base his opinion on a reasonable degree of medical certainty. We find no merit to these arguments.

[12,13] An expert's opinion is relevant if it makes any fact of consequence more likely than it would be without the evidence. Neb. Rev. Stat. § 27-401 (Reissue 2008); *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). An expert's opinion lacks foundation unless it has a factual basis and

assists the trier of fact to understand the evidence or determine a fact in issue. See *Olivotto, supra*.

In his report, Dr. Duffy stated that it was his opinion, within a reasonable degree of medical certainty, that Jurgens' incapacity increased due to her work-related injury. Dr. Duffy based his expert opinion on medical records and examination. The medical records and examination provided him with an appropriate factual basis for his opinion. See *Gibson v. City of Lincoln*, 221 Neb. 304, 376 N.W.2d 785 (1985) (holding that expert physician may base opinion on reports of other physicians). His opinion makes it more probable that Jurgens suffered increased incapacity due solely to her work-related injury than it would be without his opinion. The assigned error is without merit.

(b) Admitting Dr. Wampler's Opinion

Irwin Industrial argues that the trial court erred in admitting Dr. Wampler's testimony regarding fear avoidance. It further argues that Dr. Wampler lacked foundation because he saw Jurgens only once, in preparation for litigation, and made determinations based on her functional capacity evaluation and her subjective statements about what she believed her physical capacity to be. We find no error.

[14] Irwin Industrial claims that Dr. Wampler's testimony regarding fear avoidance was outside the scope of his expertise. An expert witness may testify to facts outside the field of his specialty if he shows he is familiar with the specialties and the treatments provided. *Stukenholtz v. Brown*, 267 Neb. 986, 679 N.W.2d 222 (2004). In *Sheridan v. Catering Mgmt., Inc.*, 5 Neb. App. 305, 558 N.W.2d 319 (1997), we held that a physician who had experience treating patients with symptoms similar to the plaintiff's was qualified to testify even without proving the medical community universally recognized the diagnosis he assigned.

[15] In this case, Dr. Wampler does not seek to diagnose Jurgens with fear avoidance, but instead uses the term to describe a pattern of behavior he observed in many of his patients. Dr. Wampler's experience working with patients with similar symptoms in the course of his practice is sufficient

foundation for his testimony. We also reject Irwin Industrial's argument that Dr. Wampler did not have proper foundation to form a medical opinion because he saw Jurgens only once and based his opinion partially on her opinion of her condition. A physician need not examine a patient in order to provide testimony so long as the testimony is based on "'scientific, technical, or other specialized knowledge'" and "'assist[s] the trier of fact to understand the evidence or to determine a fact in issue.'" *Gibson*, 221 Neb. at 309-10, 376 N.W.2d at 789 (quoting Neb. Rev. Stat. § 27-702 (Reissue 1979)).

In *Gibson*, the testifying physician based his testimony solely on medical data and medical records obtained from third parties, which the court found sufficient.

In the present case, Dr. Wampler examined Jurgens and reviewed the opinions and records of other physicians. This provided Dr. Wampler with sufficient foundation upon which to base his opinions. The trial court did not abuse its discretion in admitting his testimony.

VI. CONCLUSION

The Workers' Compensation Court properly determined that Jurgens suffered an increase in incapacity in her situational depression due solely to her work-related injury. We further find that the trial court adequately complied with rule 11(A) and properly ruled on the evidentiary issues before it. We, therefore, affirm the decision of the Workers' Compensation Court.

AFFIRMED.

In re Trust Created by Henry W. Crawford, deceased. Allan A. Armbruster, Jr., Successor Personal Representative of the Estate of Esther Zoe Crawford, deceased, appellant, v. Sam R. Brower, Successor Trustee, et al., appellees.

826 N.W.2d 284

Filed February 5, 2013. No. A-11-823.

1. **Judgments: Final Orders.** Neb. Rev. Stat. § 25-1301 (Reissue 2008) sets forth two ministerial requirements for a final judgment. The first is rendition of the judgment, defined as the act of the court, or a judge thereof, in making and signing a written notation of the relief granted or denied in an action. The second ministerial step for a final judgment is that entry of a final order occurs when the clerk of the court places the file stamp and date upon the judgment.
2. **Final Orders.** Final orders must be signed by the judge as well as file stamped and dated by the clerk.
3. **Judgments: Records: Notice: Fees: Appeal and Error.** A notice of appeal or docket fee filed or deposited after the announcement of a decision or final order but before the judgment is properly rendered shall be treated as filed or deposited after the entry of the judgment, decree, or final order and on the date of entry.
4. **Judges: Recusal: Judgments.** Recusal or disqualification of a trial judge generally requires that the judge take no further action in the case, and generally any order entered subsequent to recusal is considered void and without effect.
5. ____: ____: ____. Where the trial judge orally announces a ruling, subsequently enters an order of recusal, and thereafter performs the ministerial act of simply entering a written order or judgment reflecting the prior oral ruling, the written order is not void.
6. **Trusts: Equity: Appeal and Error.** Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record.
7. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
8. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
9. ____: ____. An appellate court, in reviewing a trial court judgment for errors appearing on the record, will not substitute its factual findings for those of the trial court where competent evidence supports those findings.
10. **Judgments: Evidence: Fees: Appeal and Error.** Where it is clear from a de novo review of the record that the court did not receive any evidence, and no witnesses were called or testified concerning the request for payment of fees,

whether they were reasonable or properly payable, or providing any basis for allowing them, the order is not supported by competent evidence.

Appeal from the County Court for Douglas County: EDNA ATKINS and MARCENA M. HENDRIX, Judges. Vacated, and remanded with directions.

Allan A. Armbruster, Jr., of Armbruster Law Office, pro se.

Sam R. Brower, of Andersen, Lauritsen & Brower, pro se.

Joseph E. Jones and Elizabeth A. Culhane, of Fraser Stryker, P.C., L.L.O., for appellee Alta Empkey.

IRWIN, SIEVERS, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Allan A. Armbruster, Jr., successor personal representative of the estate of Esther Zoe Crawford, appeals an order of the county court for Douglas County, Nebraska, which authorized the payment of accounting fees incurred by the trust established by Henry W. Crawford from funds previously ordered to be returned from the trust to Esther's estate. See *In re Estate of Crawford*, No. A-09-733, 2010 WL 3137525 (Aug. 3, 2010) (selected for posting to court Web site). Because the county court's order is not supported by competent evidence, we vacate, and remand to the county court with directions to hold an evidentiary hearing. See *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005).

II. BACKGROUND

This case is related to *In re Estate of Crawford, supra*. As we recounted in the factual background of that case, Esther executed a series of wills during the course of her life, including wills executed in 1973, 1977, 1982, 1988, 1990, 1992, 1993, 1997, 1999, and 2001. In December 2001, Esther's husband, Henry, established a trust. In the 2001 will, Esther bequeathed all her assets to Henry, if he survived her, or to the trustee of his trust, if Henry predeceased her.

Henry predeceased Esther. Esther died in November 2003. Pursuant to the terms of the 2001 will, the personal

representative of Esther's estate transferred assets of Esther to Henry's trust. In December 2005, however, an objection was filed challenging the validity of the 2001 will. In June 2008, a jury returned a verdict finding that the 2001 will was invalid. In June 2009, the county court entered an order holding that Esther's estate should proceed as an intestate proceeding and directing that any assets previously transferred from Esther's estate to the trust under the invalid 2001 will should be returned as wholly as possible to the estate.

In August 2010, in *In re Estate of Crawford, supra*, we affirmed the county court's holding that assets previously transferred from Esther's estate to Henry's trust under the invalid 2001 will should be returned as wholly as possible to the estate. No petition for further review was filed.

On October 6, 2010, the trustee of Henry's trust filed an application seeking approval to pay an accounting bill. The application indicated that an accountant had performed "tax services on behalf of the Trust" and had submitted an invoice for $2,800 for his services.

On October 15, 2010, a "Stipulation and Agreement" was filed. The agreement was entered into by interested parties in Esther's estate and Henry's trust. The agreement concerned, among other things, the return of assets previously distributed to the trust from the estate pursuant to Esther's invalid 2001 will and the continued administration of the estate and the trust.

According to the agreement, the trust then held $695,982.68 that had been improperly distributed to the trust from the estate pursuant to Esther's invalid 2001 will. The agreement provided that the trust would immediately return $675,162.99 to the estate, while holding back the remaining $20,819.69. Of the money held back, the parties agreed to authorize the trust to pay attorney fees of $17,719.69 incurred in challenging Esther's 2001 will. The parties agreed that the trust could keep another $300 for potential taxes owed by the trust. The remaining $2,800 held back by the trust is the subject of this appeal.

The agreement includes a provision that the parties labeled "DISPUTE REGARDING ACCOUNTING FEES." In that

provision, the parties specifically acknowledged that "there is a dispute concerning certain charges for tax services . . . in the amount of $2,800.00" and that "[t]he parties disagree[d] regarding whether obligations incurred on behalf of the Trust are payable out of funds that have been ordered returned to Esther's estate and/or whether the amount charged is reasonable for and in consideration of the services performed." In the same provision, the parties then agreed as follows:

> [A]n award of accounting fees by the County Court out of the cash held by the Trustee shall be paid out of the $2,800.00 retained by the Successor Trustee. If the County Court determines that the cash held in the Trust is not available for payment of obligations of the Trust or orders that less than $2,800.00 is reasonable under the circumstances, the amount by which $2,800.00 exceeds the amount determined as payable to [the accountant] by the Successor Trustee shall be paid by the Successor Trustee to [the] Successor Personal Representative.

In the agreement, the parties agreed to release a variety of potential claims, including claims against the prior trustee and personal representative. Pursuant to these releases, the estate agreed as follows:

> [To] fully and completely release and discharge, and . . . to indemnify and hold harmless the Trust, the Successor Trustee and the Trust Beneficiaries from any and all claims, suits and causes of action of any kind whatsoever (with the exception of those claims, if any, which statutes cannot [sic] be waived), whether in law or in equity, whether known or unknown, contingent or non-contingent, that they (or any other person might assert as a legal heir of Esther . . .) might have had, now may have, or may have in the future against such released parties which have accrued as of the date of execution of this Agreement, or hereafter accruing . . . . Notwithstanding, [the] Successor Personal Representative, and [the heirs] reserve the Estate's claim for the return to Esther's estate of $2,800.00 less the amount the county court orders to be paid to [the accountant] out of the cash retained by the Successor Trustee . . . .

On October 15, 2010, the county court entered an order approving the parties' agreement.

On November 17, 2010, the county court held a hearing on the application for payment of accounting fees. During that hearing, the successor personal representative specifically indicated to the court there was a question of whether the outstanding accounting bill could be paid with a portion of the money that had been improperly transferred to the trust pursuant to Esther's invalid 2001 will and that had been previously ordered by the county court and this court returned to the estate. The successor personal representative argued that the bill had been incurred by the trust and that the obligations had nothing to do with the estate.

During the hearing, the court first indicated that "the Court of Appeals' [August 2010] order should be implemented, [and] that the money should be paid back to — whatever is in the trust that belongs to [the estate] should be returned to the estate." The court indicated that it would then need to determine whether the $2,800 bill was "fair" and whether the trust had funds to satisfy the bill without considering money that properly belonged to the estate. The prior trustee and the successor trustee both represented to the court that the trust had no other money to pay the bill. As such, the only money the trust had to satisfy the accounting bill was the $2,800 that had been held back and not yet returned to the estate pending the court's ruling.

The successor personal representative noted that everyone agreed that the $2,800 being held by the trust "is out of the pool of the money that was to be given and returned to the estate." The successor personal representative again argued that the accounting bill incurred by the trust should not be paid with money belonging to the estate. The successor personal representative then indicated that the estate "[was] not going to appeal" the county court's ruling on whether the bill could be paid with money held back and not yet returned to the estate and indicated that "[if] that is the order of the Court, [the estate would] accept that," but again argued that the court should not allow payment of the bill with money belonging to the estate.

The court then orally announced that it was "going to order that [the bill] be paid out of the amount that was held back to pay the fees since that was the agreement of the parties." The successor personal representative again argued that it was "not the agreement of the parties" that the bill be paid with the money held back. At that point, the language quoted above concerning the parties' dispute about the accounting fees and agreement that $2,800 could be held back and not returned to the estate pending the court's ruling was read to the court. The court then held that "the bill was incurred and unless parties have evidence that the $2,800 is not fair and reasonable, then I am ordering that the $2,800 be paid out of the trust money that is presently in [the successor trustee's] possession" and overruled the successor personal representative's objection to using the estate's money to pay the trust's bill.

Although the court on November 17, 2010, orally announced its decision on the application for payment of the accounting fees, the court never entered a signed or file-stamped order on the matter.

On January 7, 2011, the successor personal representative filed a motion for rehearing. On January 12, the county court apparently denied the motion for rehearing, but again failed to enter any signed or file-stamped order to that effect. On March 28, the successor personal representative filed a motion asking the court to enter orders consistent with its oral pronouncements of November 17, 2010, and January 12, 2011, so that the successor personal representative could properly secure an appeal from the court's rulings.

On April 1, 2011, the county court made an unsigned docket entry indicating that it had signed an order for the payment of the accounting fees "which were ordered to be paid" on November 17, 2010. However, the file again contains no signed or file-stamped order to this effect.

On April 1, 2011, the county court judge entered an order recusing herself from the case.

On April 7, 2011, the successor personal representative filed a motion for new trial. On April 25, the successor personal representative filed an amended motion for new trial. On

August 29, the new county court judge presiding over the case entered an order denying the motion for new trial.

On September 20, 2011, the successor personal representative filed a notice of appeal. He indicated his intent to appeal "the final Order entered by the County Court of Douglas County, Nebraska on April 1, 2011, granting the Application for Payment of Accountant's Fees." At that time, however, there was still no signed or file-stamped order actually granting the successor trustee's request to pay the accounting fees with the $2,800 that belonged to the estate and had been held back from the trust's repayment of assets to the estate. Despite the prior county court judge's oral pronouncements on several occasions, she had failed to take the necessary steps to create a final, appealable order.

On October 31, 2011, the prior county court judge filed an affidavit in which she indicated that she was signing and filing an order for payment of the accounting fees, "with the intent and directions that said Order shall take effect and be entered of record as of April 1, 2011 as a correction of the record and for appeal purposes." On October 31, she did sign and file an order granting the application for payment of accounting fees.

III. ASSIGNMENTS OF ERROR

On appeal, the successor personal representative assigns several errors challenging the district court's ruling that an accounting fee incurred by the trust was properly paid with money belonging to the estate.

IV. ANALYSIS

1. Jurisdiction

We first address the jurisdictional complexity that was needlessly created in this case by the initial county court judge's repeated failure to properly render a final order concerning the court's granting of the application for approval to pay the accounting fees from the money held back by the trust. The record presented on appeal indicates that on at least three different occasions, the county court judge announced a decision but failed to render a final order. The

parties subsequently filed motions for rehearing or new trial when there had not yet been any final order rendered, and the parties were forced to expend time and money motioning the court to properly enter orders so that an appeal could be secured. Moreover, the jurisdictional posture of this case was further complicated when the initial county court judge failed to render her final decision until nearly 7 months after recusing herself from the case.

[1,2] In *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004), we issued a published opinion concerning the importance of properly rendering final orders to provide guidance for the bench and bar, eliminate unnecessary procedural delays for litigants, and make the work of the appellate courts somewhat simpler. As we noted in that case, Neb. Rev. Stat. § 25-1301 (Reissue 2008) sets forth two ministerial requirements for a final judgment. The first is rendition of the judgment, defined as "the act of the court, or a judge thereof, in making and signing a written notation of the relief granted or denied in an action." § 25-1301(2). The second ministerial step for a final judgment is that entry of a final order occurs when the clerk of the court places the file stamp and date upon the judgment. § 25-1301(3). In short, final orders must be signed by the judge as well as file stamped and dated by the clerk. *State v. Brown, supra*.

[3] As we noted and discussed in some depth in *State v. Brown, supra*, it has long been the law in Nebraska that a notice of appeal or docket fee filed or deposited after the announcement of a decision or final order but before the judgment is properly rendered shall be treated as filed or deposited after the entry of the judgment, decree, or final order and on the date of entry. See Neb. Rev. Stat. § 25-1912(2) (Reissue 2008). Announcement of a decision can come, among other ways, orally from the bench, from trial docket notes, from file-stamped but unsigned journal entries, or from signed journal entries which are not file stamped. *State v. Brown, supra*. Section 25-1912(2) creates what we have called "potential jurisdiction" or "springing jurisdiction," wherein an announced decision creates a situation where the appellate court potentially has jurisdiction that will spring into existence when

the announced decision is properly rendered. See *State v. Brown, supra*.

In the present case, the initial county court judge announced a ruling on the application for approval of the accounting fees during the hearing on November 17, 2010. This announcement created potential jurisdiction, but there was no final, appealable order until the court rendered a final decision that was signed, dated, and file stamped. In January 2011, the judge apparently overruled a motion for rehearing, but again failed to enter a written, signed, and file-stamped order. Then, on April 1, the judge again announced a decision on the application, evidenced by an unsigned docket entry. There was still no final, appealable order, however, because the judge again did not sign, date, and enter a written order.

On April 1, 2011, the initial county court judge recused herself from presiding over this case. At the time of her recusal, she had still not rendered a final order consistent with her announced ruling of November 2010. On October 31, 2011, nearly a year after announcing her decision on the application for approval to pay accounting fees, the recused county court judge signed and entered a written order granting the application.

At the same time, she executed an affidavit indicating her intent to have the written order be effective as of April 1, 2011. The county court judge's intent notwithstanding, the order was not effective until the date it was signed, entered, and file stamped—October 31, 2011. On that date, more than a month after the successor personal representative filed his notice of appeal upon the subsequent county court judge's denial of a motion for new trial and nearly a year after the decision was announced, our potential jurisdiction "sprung" to fruition.

[4,5] In addition to the complications and delays occasioned by the initial county court judge's failures to render a final decision on her ruling, an additional jurisdictional wrinkle was interjected into this case by the judge's finally rendering her final decision only after having already recused herself from the case. Recusal or disqualification of a trial judge generally requires that the judge take no further action in the case, and

generally any order entered subsequent to recusal is considered void and without effect. See, *Plaza v. Plaza*, 21 So. 3d 181 (Fla. App. 2009); *Goolsby v. State*, 914 So. 2d 494 (Fla. App. 2005); *Davis v. State*, 849 So. 2d 1137 (Fla. App. 2003). However, there is an exception to this rule where the trial judge orally announces a ruling, subsequently enters an order of recusal, and thereafter performs the ministerial act of simply entering a written order or judgment reflecting the prior oral ruling. *Plaza v. Plaza, supra*.

We conclude that we have jurisdiction to address the merits of the successor personal representative's appeal.

2. Merits

The successor personal representative asserts that the county court's order directing payment of accounting fees incurred by the trust with money belonging to the estate was not supported by competent evidence. Inasmuch as there was no testimony or evidence adduced to support the payment of the fees, we agree.

[6-9] Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record. *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007). In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *Id*. When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*. An appellate court, in reviewing a trial court judgment for errors appearing on the record, will not substitute its factual findings for those of the trial court where competent evidence supports those findings. *Id*.

In *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005), the Nebraska Supreme Court addressed a situation wherein the trial court removed a trustee, replaced her with a successor trustee, and eventually entered orders concerning assets and the payment of attorney and trustee fees and costs. On appeal, the former trustee challenged her removal and replacement, as well as the trial court's orders concerning

assets, fees, and costs. Although the Supreme Court found that the former trustee had not timely appealed her removal, the court addressed the trial court's orders concerning assets and the payment of fees and costs for which the successor trustee had sought approval.

The Supreme Court noted that when the parties appeared in court concerning the successor trustee's requests for directions concerning assets, fees, and costs, "[n]o witnesses testified, and only one exhibit was offered and received into evidence." *Id.* at 316, 693 N.W.2d at 505. The Supreme Court noted that instead of witnesses and evidence, "the parties' attorneys presented brief arguments, and the court announced its findings after having 'reviewed all the filings.'" *Id.* at 316-17, 693 N.W.2d at 505.

In reviewing the procedure used by the trial court, the Supreme Court noted that "[t]he court's failure to hold a formal evidentiary hearing" was "of great concern." *Id.* at 317, 693 N.W.2d at 505. The Supreme Court emphasized that the appellate court's standard of review is, in the absence of an equity question, to review for error appearing on the record, and that the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. Because there had been no witness testimony and essentially no evidence adduced to support the trustee's request for fees and costs, the Supreme Court held that "[t]he district court's . . . orders [were] not supported by competent evidence," and the Supreme Court vacated, and remanded with directions to hold an evidentiary hearing. *Id.*

Similarly, in the present case, the trustee requested the court's approval to pay accounting fees incurred on behalf of the trust. The trustee was seeking the court's approval to pay the accounting fees with money that the county court and this court had both previously specifically ordered did not belong to the trust and should be returned to the estate. At the hearing, no witnesses testified and no evidence was received to support the payment of the fees, let alone use of the estate's money to pay the fees. Despite having specifically ruled that the money at issue should be returned to the estate and was

not available to the trust, the county court in the present case approved payment of the accounting fees with the estate's money. The court provided no explanation or rationale for its ruling.

[10] Our review of the record indicates that at the hearing, the trustee, during his argument to the court, indicated that he was "offer[ing] the invoice from [the accountant]." However, there was no exhibit marked, the court never made any ruling indicating that the invoice was being received as evidence, and the bill of exceptions presented to us includes no exhibits. It is clear from a de novo review of the record that the court did not receive any evidence. In addition, no witnesses were called or testified concerning the fees, whether they were reasonable or properly payable, or providing any basis for using the estate's money to pay them.

As the Supreme Court found in *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005), we find that the county court's order that the accounting fees were payable with the estate's money is not supported by competent evidence. We vacate, and remand to the county court with directions to hold an evidentiary hearing. See *id*.

V. CONCLUSION

We conclude that we have jurisdiction to address the merits of this appeal. We find that there was no evidence adduced to support the county court's decision. We vacate, and remand with directions to hold an evidentiary hearing.

VACATED, AND REMANDED WITH DIRECTIONS.

WILLIE J. HARRIS, APPELLEE, V. IOWA TANKLINES, INC., AND COMMERCE & INDUSTRY, APPELLANTS.

825 N.W.2d 457

Filed February 5, 2013. No. A-12-354.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not

sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.

2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the finding of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.
3. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
4. **Statutes.** Statutory interpretation presents a question of law.
5. **Appeal and Error.** An appellate court resolves questions of law independently of the trial court.
6. **Workers' Compensation.** Neb. Rev. Stat. § 48-125 (Reissue 2010) is applicable to orders approving lump-sum settlements.
7. **Workers' Compensation: Time.** When a workers' compensation settlement check is sent to the employer's counsel, but not to the employee or his or her counsel, within 30 days after the entry of the award, it is not sent directly to the employee within the statutorily prescribed time.
8. ____: ____. A workers' compensation payment sent directly to the employee's counsel within 30 days after the entry of the award is in compliance with Neb. Rev. Stat. § 48-125(1) (Reissue 2010).
9. **Workers' Compensation: Penalties and Forfeitures: Time.** Neb. Rev. Stat. § 48-125(1) (Reissue 2010) does not include any requirement that there be actual prejudice suffered by the employee before waiting-time penalties are appropriate.
10. ____: ____: ____. The plain language of Neb. Rev. Stat. § 48-125(1) (Reissue 2010) provides that a workers' compensation payment shall be sent directly to the person entitled to payment within 30 days after the entry of the award and that a waiting-time penalty shall be added for all delinquent payments.

Appeal from the Workers' Compensation Court. Affirmed.

Harry A. Hoch III and Ronald E. Frank, of Sodoro, Daly & Sodoro, P.C., for appellants.

John K. Green, of Pickens & Green, L.L.P., for appellee.

IRWIN, PIRTLE, and RIEDMANN, Judges.

PER CURIAM.

INTRODUCTION

This appeal raises one primary issue: whether an employer and its insurer comply with Neb. Rev. Stat. § 48-125(1) (Reissue 2010) when they send payment to the employer's attorney on the 30th day following the entry of a workers'

compensation award and that attorney then delivers it to the employee's attorney on the 31st day.

The appellants are the employer, Iowa Tanklines, Inc., and Iowa Tanklines' insurer, Commerce & Industry. They argue that they complied with the 30-day statutory requirement when, on the 30th day following the entry of the award, Commerce & Industry wrote and forwarded the award check to counsel for Iowa Tanklines and Commerce & Industry (Iowa Tanklines' counsel). Iowa Tanklines' counsel received the check the next day, the 31st day following the entry of the award. Iowa Tanklines' counsel gave the check to the employee's counsel later that day.

Contrary to the assertions of Iowa Tanklines and Commerce & Industry, we agree with the decision of the review panel that the payment to the employee was delinquent. In reaching our decision, we are bound by controlling Nebraska law that requires such awards shall be sent directly to the person entitled to compensation or his or her designated representative within 30 days of the award. Here, because Commerce & Industry initially sent the check to Iowa Tanklines' counsel instead of to the employee or his counsel, payment was not sent to the employee until 31 days after the entry of the award.

Because the review panel's decision in this case was correct, we affirm its decision and award of attorney fees.

BACKGROUND

The facts in this case are not in dispute. On June 5, 2003, Willie J. Harris suffered injuries in an accident arising out of and in the course of his employment with Iowa Tanklines. The parties reached a settlement agreement regarding a workers' compensation claim filed by Harris in regard to the work-related accident. The settlement agreement was subsequently approved by the Nebraska Workers' Compensation Court on May 11, 2010. The amount due Harris under the lump-sum settlement was $315,000, plus payment to a Medicare set-aside trust. The sum of $50,000 was paid to Harris on a timely basis, leaving a balance of $265,000.

On June 10, 2010, Commerce & Industry, Iowa Tanklines' insurance provider, issued a check in the amount of $265,000

payable to Harris and his attorney. On that same day, Commerce & Industry gave a package containing the check to United Parcel Service (UPS) for the purpose of effectuating delivery. The package was addressed to Iowa Tanklines' counsel in Omaha, Nebraska, for next-day delivery. UPS delivered the package with the check to Iowa Tanklines' counsel's office on June 11. Upon receipt of the check, a representative from Iowa Tanklines' counsel called Harris' counsel to arrange delivery of the check. The representative told Harris' counsel that the check would be hand-delivered to his office or, if preferred, that he could come pick it up. Harris' counsel chose to pick up the check, and it was, in fact, picked up on June 11, the same day it arrived at the office of Iowa Tanklines' counsel. The check was subsequently deposited into Harris' counsel's account.

On June 6, 2011, nearly 1 year after cashing the check, Harris filed a motion for penalties and attorney fees, which was captioned "Complaint," alleging that he did not receive the lump-sum settlement within 30 days of the court's order and that therefore, he was entitled to waiting-time penalties and attorney fees pursuant to § 48-125(1).

Following a hearing, the trial court denied Harris' request for penalties and attorney fees. The court found that the check was issued and sent on June 10, 2010, which was 30 days after the court's approval of the settlement, and was received by Harris' counsel on June 11. The court concluded that the check was timely sent and delivered to Harris' counsel through Iowa Tanklines' counsel. The trial court found that "[t]he fact that the check was not mailed directly to [Harris] or [Harris'] counsel should not subject [Iowa Tanklines] to penalties when sent to [Iowa Tanklines'] counsel and delivered to [Harris] or his counsel on the same day as received by [Iowa Tanklines'] counsel."

Harris filed an application for review. The review panel found that because the check was sent to Iowa Tanklines' counsel before it was delivered to Harris, payment was not sent "directly to the person entitled to compensation or his or her designated representative" as required by § 48-125(1). Therefore, the review panel concluded that Harris' request

for penalties and attorney fees should have been granted, and reversed the trial court's order and remanded the matter for an assessment of penalties due and owing, along with an attorney fee of $2,500 and interest as allowed by law.

ASSIGNMENTS OF ERROR

Iowa Tanklines and Commerce & Industry assign that the review panel erred in (1) reversing the trial court's finding that the settlement check was timely sent and delivered to Harris' counsel and (2) awarding Harris attorney fees on the ground that he obtained an increase in benefits owed to him.

STANDARD OF REVIEW

[1-3] A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Parks v. Marsden Bldg Maintenance*, 19 Neb. App. 762, 811 N.W.2d 306 (2012). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the finding of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong. *Id*. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Id*.

[4,5] Statutory interpretation presents a question of law. *Downey v. Western Comm. College Area*, 282 Neb. 970, 808 N.W.2d 839 (2012). An appellate court resolves questions of law independently of the trial court. *Id*.

ANALYSIS

Delinquency of Payment.

The question we must address in this appeal is whether Iowa Tanklines and Commerce & Industry complied with the terms of § 48-125(1) requiring payments be sent directly

to the person entitled to compensation within 30 days of the award, when the settlement check was sent from the insurance company to Iowa Tanklines' counsel within 30 days of the award, but was not sent to Harris or his counsel until 31 days after the award.

[6] Section 48-125(1) provides:

> (a) 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. *Such payments shall be sent directly to the person entitled to compensation or his or her designated representative* except as otherwise provided in section 48-149.
>
> (b) 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 . . . .

(Emphasis supplied.) In *Hollandsworth v. Nebraska Partners*, 260 Neb. 756, 619 N.W.2d 579 (2000), the Nebraska Supreme Court held that § 48-125 is applicable to orders approving lump-sum settlements.

In the present case, Commerce & Industry issued the settlement check on the 30th day after the compensation court's approval of the settlement and directed UPS to deliver the check to Iowa Tanklines' counsel, who then effectuated delivery to Harris' counsel on the 31st day. Iowa Tanklines and Commerce & Industry argue that delivery of the check started within the 30-day period when the check was given to UPS for eventual delivery by Iowa Tanklines' counsel to Harris' counsel. They argue that Iowa Tanklines' counsel, as an agent of Iowa Tanklines, was a "link in the chain of delivery sent into motion" on the 30th day. Iowa Tanklines and Commerce & Industry also point out that no delay in delivery occurred, because Harris received his settlement check on the same day he would have had it been sent by Commerce & Industry directly to him. Harris, on the other hand, contends that Iowa Tanklines and Commerce & Industry did not send

the check "directly to the person entitled to compensation or his or her designated representative" within 30 days, resulting in a failure to strictly comply with the plain language of § 48-125(1).

[7] We conclude that the review panel was correct in reversing the trial court's finding that the settlement check was timely sent and delivered to Harris' counsel. Although the settlement check was sent to the employer's counsel within 30 days after the entry of the award, it was not sent directly to the employee within the statutorily prescribed time.

The trial court relied on *Brown v. Harbor Fin. Mortgage Corp.*, 267 Neb. 218, 673 N.W.2d 35 (2004), in determining whether the check was timely sent. In *Brown*, the employee received an award for workers' compensation benefits on August 28, 2002. On September 25, the employer's parent company issued a check payable to the employee. On September 26, the check was placed in an envelope which was postmarked September 26, 2002, *and mailed to the employee's counsel*. The employee's counsel received the check on September 30. The employee subsequently filed an application for penalties, claiming that the check was received more than 30 days after the entry of the award. The trial court determined that payment was delinquent and that the employee was entitled to waiting-time penalties. The review panel affirmed the judgment of the trial court.

[8] On appeal, the Nebraska Supreme Court reversed and remanded, holding that payment of workers' compensation benefits sent to the employee's counsel within 30 days after the entry of an order, award, or judgment, is not delinquent under § 48-125(1) and that no penalties are due. The court found that the payment in *Brown* was not sent after 30 days from the date of the award and therefore was not delinquent. However, in the *Brown* case, as noted above, the payment was sent directly to the employee's counsel within 30 days, in compliance with the statute. That is not what happened in this case.

In the present case, the check for the lump-sum settlement was issued and turned over to UPS on June 10, 2010, 30 days after the approval of the settlement on May 11. Therefore, the check was initially sent within 30 days after the entry of the

order approving settlement, as it was in *Brown v. Harbor Fin. Mortgage Corp., supra*.

The difference between *Brown* and the present case is that in *Brown*, the parent company of the employer issued the check and sent it to the employee's counsel. In the instant case, Commerce & Industry issued the check and sent it to Iowa Tanklines' counsel, with the expectation that counsel would carry out the final leg of the delivery to Harris' counsel. The trial court found that the use of Iowa Tanklines' counsel in the delivery did not violate the requirement that payment be sent directly to Harris or his counsel under § 48-125(1), because there is an agency relationship that exists between counsel and client. The dissent also emphasizes this agency relationship.

The review panel, however, found that the trial court incorrectly interpreted § 48-125(1), because the statute specifically provides that payments are to be sent "directly to the person entitled to compensation or his or her designated representative." The review panel relied on *Lydick v. Insurance Co. of North America*, 187 Neb. 97, 187 N.W.2d 602 (1971), to define the term "directly." In that case, the Supreme Court found "directly" to mean "'"[i]n a direct manner, without anything intervening."'" *Id.* at 100, 187 N.W.2d at 605. The court then defined "intervene" as "'"1. To enter or appear as an irrelevant or extraneous feature or circumstance; to come (in between). 2. To occur, fall or come between points of time or events."'" *Id.*

The review panel concluded, based on the definitions found in *Lydick*, that transmittal of the payment to Iowa Tanklines' counsel was an intervening event and that therefore, payment was not made in compliance with the pertinent statute.

We agree with the review panel's conclusion that payment was not made directly to the person entitled to the compensation in a timely manner. Had the check been issued sooner to Iowa Tanklines' counsel, who then sent it to Harris or Harris' attorney within the 30-day time period, Harris would not be entitled to waiting-time penalties under the statute. But here, where the insurance company waited until the 30th day to issue the check, it should have been sent directly to Harris

or Harris' representative in order to be timely sent in accordance with *Brown v. Harbor Fin. Mortgage Corp.*, 267 Neb. 218, 673 N.W.2d 35 (2004). Because the insurance company failed to do that, the review panel was correct in its finding and decision.

Both the trial court and the dissent rely on a notion of agency relationships to justify the insurance company's failure to send the check directly to Harris or his counsel. Both would conclude that because the insurance company placed delivery of the check into motion within 30 days by sending it to somebody with an agency relationship *to the insurance company*, the check should be found to have been directly sent to Harris. The flaw in this reasoning is that there is *no* agency relationship between the insurance company, the employer, or the employer's counsel *with Harris*. The agency rationale would be apropos if the check was somehow sent within 30 days to somebody with an agency relationship to Harris, but it was not. The dissent's recognition of the fact that "[t]he relationship between attorney and client is one of agency" does not explain how someone within the insurance company or employer's agency satisfied the plain language of the statute—there is no agency relationship between Iowa Tanklines' counsel and Harris. See *VRT, Inc. v. Dutton-Lainson Co.*, 247 Neb. 845, 530 N.W.2d 619 (1995).

As an example of why the trial court's and the dissent's agency rationale cannot be correct is the following simple hypothetical: Assume the insurance company, on the 30th day, sent the check to the employer's counsel. Assume the employer's counsel, with employer's counsel's agency relationship to the insurance company, received the check on the 31st day and promptly placed it in a desk drawer and did not send it to the employee or his counsel for a week, a month, or a year. Under the agency rationale of the trial court and the dissent, such delay of a week, a month, or a year would not result in any penalties, because the check was sent to someone with an agency relationship with the employer's insurance company within 30 days. And, the mere fact that through fortuitous circumstances there did not end up being a long delay in the present case does not change the legal reasoning and make an

agency theory a correct basis for finding the plain language of the statute complied with when the insurance company and/or its agents did not send the check directly to Harris within 30 days of the award.

Similarly, the particular facts of this case do not change the legal conclusion that Iowa Tanklines did not comply with the plain language of the statute. The dissent points out variously that "under this particular set of facts" (emphasis omitted), there was no "noteworthy" delay, that there was "no measurable or meaningful delay in getting the check into the hands of the employee's counsel," and that Harris received the check "on the same day he would have had it been sent" directly to him. This is all true, but does not change the legal conclusion that the check was, in fact, not sent directly to him within 30 days. Had Iowa Tanklines and Commerce & Industry waited until the 31st day to issue the check and hand-delivered it to Harris that same day, payment still would have been delinquent even though Harris would have received payment on the 31st day. Read together, § 48-125(1) and *Brown v. Harbor Fin. Mortgage Corp., supra*, instruct that payment must leave the employer's control within 30 days in order to be timely made.

This case presents a purely legal question of statutory interpretation, not an equity question.

[9] The statute does not include any requirement that there be actual prejudice suffered by the employee before waiting-time penalties are appropriate.

[10] The plain language of the statute provides that the payment "shall" be sent directly to the person entitled to payment within 30 days after the entry of the award and that a waiting-time penalty "shall be added" for "all" delinquent payments. § 48-125(1). The dissent would add an additional requirement of actual prejudice to the statute where the Legislature chose not to, and cites no authority for the notion that actual prejudice or equity is an appropriate consideration in resolution of this purely legal question.

We conclude that the payment at issue in this case was not timely sent in accordance with the express terms of § 48-125(1). Thus, the review panel was correct in reversing

the finding of the trial court that the payment to Harris was timely sent and delivered.

Attorney Fees.

The review panel awarded Harris $2,500 in attorney fees pursuant to § 48-125(2). Iowa Tanklines and Commerce & Industry assert this was error. Because we affirm the review panel's award, we affirm the review panel's award of attorney fees.

CONCLUSION

For the reasons stated above, we affirm the order of the review panel in all respects.

AFFIRMED.

PIRTLE, Judge, dissenting.

I am compelled to dissent because I agree with the decision reached by the trial court in this case. That is, under these facts as presented, which neither side disputes, a check for $265,000 was timely issued by the insurance company, sent a considerable distance by overnight delivery with UPS, and received the very next day by counsel for the employee. Approximately 1 year later, counsel for the employee filed a "Complaint" with the Workers' Compensation Court demanding a penalty of more than $132,500. Why? Because the check was sent to counsel for the employer and its insurance company in Omaha, rather than "directly to the person entitled to compensation or his or her designated representative" as specified in Neb. Rev. Stat. § 48-125(1)(a) (Reissue 2010). This alleged "violation" of the strict reading of the statute resulted in no measurable or meaningful delay in getting the check into the hands of the employee's counsel, who is also located in Omaha. As such, I must respectfully disagree with the majority's affirmance of the review panel's decision in this case.

As set out more fully in the majority opinion, Commerce & Industry issued the settlement check on the 30th day after the compensation court's approval of the settlement and directed UPS to deliver the check to Iowa Tanklines' counsel, who then effectuated actual delivery to Harris' counsel on the 31st day.

Iowa Tanklines and Commerce & Industry argued that delivery of the check started within the 30-day period when the check was given to UPS for eventual delivery by Iowa Tanklines' counsel to Harris' counsel. They argued that Iowa Tanklines' counsel, as an agent of Iowa Tanklines, was a link in the chain of delivery set into motion on the 30th day. Iowa Tanklines and Commerce & Industry also argued that no delay in delivery occurred, because Harris received his settlement check on the same day he would have had it been sent by Commerce & Industry directly to him or his counsel. Harris, on the other hand, contended that Iowa Tanklines and Commerce & Industry did not send the check "directly to the person entitled to compensation or his or her designated representative," resulting in a failure to comply with § 48-125(1).

I believe that the trial court's reliance on *Brown v. Harbor Fin. Mortgage Corp.*, 267 Neb. 218, 673 N.W.2d 35 (2004), to determine whether the check was timely sent and delivered was correct. In *Brown*, the court determined that payment of benefits sent within 30 days after the entry of an award is not delinquent under § 48-125(1).

In the present case, the check was initially sent within 30 days after the entry of the order approving settlement, as it was in *Brown*. However, as the majority correctly points out, this case is different from the *Brown* case in that Commerce & Industry sent the check to Iowa Tanklines' counsel, rather than to Harris or his attorney, with the expectation that Iowa Tanklines' counsel would carry out the final leg of the delivery to Harris' attorney. The trial court found that the use of Iowa Tanklines' counsel in the delivery process did not violate the requirement that payment be sent directly to Harris or his counsel under § 48-125(1) due to the agency relationship that exists between counsel and client. The trial court stated:

> There is a special relationship between [Iowa Tanklines] and its insurance company and their lawyer. The lawyer is an agent for [Iowa Tanklines] and [Commerce & Industry]. As agent, the delivery of the check to counsel for [Iowa Tanklines], an agent of [Iowa Tanklines], and the immediate delivery of the check to counsel for [Harris] does not result in a penalty.

> . . . The fact that the check was not mailed directly to [Harris] or [Harris'] counsel should not subject [Iowa Tanklines] to penalties when sent to [Iowa Tanklines'] counsel and delivered to [Harris] or his counsel on the same day as received by [Iowa Tanklines'] counsel.

In reversing the trial court's order, the review panel relied on the definition of "directly" and "intervene" in *Lydick v. Insurance Co. of North America*, 187 Neb. 97, 187 N.W.2d 602 (1971), and concluded that transmittal of the payment to Iowa Tanklines' counsel was an intervening event such that payment was not made directly to the person entitled to the compensation, as stated in § 48-125(1). In my judgment, the review panel's reliance on the definitions in *Lydick v. Insurance Co. of North America, supra*, is misplaced. The *Lydick* case involved the interpretation of a windstorm exclusionary clause of an insurance policy for cattle. The policy extended to insure against direct loss of cattle by windstorm, hail, or explosion. The issue in that case was whether a windstorm was the direct cause of the plaintiffs' loss of cattle and, therefore, covered under the plaintiffs' insurance policy. The Nebraska Supreme Court relied on the definition of "directly" and "intervene" as set forth in the majority opinion, but specifically stated it did so "[i]n the context of this case . . . ." *Id.* at 100, 187 N.W.2d at 604-05. The definitions in *Lydick* were used in a much different context than the present case.

I believe the trial court correctly found that the use of Iowa Tanklines' counsel in the delivery process did not violate the requirement that payment be sent directly to Harris or his counsel *under this particular set of facts*. The relationship between attorney and client is one of agency; the general agency rules of law apply to the relation of attorney-client. *VRT, Inc. v. Dutton-Lainson Co.*, 247 Neb. 845, 530 N.W.2d 619 (1995). Accordingly, the check was sent and the delivery process began on June 10, 2010, 30 days after the approved settlement, when Commerce & Industry gave the check to UPS to deliver to Iowa Tanklines' counsel. Iowa Tanklines' counsel, as an agent of Iowa Tanklines, received the check on June 11 (a Friday) and completed the delivery process by getting the check to Harris' counsel the same day that Iowa Tanklines'

counsel received the check. The delivery of the check to Iowa Tanklines' counsel did not cause any noteworthy delay in delivery in this particular case.

The majority opinion puts forth a hypothetical suggesting a scenario where the employer's attorney "received the check on the 31st day and promptly placed it in a desk drawer and did not send it to the employee or his counsel for a week, a month, or a year." However, that is not what happened here, nor is it the scenario we have been asked to review, because that situation would be a much easier call, in my opinion. The question before us in this case is, Did the employee or his counsel suffer any meaningful or measurable delay in receiving the check? The obvious answer is no. So why then a penalty of $132,500, plus additional attorney fees? The majority says, because the controlling statute was "technically" violated. I, on the other hand, would conclude "no harm, no foul."

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. *Walton v. Patil*, 279 Neb. 974, 783 N.W.2d 438 (2010). 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*.

The purpose of the waiting-time penalty as provided in § 48-125(1) is to encourage prompt payment by making delay costly if the award has been finally established. See *Roth v. Sarpy Cty. Highway Dept.*, 253 Neb. 703, 572 N.W.2d 786 (1998). There is nothing in the record to show that Iowa Tanklines intentionally delayed payment. While Iowa Tanklines may have waited until the final hour to make payment, the evidence clearly shows that Harris received the check the same day he would have had the check been delivered directly to his counsel by UPS.

Under the facts of this case and the purpose underlying the waiting-time penalty, it would be an absurd result, rather than a sensible result, to interpret § 48-125(1) in such a way that Harris is entitled to such a substantial penalty simply because the check was sent to Iowa Tanklines' counsel for final delivery to Harris, rather than being sent to Harris' counsel directly when it was received on the same day. And, in fact, to take this absurdity one step further, Iowa Tanklines and Commerce & Industry correctly point out that had Commerce & Industry issued the check on the 30th day after approval of the settlement and sent it directly to Harris' counsel by regular U.S. mail, they would have fully complied with the requirements of the statute and the holding in *Brown v. Harbor Fin. Mortgage Corp.*, 267 Neb. 218, 673 N.W.2d 35 (2004). However, Harris' counsel likely would not have received the check for at least 3 to 5 days. In this case, Harris' counsel received the check the day after it was sent, yet Harris claims he was prejudiced and, therefore, owed another $132,500; thus, the absurd result. It is this kind of "legal gymnastics" which, in my opinion, leads to disrespect for the law.

I agree with the decision of the trial court that under the facts of this case, which were not in dispute, the payment at issue was sent within 30 days from the date of the award and delivered to Harris in accordance with the spirit and purpose underlying § 48-125(1). Thus, I respectfully disagree with the majority's decision to affirm the review panel's order. I would remand the cause to the review panel with directions to reverse its order and to reinstate the order of the trial court, including the denial of any attorney fees.

COURTNEY R. HILL, APPELLANT AND CROSS-APPELLEE, V. TYSHA K. HILL, APPELLEE AND CROSS-APPELLANT.

827 N.W.2d 304

Filed February 12, 2013. No. A-11-1029.

1. **Modification of Decree: Divorce: Child Custody.** If trial evidence establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior decrees or court orders have characterized the arrangement.
2. **Child Custody.** Joint physical custody means mutual authority and responsibility of the parents regarding the child's place of residence and the exertion of continuous blocks of parenting time by both parents over the child for significant periods of time.
3. ____. The amount of time children spend with each parent is less important than how the time is allocated when determining whether joint physical custody exists.
4. **Divorce: Child Custody.** Neb. Rev. Stat. § 42-364(3)(b) (Cum. Supp. 2012) requires that in dissolution cases, if the parties do not agree to joint custody in a parenting plan, the trial court can award joint custody if it specifically finds, after a hearing in open court, that it is in the best interests of the child.
5. **Child Custody.** A district court abuses its discretion in ordering joint custody when it fails to specifically find that joint physical custody is in the child's best interests as required by Neb. Rev. Stat. § 42-364 (Cum. Supp. 2012).
6. ____. When a trial court determines at a general custody hearing that joint physical custody is, or may be, in a child's best interests, but neither party has requested joint custody, the court must give the parties an opportunity to present evidence on the issue before imposing joint custody.
7. ____. Joint physical custody must be reserved for those cases where, in the judgment of the trial court, the parents are of such maturity that the arrangement will not operate to allow the child to manipulate the parents or confuse the child's sense of direction, and will provide a stable atmosphere for the child to adjust, rather than perpetuating turmoil or custodial wars.
8. **Judgments.** Implicit findings cannot satisfy procedural rules requiring explicit findings.
9. **Child Support: Appeal and Error.** An appellate court reviews child support cases de novo on the record and will affirm the trial court's decision in the absence of an abuse of discretion.
10. **Child Custody: Rules of the Supreme Court.** Trial courts employ worksheet 3, the joint custody worksheet of the Nebraska Child Support Guidelines, in cases of joint physical custody unless a sound reason not to do so is established by the record.
11. **Child Custody: Child Support: Rules of the Supreme Court: Time: Presumptions.** When a specific provision for joint custody is ordered and each party's parenting time exceeds 142 days per year, a rebuttable presumption exists that support shall be calculated using worksheet 3, the joint custody worksheet of the Nebraska Child Support Guidelines.

12. **Child Support: Rules of the Supreme Court.** Neb. Ct. R. § 4-212 (rev. 2011) is applicable when the threshold amount of parenting time is met, even if no specific provision for joint physical custody is ordered.
13. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Reversed and remanded with directions.

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

Anthony W. Liakos, of Govier & Milone, L.L.P., for appellee.

IRWIN, PIRTLE, and RIEDMANN, Judges.

RIEDMANN, Judge.

I. INTRODUCTION

Courtney R. Hill appeals and Tysha K. Hill cross-appeals from the decision of the district court for Douglas County that awarded joint legal custody of the parties' children, but awarded Tysha sole physical custody and ordered Courtney to pay child support accordingly. Because we find that the trial court awarded what amounted to joint physical custody without following the statutory procedure, we conclude that the trial court abused its discretion and reverse, and remand with directions.

II. BACKGROUND

Courtney and Tysha married in 2003. Two children were born during the marriage: one born in 2006 and another born in 2008.

In 2010, Courtney filed a complaint for dissolution of marriage. Courtney sought "temporary and permanent care, custody and control" of the children and child support. Tysha filed an answer and "counter complaint." She, too, sought "temporary and permanent care, custody and control" of the children and child support. The parties continued to reside together in the marital home until December 2010.

On December 27, 2010, the trial court entered a temporary order awarding joint legal custody to the parties and awarding sole physical custody to Tysha. The court order stated that

Courtney would have parenting time "[e]very Tuesday from 5:00 p.m. until Wednesday at 8:00 a.m." and "[a]lternating weekends from Friday at 5:00 p.m. until Sunday at 5:00 p.m." The temporary order directed that Courtney pay $900 per month in child support.

On August 8, 2011, trial was held on the issues of sole physical custody and the parties' partial parenting plan. The trial court heard the parties on the above issues and received evidence pertaining to child support.

In general, both parties presented evidence that throughout the marriage, they shared day-to-day parenting responsibilities of the children, were each actively involved in the children's lives, and were each capable and affectionate parents, and that the children had thrived under each parent's care. At the time of trial, Tysha continued to reside in the family home and Courtney lived in a separate residence with similar accommodations.

Despite each party's request for sole custody, Courtney's attorney elicited testimony from Courtney regarding joint physical custody, without objection from Tysha's counsel. Courtney testified that he wanted "full custody," or if not that, then he wanted joint custody with a "50/50 even split." Courtney also offered evidence requesting sole physical custody. Courtney testified he was uncertain whether he and Tysha could communicate effectively to coparent their children. He testified, "I've tried to communicate with her on many times, including school issues, past financial issues, and they all need to seem to be resolved by [attorneys]. So I would hope that that would change in the future but I'm not confident."

In Tysha's testimony, she requested the court award the parties joint legal custody, but she wanted to retain sole physical custody. She testified that she did not think the equal division of time proposed by Courtney would be in the children's best interests, and she believed that the parenting time awarded in the temporary order was in the children's best interests. She stated:

> [The older child] in particular, I'm concerned that there's a lot of back and forth, that he will not adjust well to

> that. He's a very structured child. He likes things in order. He likes to — likes to know exactly where he's going to be, and I'm concerned that by going back and forth frequently between two houses will create some problems with him adjusting.

Tysha further testified that the children are attached to their home and that she had concerns about them being away from home for long periods of time. She foresaw the older child's having "strong adjustment issues" trying to determine "whose day it is" with longer visitation periods. She admitted that the children had not had problems adjusting to the Tuesday overnight visits with Courtney.

Tysha's brother, mother, and father all testified that they had observed the children under the parenting time schedule set in place by the temporary order and that the children seemed to be doing well. Tysha's brother reiterated that the older child needed "a lot of structure." Her mother testified that the children seemed more calm and content and less anxious since December 2010. Tysha's friend and neighbor testified that the children seemed to have adjusted well since the separation and seemed happy. According to Tysha's mother and Tysha's neighbor, Tysha had been the children's primary caregiver.

Following trial, the judge met with the parties' attorneys in private, but the discussion is not part of the record. Afterward, the judge announced from the bench that it was in the children's best interests that Tysha receive sole physical custody. The trial court approved the parenting plan filed by the parties, which essentially divided holiday, summer, and school break parenting time equally between the parties, and further awarded Courtney "every other weekend from Friday evening until Monday morning and . . . every Tuesday night." Courtney's attorney pointed out, "What we had discussed was my client would have every other weekend but that it would include Mondays and Tuesdays on that weekend and then on that off week he just would have the Tuesdays." The trial judge agreed.

In the decree of dissolution, the court awarded joint legal custody to the parties, but sole physical custody to Tysha,

subject to Courtney's parenting time rights delineated in the decree and the parenting plan, which the trial court incorporated into its decree. The decree awarded Courtney the following parenting time:

> [Courtney] shall have the minor children on alternating weekends from Friday after school until Wednesday at 8:00 a.m. or return to school, if in session. In off week, [Courtney] shall have the children on Tuesday after school until Wednesday at 8:00 a.m. or return to school, if in session.

The trial court utilized "Worksheet 1," the sole physical custody worksheet of the Nebraska Child Support Guidelines, to calculate Courtney's child support obligation and ordered Courtney to pay $881 per month for the two children.

Courtney filed this appeal, and Tysha cross-appealed.

III. ASSIGNMENTS OF ERROR

On appeal, Courtney alleges, restated and renumbered, that the trial court erred (1) in not awarding the parties joint legal custody, (2) in characterizing physical custody of the children as sole physical custody when it was actually joint physical custody, and (3) in calculating child support based on the sole physical custody worksheet.

On cross-appeal, Tysha alleges that the trial court erred in determining Courtney's parenting time schedule.

IV. STANDARD OF REVIEW

Child custody determinations, and parenting time 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. *Rosloniec v. Rosloniec*, 18 Neb. App. 1, 773 N.W.2d 174 (2009). 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.*

V. ANALYSIS

1. Joint Legal Custody

Courtney's first assignment of error alleges the trial court erred in failing to award joint legal custody. It is undisputed that the divorce decree awards the parties joint legal custody; therefore, there is no merit to this assignment of error.

2. Physical Custody

(a) Trial Court Awarded De Facto Joint Physical Custody

Courtney argues that the trial court awarded the parties de facto joint physical custody without the "formal proclamation" of joint physical custody. Brief for appellant at 12. He further argues that it would be in the best interests of the children to officially award the parties joint physical custody "to reflect the actual practice of the parties." *Id.* at 13. We determine that even though the trial court stated it was awarding sole physical custody to Tysha, the court awarded de facto joint physical custody.

[1,2] If trial evidence establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior decrees or court orders have characterized the arrangement. *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999). "Joint physical custody means mutual authority and responsibility of the parents regarding the child's place of residence and the exertion of continuous blocks of parenting time by both parents over the child for significant periods of time." See Neb. Rev. Stat. § 43-2922(12) (Cum. Supp. 2012). Several cases have discussed in detail how to distinguish joint physical custody from sole physical custody with liberal parenting time.

In *Elsome, supra*, the decree provided that the parties would have joint legal custody of their children, but neither party was designated as the primary physical custodian. The parties stipulated to a shared physical custody arrangement based on 14-day cycles in which the children generally spent 4 days of the week with their mother and the following 3 days with their father. As a result of this schedule, the father physically had

the children in his care 38 to 40 percent of the time. On appeal, the court defined joint physical custody as joint responsibility for minor day-to-day decisions and the exertion of continuous physical custody by both parents for significant periods of time. Therefore, based on the custody arrangement in place, the court determined that the parties shared joint physical custody of their children.

Focusing again on the issues of which parent has responsibility for minor day-to-day decisions and continuous physical custody, we determined in *Pool v. Pool*, 9 Neb. App. 453, 613 N.W.2d 819 (2000), that no joint physical custody existed. In *Pool*, the father had parenting time with his children every other weekend, plus one additional weekend day per month; from 4 to 8 p.m. two nights a week; on alternating holidays; and from June 1 to July 31 each year. The trial court had found that the children spent about 39 percent of the time with their father.

On appeal, we distinguished the situation in *Pool, supra*, from that in *Elsome, supra*. Whereas in *Elsome*, the evidence revealed that the parents were really in a joint physical custody arrangement, the opposite was true in *Pool*, where the father had been granted "rather 'typical' weekend, holiday, and summer visitation rights." 9 Neb. App. at 458, 613 N.W.2d at 824.

In *Heesacker v. Heesacker*, 262 Neb. 179, 629 N.W.2d 558 (2001), the court considered not only the day-to-day responsibility each parent had as set forth in *Pool, supra*, and *Elsome, supra*, but also factored in the expenses incurred as a result of that responsibility to conclude that the mother had sole physical custody. In *Heesacker*, the father had custody of the child on alternating weekends, one night per week, and 2 additional days each month for a total of 35 percent of the total parenting time. The trial court found there was no evidence the father was paying an equal amount of the child's day-to-day expenses, and although the father argued he incurred his own expenses when the child was with him, the Nebraska Supreme Court noted that the father did not argue he incurred more expenses than any other noncustodial parent. In addition, the court found that it was the mother who was responsible for preparing the child

for school and was the parent who dealt most with the child's needs and the physical and emotional demands of her day-to-day care. Therefore, the court determined the parties' arrangement was properly characterized as sole physical custody with a liberal visitation schedule.

Similarly, in *Drew on behalf of Reed v. Reed*, 16 Neb. App. 905, 755 N.W.2d 420 (2008), this court held that even though the father enjoyed liberal parenting time, the schedule did not constitute joint physical custody. In *Reed*, the father had parenting time on alternating weekends, one overnight visit per week, one additional overnight visit on the weekends when he did not have parenting time, spring breaks excluding the mother's Easter parenting time, two 2-week periods in the summer, and alternating holidays. This schedule resulted in the father's having the children 43 percent of the time. On appeal, we concluded that the schedule in *Reed* was similar to those in *Heesacker, supra*, and *Pool, supra*, and that such a schedule did not justify a joint custody child support calculation because the children did not live with their father day in and day out on a rotating or alternating basis.

[3] The foregoing cases establish that the *amount* of time the children spend with each parent is less important than *how* the time is allocated when determining whether joint physical custody exists. The cases distinguish a continuous alternating schedule from a more "typical" parenting time schedule, even if the amount of time the children spend with each parent is the same in each arrangement. As we stated in *Reed, supra*, "[a]lternately living with divorced parents is to be distinguished from cases in which the noncustodial parent has liberal parenting time." 16 Neb. App. at 910, 755 N.W.2d at 426.

We conclude that the present case is more like the schedule in *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999), than the schedules in *Heesacker, supra*; *Pool v. Pool*, 9 Neb. App. 453, 613 N.W.2d 819 (2000); and *Reed, supra*. The trial court awarded Courtney parenting time (1) on alternating weekends from Friday after school until Wednesday at 8 a.m. and, in the off week, Tuesday after school until Wednesday at 8 a.m.; (2) two nonconsecutive 7-day periods during the

summer; and (3) alternate holidays and school breaks. As a result, Courtney has the children for a five-night stretch during every 14-day cycle, plus one additional night in the off week.

In addition, keeping in mind the court's rationale in *Heesacker v. Heesacker*, 262 Neb. 179, 629 N.W.2d 558 (2001), the record contains no evidence of the expense Courtney incurs as a result of his parenting time; however, he is responsible for the children's day-to-day expenses during the five-night stretch that they are with him every other week. Courtney is also responsible for getting the children ready for school 4 days out of the 10 weekdays in every 14-day cycle. Therefore, we conclude that this is the type of situation contemplated in *Elsome, supra*, where the children live day in and day out with both parents on a rotating basis, and each parent is equally responsible for the physical and emotional demands of the children's day-to-day care. Accordingly, the arrangement in this case is correctly described as joint physical custody.

(b) Trial Court Failed to Provide Procedural Due Process in Awarding De Facto Joint Custody

We next address whether the trial court arrived at a joint physical custody arrangement using the correct procedure. Citing Neb. Rev. Stat. § 42-364(3) (Cum. Supp. 2012) and case law, Tysha contends that because neither party requested joint physical custody, an award of joint physical custody in this case would be reversible error. We agree that the trial court abused its discretion in awarding joint physical custody without fulfilling procedural due process requirements. We note, however, that Courtney's counsel elicited such testimony from Courtney without objection from opposing counsel, which may have led the trial court to believe that the parties were prepared to litigate the issue of joint physical custody. The record reveals, however, that Courtney first raised the issue of joint physical custody at trial, without any advance notice to Tysha.

[4,5] Section 42-364(3)(b) requires that in dissolution cases, if the parties do not agree to joint custody in a

parenting plan, the trial court can award joint custody if it specifically finds, after a hearing in open court, that it is in the best interests of the child. A district court abuses its discretion in ordering joint custody when it fails to specifically find that joint physical custody is in the child's best interests as required by § 42-364. *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007).

[6] In *Zahl*, the Nebraska Supreme Court examined the due process requirements set forth in § 42-364. In *Zahl*, both parents sought sole custody of their child. After holding a general custody hearing, the court awarded the parties joint legal and physical custody. The father appealed, arguing that the court was required to hold an evidentiary hearing directed to the issue of joint physical custody before awarding it. The Nebraska Supreme Court agreed and held that when a trial court determines at a general custody hearing that joint physical custody is, or may be, in a child's best interests, but neither party has requested joint custody, the court must give the parties an opportunity to present evidence on the issue before imposing joint custody.

[7] In determining that the trial court in *Zahl* did not provide adequate due process, the Nebraska Supreme Court noted that

> joint physical custody must be reserved for those cases where, in the judgment of the trial court, the parents are of such maturity that the arrangement will not operate to allow the child to manipulate the parents or confuse the child's sense of direction, and will provide a stable atmosphere for the child to adjust, rather than perpetuating turmoil or custodial wars.

273 Neb. at 1053, 736 N.W.2d at 373. Therefore, because the factual inquiry for awarding joint custody was substantially different from that for an award of sole custody, the trial court in *Zahl* did not provide adequate due process and the parties were entitled to a new hearing with notice on the issue of joint custody. See, also, *State ex rel. Amanda M. v. Justin T.*, 279 Neb. 273, 777 N.W.2d 565 (2010) (in paternity case where neither party has requested joint custody, if court determines that joint custody is, or may be, in best interests of child, court

shall give parties notice and opportunity to be heard by holding evidentiary hearing on issue of joint custody).

[8] The Supreme Court in *Zahl, supra*, further held that the trial court had abused its discretion in failing to specifically find that joint physical custody was in the child's best interests, as required by § 42-364. Although the mother contended that the court implicitly made the finding, "implicit findings cannot satisfy procedural rules requiring explicit findings." *Zahl*, 273 Neb. at 1054, 736 N.W.2d at 373.

In the present case, neither party requested joint physical custody prior to trial. In fact, each party presented evidence that sole physical custody was the preferred arrangement, although as noted above, Courtney's counsel elicited testimony from Courtney regarding joint physical custody. The trial court did not conduct a special hearing as required by *Zahl*, and the evidence the parties presented, or were prepared to present, at trial was different from the evidence that would be used to advocate or contest a ruling of joint custody.

The trial court apparently determined that joint physical custody is, or may be, in the children's best interests, as evidenced by its award of de facto joint physical custody. The trial court made an explicit finding that joint legal custody was in the children's best interests, but made no explicit finding that joint physical custody was in the children's best interests as required by § 42-364(3).

We therefore conclude that the trial court abused its discretion in not giving the parties an opportunity to present evidence on the issue before imposing joint physical custody and in failing to make the explicit finding that an award of joint physical custody was in the children's best interests. Therefore, we reverse, and remand on this issue. On remand, the court is directed to conduct the required evidentiary hearing on the issue of joint physical custody.

3. Child Support

[9] An appellate court reviews child support cases de novo on the record and will affirm the trial court's decision in the absence of an abuse of discretion. *State on behalf of A.E. v. Buckhalter*, 273 Neb. 443, 730 N.W.2d 340 (2007).

[10] Courtney asserts that the trial court erred in calculating child support based on sole physical custody rather than joint physical custody. In *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999), the court determined that the father had proved he shared joint physical custody. Based on this finding, the court held that the trial court erred in failing to use the joint custody worksheet to calculate child support. *Id.* The court explicitly directed that trial courts employ worksheet 3, the joint custody worksheet of the Nebraska Child Support Guidelines, in cases of joint physical custody unless a sound reason not to do so was established by the record. *Elsome, supra.*

[11] Since *Elsome* was decided, the Nebraska Child Support Guidelines have been revised. The guidelines now provide that "[w]hen a specific provision for joint custody is ordered and each party's parenting time exceeds 142 days per year, it is a rebuttable presumption that support shall be calculated using worksheet 3." Neb. Ct. R. § 4-212 (rev. 2011).

[12] In *Patton v. Patton, ante* p. 51, 818 N.W.2d 624 (2012), we concluded that § 4-212 was applicable when the threshold amount of parenting time is met, even if no specific provision for joint physical custody is ordered. Despite an award of physical custody to the mother, we determined that because the father had the children at least 160 days per year, it was not error for the court to use the joint custody worksheet.

In the present case, according to our calculations, Courtney's alternating weekends and one overnight in the off week alone provide him 156 days of parenting time. Thus, his parenting time, not including summer time and holidays, exceeds the 142-day threshold described in § 4-212 and created a rebuttable presumption that support should be calculated based on joint physical custody. Therefore, given our finding above and § 4-212, we find that the court abused its discretion in calculating child support based on the sole physical custody worksheet.

4. Tysha's Cross-Appeal

[13] On cross-appeal, Tysha argues that the evidence adduced at trial does not support the increase in parenting time

awarded to Courtney in the decree. Having concluded that the trial court failed to follow the proper procedure in awarding the parties joint physical custody and failed to make the requisite findings, we need not separately address this issue. See *In re Trust Created by Hansen*, 281 Neb. 693, 798 N.W.2d 398 (2011) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

VI. CONCLUSION

Because the trial court awarded joint physical custody without following the procedural due process requirements and without making explicit findings as to the children's best interests, we reverse, and remand this matter to the trial court with directions.

On remand, if the court intends to award sole physical custody to Tysha, it is directed to alter Courtney's parenting time schedule to reflect a sole physical custody arrangement.

If the court is considering a joint physical custody award, the court is directed to provide notice to the parties and to conduct a hearing on the issue of joint physical custody. The parties shall be allowed to present new evidence on that issue not previously offered. The court shall make its determination in accordance with the procedures set forth in § 42-364.

After a determination on the issue of physical custody, the court shall determine child support accordingly.

REVERSED AND REMANDED WITH DIRECTIONS.

Thomas Kalkowski, appellant and cross-appellee, v. Nebraska National Trails Museum Foundation, Inc., and City of Ogallala, Nebraska, appellees and cross-appellants, and Ogallala/Keith County Chamber of Commerce, appellee.

826 N.W.2d 589

Filed February 12, 2013. No. A-12-122.

1. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.
3. **Limitations of Actions.** Generally, a cause of action accrues and the period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit.
4. ____. For a limitations period to begin to run, it is not necessary that a plaintiff have knowledge of the exact nature or source of a problem, but only that a problem exists.
5. **Limitations of Actions: Fraud.** A 4-year statute of limitations period governs claims of fraud, but the cause of action shall not be deemed to have accrued until the discovery of the fraud.
6. **Limitations of Actions: Pleadings.** A plaintiff seeking to invoke the discovery clause to toll the statute of limitations must allege facts showing why the cause of action reasonably could not have been discovered during the limitations period.
7. **Limitations of Actions: Fraud.** An action for fraud does not accrue until there has been a discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to such discovery.
8. **Limitations of Actions: Pretrial Procedure.** Discovery, as applied to the statute of limitations, occurs when one knows of the existence of an inquiry or damage and not when he or she has a legal right to seek redress in court.
9. **Limitations of Actions: Pretrial Procedure: Fraud.** The discovery provision in Neb. Rev. Stat. § 25-207 (Reissue 2008) relates to when an action must be instituted and does not depend upon the eventual success of a fraud claim.
10. **Taxation: Public Purpose: Legislature.** It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a tax invalid because it is not for a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind.

11. **Public Purpose.** The general encouragement of growth and industry through such devices as publicity and advertising are public purposes.
12. **Taxation: Public Purpose.** There is no hard-and-fast rule in determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose, and each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare.

Appeal from the District Court for Keith County: DONALD E. ROWLANDS, Judge. Affirmed.

Randy Fair, of Dudden & Fair, P.C., L.L.O., for appellant.

James R. Korth and Tanya M. Martens, of McGinley, O'Donnell, Reynolds & Korth, P.C., L.L.O., for appellee Nebraska National Trails Museum Foundation, Inc.

Michael J. McQuillan and Joshua Wendell, of McQuillan Law Office, P.C., L.L.O., for appellee City of Ogallala, Nebraska.

Philip E. Pierce, of Pierce Law Office, for appellee Ogallala/Keith County Chamber of Commerce.

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

MOORE, Judge.

INTRODUCTION

The district court for Keith County dismissed the complaint filed by Thomas Kalkowski against the Nebraska National Trails Museum Foundation, Inc. (Foundation); the City of Ogallala, Nebraska (City); and the Ogallala/Keith County Chamber of Commerce (Chamber) (collectively the Appellees) after finding that although Kalkowski's action against the Appellees was not barred by the applicable statute of limitations, the transfers of money at issue were not fraudulently concealed and were made for a public purpose under Neb. Rev. Stat. § 13-315 (Reissue 2012). Kalkowski appeals, and the Foundation and the City cross-appeal the district court's determination that Kalkowski's action was not barred by the statute of limitations. For the reasons that follow, we affirm the decision of the district court.

BACKGROUND

On June 24, 1997, Douglas Teaford appeared on behalf of the Foundation at a regular meeting of the city council (Council) and requested funds for the Foundation's proposed museum. The site of the proposed museum is located in Keith County, approximately 10 to 14 miles west of Ogallala. The City tabled the Foundation's request until the July 8 meeting to enable the City to obtain a legal opinion. Minutes for the July 8 meeting do not mention the Foundation's request, but do show that the City tabled a resolution of intent to provide funds to the Chamber "until budget time." In a letter to the Chamber dated July 15, 1997, the City informed the Chamber that the City "intend[ed] to introduce a request for an additional $20,000 each year in the 1998 and 1999 fiscal budgets for economic development and promotion." The letter did not mention the Foundation or its request for funds for a proposed museum. On October 28, the City wrote a check to the Chamber in the amount of $25,625. On November 3, the Chamber wrote a check for $20,000 to the Foundation.

On February 1, 1999, in a letter to Steve Krajewski, the city manager, Teaford wrote, "Please consider this letter the official request for funding the second installment committed to by the City Council on July 15, 1997." Krajewski replied on February 2, stating:

> Please allow me to attempt to clarify the confusion with respect to your letter dated February 1, 1999, specifically your request for the "second installment committed to by the City Council on July 15, 1997". The City's commitment, dated July 15, 1997, was to provide $20,000 each year for 1998 and 1999 to the [Chamber], *not* the [Foundation].

(Emphasis in original.) On February 23, the City wrote a check to the Chamber for $20,000. On March 2, the Chamber wrote a check for $20,000 to the Foundation.

In February 2004, as part of a separate lawsuit between Kalkowski and the Foundation involving Kalkowski's lease of the real estate owned by the Foundation, Kalkowski received an affidavit signed by Teaford in support of the Foundation's request for an injunction preventing Kalkowski from disking

the ground. Attached to the affidavit was a financial report showing the investment of various organizations in the project. This report listed cash gifts of $20,000 in the years 1997 and 1999 from the "City/Chamber." Prior to receiving this document, Kalkowski had no knowledge that the Foundation allegedly received money from the City. On March 22, 2005, at a regular Council meeting, Kalkowski asked the City to take certain steps regarding the transactions at issue. On April 12, the City decided to take no action on the matter.

Kalkowski filed the initial complaint in this action on April 22, 2005, and an amended complaint on July 8. Kalkowski alleged that the unlawful and fraudulent transfer of at least $40,000 of the City's public funds to the Foundation via the Chamber benefited the Foundation, whose proposed museum site is located more than 10 miles outside of Ogallala. Kalkowski alleged that the transfer of funds was made under the guise of "economic development and promotion" and was thus not within his reasonably diligent attention, observation, and judgment. Kalkowski alleged that the Appellees concealed the donations from the general public for the purposes of keeping taxpayers from objecting to them. Kalkowski sought a judgment to return the public funds to the City; to enjoin the City from contributing additional public funds to the Foundation, whether directly or through the Chamber; and to enjoin the Chamber from contributing additional public funds of the City to the Foundation.

In their responsive pleadings, the Appellees all asserted that Kalkowski's complaint was barred by the applicable statute of limitations. All of the parties filed motions for summary judgment, which were heard by the district court on November 13 and December 1, 2006.

On January 16, 2007, the district court entered an order sustaining the Appellees' motions for summary judgment, overruling Kalkowski's motion for summary judgment, and dismissing the case. The district court found that Kalkowski was barred "by the four year statute of limitations by virtue of the fact that matters appearing of public record operate as constructive notice and constitute discovery of facts with respect to fraud." The court noted that the transactions challenged by

Kalkowski occurred in November 1997 and February 1999 and determined that the payments were part of the public budget records, disclosed on Council agendas and minutes. The court accepted the Appellees' argument that the City's records, which are open by statute to the public, put Kalkowski on notice of the transactions which he claimed were impermissible. The court noted that Kalkowski did not allege or show any facts that would indicate that the City or any of the other Appellees refused him access to their records and books at that time. Accordingly, the court held that Kalkowski's claim was barred by the statute of limitations, which ran "no later than March 2, 2003."

Kalkowski appealed, and on July 22, 2008, this court reversed the district court's dismissal on the basis of the statute of limitations, finding that Kalkowski was not put on notice of the City's expenditure of funds in question by public records available at that time. We remanded the matter for further proceedings. See *Kalkowski v. Nebraska Nat. Trails Museum Found.*, No. A-07-268, 2008 WL 2839037 (Neb. App. July 22, 2008) (selected for posting to court Web site).

Following the above mandate, a trial was held on December 14 and 15, 2011. Teaford was a Foundation board member from approximately 1995 through 1998 and served as executive director from approximately 1999 through 2007. Teaford explained that when he sent the February 1999 letter to the Council, his understanding was that he needed to ask the City for the additional $20,000. However, Teaford admitted that he had some confusion over the source of the funds and that the return letter from the City cleared it up. Teaford testified that the financial document attached to his 2004 affidavit which showed contributions from the "City/Chamber" was an internal document used by the Foundation.

Gregory Beal, a Foundation board member from 1997 through 1999, testified that there was no question that the money was given to the Foundation by the Chamber and not the City.

Krajewski, who served as the city manager from approximately 1997 through 2007, testified that the Council agreed to provide the Chamber additional funds. He testified that he

believed there was an awareness of the Council that the money given to the Chamber would then go to the Foundation.

Mary Lou Heelan, a Council member from approximately 1997 through 2000, testified that the Council gave money to the Chamber at their request to be used toward promotional purposes for the area. She recalled no discussion that the money transferred to the Chamber would ultimately be given to the Foundation. Heelan testified that if she had known of such a plan, she would not have approved of it.

The deposition testimony of Joel Sanders was admitted as evidence. Sanders was a Council member in 1997 and testified that he had reservations about giving money to the Foundation because it was outside Ogallala's city limits. He said there were discussions that the money could be utilized through the Chamber; however, he could not recall the basis for any of these discussions.

Several former Chamber members also testified about their recollections of the relevant time period. Jim Glenn, who was on the Chamber board and served as director in 1999, testified that he did not specifically recall approval for the money to go to the Foundation, but he knew that the Chamber was supporting the project. Glenn testified that the Chamber was doing everything it could to support economic development in the area. Glenn's signature was on one of the checks written by the Chamber to the Foundation, and Glenn testified that he would not have signed a check without authorization.

Timothy Jimenez, who was a Chamber board member during the relevant time period, also did not recall a specific vote authorizing $40,000 to go to the Foundation. Additionally, Jan Johnson, a Chamber board member during 1996 and 1997, remembered a presentation from the Foundation but did not recall a request, discussion, or voting on funds.

Marion Kroeker McDermott was the project director for the Chamber in 1998 and became executive director in 2000. She was unable to find any documents or minutes discussing the transfer of $40,000 from the Chamber to the Foundation; however, she testified that prior to 2000, the Chamber's books were a mess and there were some gaps in the recordkeeping.

All of the individuals from the City, the Chamber, and the Foundation testified that there was no intent to deceive the public, no facts were concealed, and no illegal activities were performed.

Finally, there was testimony that the museum being built by the Foundation would benefit the City. Teaford testified that Ogallala is the primary community in Keith County with amenities that tourists would require. Krajewski compared the museum to Lake McConaughy, which is also outside of Ogallala's city limits, but attracts people to spend money in Ogallala's restaurants, hotels, and gas stations. McDermott testified that an entity could benefit the City even if it were outside of city limits, because Ogallala is the largest community in the county and tourists would likely stay in its motels, eat in its restaurants, and shop in its stores. Finally, Beal, a Foundation board member, testified that the City would be the primary beneficiary of the project because Ogallala has lodging, restaurants, and people.

On January 17, 2012, the district court entered an order in favor of the Appellees and dismissing Kalkowski's complaint. The district court first readdressed whether Kalkowski filed the action before the statute of limitations expired. The district court held that Kalkowski filed his complaint within approximately 13 months of learning the facts and circumstances which gave rise to the litigation via the Teaford affidavit filed February 9, 2004. Teaford's affidavit was the first time Kalkowski received actual notice of city funds being transferred to the Chamber and subsequently transferred by the Chamber to the Foundation. The court held that Kalkowski could not, with reasonable diligence, have discovered this information through the minutes of the Council or other records readily available to the public. The Chamber is a nonprofit corporation, and its records were private in nature and not available to the public. Therefore, the statute of limitations began running on February 9, 2004, and Kalkowski's initial complaint, filed on April 22, 2005, was well within the statute of limitations.

As to the merits of Kalkowski's fraudulent concealment claim, the court found that at no time did any of the City's

employees engage in any fraudulent concealment, civil conspiracy, or other improper activity to conceal from Kalkowski or the general public that a transfer of funds totaling $40,000 had been made from the City to the Chamber. The court also found that the expenditure of funds by the City to the Chamber, which funds were subsequently transferred from the Chamber to the Foundation, were appropriate and expended for a public purpose. The court noted that so long as the funds are utilized for the purpose of encouraging immigration, new industries, and investment in Ogallala, § 13-315 permits their expenditure. The court noted that several witnesses testified that constructing the museum would increase immigration and tourism within Ogallala. While the direct economic impact could not be precisely determined at that time, the court noted that it would not second-guess the decision of the elected officials of the Council in this regard.

Kalkowski appeals, and the Foundation and the City cross-appeal.

ASSIGNMENTS OF ERROR

Kalkowski alleges, restated, that the trial court erred in finding (1) that the transfer of $40,000 from the City to the Chamber was not the result of any fraudulent concealment, civil conspiracy, or other improper activity and (2) that the transfer of these funds was for a public purpose as authorized by Nebraska law.

On cross-appeal, the Foundation and the City both allege that the trial court erred in finding that Kalkowski's claim was not barred by the statute of limitations.

STANDARD OF REVIEW

[1] The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong. *Behrens v. Blunk*, 284 Neb. 454, 822 N.W.2d 344 (2012).

[2] On appeal from an equity action, we decide factual questions de novo on the record and, as to questions of both fact

and law, are obligated to reach a conclusion independent of the trial court's determination. *County of Sarpy v. City of Gretna*, 273 Neb. 92, 727 N.W.2d 690 (2007).

ANALYSIS

Statute of Limitations.

The Foundation and the City both allege via cross-appeal that the district court erred in finding that Kalkowski's action was not barred by the statute of limitations.

[3,4] Generally, a cause of action accrues and the period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit. *Irving F. Jensen Co. v. State*, 272 Neb. 162, 719 N.W.2d 716 (2006). For a limitations period to begin to run, it is not necessary that a plaintiff have knowledge of the exact nature or source of a problem, but only that a problem exists. *Nuss v. Alexander*, 269 Neb. 101, 691 N.W.2d 94 (2005).

[5-8] Neb. Rev. Stat. § 25-207(4) (Reissue 2008) provides that an action on the ground of fraud can only be brought within 4 years, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud. A plaintiff seeking to invoke the discovery clause to toll the statute of limitations must allege facts showing why the cause of action reasonably could not have been discovered during the limitations period. *Nuss v. Alexander, supra*. An action for fraud does not accrue until there has been a discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to such discovery. *Fitzgerald v. Community Redevelopment Corp.*, 283 Neb. 428, 811 N.W.2d 178 (2012). Discovery, as applied to the statute of limitations, occurs when one knows of the existence of an inquiry or damage and not when he or she has a legal right to seek redress in court. *Andres v. McNeil Co.*, 270 Neb. 733, 707 N.W.2d 777 (2005).

The district court found that Kalkowski did not discover the facts constituting the basis of his cause of action until Teaford's affidavit was filed on February 9, 2004. The affidavit included as an exhibit a document from the Foundation

indicating that it received $20,000 from the "City/Chamber" in both 1997 and 1999. The district court found that Kalkowski could not, with reasonable diligence, have discovered through the minutes of the Council or other records readily available to the public that the City had transferred funds to the Chamber in 1997 and 1999, and the court further found that such funds were immediately transferred to the Foundation. The Chamber's records were private in nature and not available to the public.

We agree with the district court that the records readily available to the public provide no link between the money transferred by the City to the Chamber and the money transferred by the Chamber to the Foundation. The Foundation document attached to Teaford's affidavit referencing contributions from the "City/Chamber" was Kalkowski's first indication that there might be a link between the two and became the basis of his discovery of the alleged fraud. Therefore, the district court correctly determined that Kalkowski had 4 years from February 9, 2004, in which to file this litigation and that Kalkowski's complaint, filed April 22, 2005, was well within the statute of limitations.

[9] The Appellees argue that the discovery exception should not be applied in this case because the district court found that the Appellees did not engage in fraudulent concealment with regard to the transfer of funds from the City to the Chamber and because Kalkowski did not appeal this finding. However, the discovery provision in § 25-207 relates to when an action must be instituted and does not depend upon the eventual success of a fraud claim. Therefore, we find no merit to the Foundation's and the City's cross-appeals. The district court's finding that Kalkowski's claim was not barred by the statute of limitations was not clearly wrong.

Illegal Transfer of Funds and Public Purpose.

Kalkowski argues that the district court erred in finding that the transfer of funds from the City to the Chamber and ultimately from the Chamber to the Foundation was for a public purpose and was not an illegal expenditure. Kalkowski

does not challenge on appeal the district court's finding that the City did not fraudulently conceal the true purpose for the transfer of funds; therefore, we need not address that finding further.

Section 13-315 provides that a city council has the power to appropriate or expend annually from the general funds or from revenue received from any proprietary functions an amount not to exceed a specified amount "for the purpose of encouraging immigration, new industries, and investment and to conduct and carry on a publicity campaign." Section 13-315 further provides that the money may be expended directly by the city or paid to the chamber of commerce or other organization for these purposes under the direction of the board of directors of the organization. Neb. Rev. Stat. § 13-316 (Reissue 2012) requires that the amount to be expended for the ensuing year shall be fixed at the time of making up the annual budget and shall be included in the budget.

[10-12] The Nebraska Supreme Court upheld the constitutionality of that portion of the predecessor statute to § 13-315 which allows expenditure of funds "for the purpose of encouraging immigration, new industries, and investment and to conduct and carry on a publicity campaign," as well as the provision that such expenditures can be made through chambers of commerce or other listed organizations. See *Chase v. County of Douglas*, 195 Neb. 838, 241 N.W.2d 334 (1976). In reaching this conclusion, the court noted that this provision describes a public purpose and rests upon two legal propositions. The first proposition is that it is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. *Id*. "However, to justify a court in declaring a tax invalid because it is not for a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind." *Id*. at 846, 241 N.W.2d at 339. The second proposition relied upon by the court is that the general encouragement of growth and industry through such devices as publicity and advertising are public purposes. *Id*. The court in *Chase* recognized that there is

> "'[n]o hard and fast rule . . . in determining whether a proposed expenditure of public funds is valid as devoted to a "public use or purpose" [and] each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare.'"

Id. at 847, 241 N.W.2d at 340.

In our de novo review, we find that there was sufficient evidence presented to the district court that the funds allocated by the City to the Chamber were for a public purpose and that the City satisfied the requirements of making such expenditures under these statutes. The City allocated $20,000 in its annual fiscal budgets for the years in question for economic development and promotion, as required by § 13-316. These funds were paid to the Chamber, as allowed by § 13-315, which in turn transferred funds to the Foundation. There was sufficient evidence that the promotion of the Foundation's museum would provide an economic benefit for the City, which fits within the public purpose of the general encouragement of growth and industry. See *Chase v. County of Douglas, supra*.

Kalkowski also argues that the transfer of the funds from the Chamber to the Foundation was illegal because the Chamber board did not specifically approve of this use. Kalkowski refers to that portion of § 13-315 which provides that such funds may be paid to the chamber of commerce to be expended "under the direction of the board of directors." Kalkowski points to the lack of any records showing authorization for the transfer of funds from the Chamber to the Foundation. In our independent review of the record, we find that there was insufficient evidence presented by Kalkowski to conclude that the expenditure of funds was not under the direction of the Chamber's board of directors. Most of the witnesses associated with the Chamber at the time of the expenditures either did not remember this time period or simply affirmed that they would not have expended the funds without prior approval. And, there was evidence that the Chamber's recordkeeping prior to 2000 was either poor or nonexistent. Kalkowski failed to prove that the expenditures

by the Chamber were not made under the direction of its board of directors.

We find no error in the district court's determination that the expenditure of funds by the City to the Chamber, which funds were subsequently transferred from the Chamber to the Foundation, were appropriate and for a public purpose, according to § 13-315.

CONCLUSION

The district court did not err in finding that Kalkowski's claim was not barred by the statute of limitations or in finding that the expenditure of funds by the City was for a public purpose and in conformity with the statutes.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DEAN L. OSBORNE, APPELLANT.

826 N.W.2d 892

Filed February 19, 2013. No. A-12-112.

1. **Courts: Jurisdiction: Appeal and Error.** A district court sitting as an intermediate appellate court may timely modify its opinions, a notion consistent with the generally recognized common-law rule that an appellate court has the inherent power to reconsider an order or ruling until divested of jurisdiction.
2. **Courts: Appeal and Error.** Judicial efficiency is served when any court, including an appellate court, is given the opportunity to reconsider its own rulings, either to supplement its reasoning or to correct its own mistakes.
3. **Criminal Law: Convictions: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: 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. 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.
4. **Sexual Assault: Convictions: Proof.** According to Neb. Rev. Stat. § 28-320(1) (Reissue 2008), a conviction for third degree sexual assault requires proof that the defendant subjected another person to sexual contact without the consent of the victim or where the defendant knew or should have known that the victim

was physically or mentally incapable of resisting or appraising the nature of the conduct.

5. **Sexual Assault: Words and Phrases.** Neb. Rev. Stat. § 28-318(5) (Reissue 2008) defines sexual contact as meaning intentional touching of the victim's sexual or intimate parts or intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact includes only such conduct which can reasonably be construed as being for the purpose of sexual arousal or gratification.
6. ____: ____. Neb. Rev. Stat. § 28-318(2) (Reissue 2008) defines intimate parts to mean the genital area, groin, inner thigh, buttocks, or breast.
7. **Sexual Assault: Proof.** In proving sexual contact, the State need not prove sexual arousal or gratification, but only circumstances and conduct which could be construed as being for such a purpose.
8. **Obscenity: Minors: Convictions: Proof.** According to Neb. Rev. Stat. § 28-809 (Reissue 2008), a conviction for admitting a minor to an obscene motion picture, show, or presentation requires proof that the defendant knowingly exhibited to a minor or knowingly provided to a minor an admission ticket or pass or knowingly admitted a minor to premises whereon there is exhibited a motion picture, show, or other presentation which, in whole or in part, predominantly pruriently, shamefully, or morbidly depicts nudity, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors.
9. **Obscenity: Minors: Words and Phrases.** Neb. Rev. Stat. § 28-807(6) (Reissue 2008) defines harmful to minors as meaning that the description or representation of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse predominantly appeals to the prurient, shameful, or morbid interest of minors; is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and is lacking in serious literary, artistic, political, or scientific value for minors.
10. **Criminal Law: Obscenity: Minors: Statutes: Words and Phrases.** The offense defined in Neb. Rev. Stat. § 28-809 (Reissue 2008) is labeled in the statute as "Obscene motion picture, show, or presentation; admit minor; unlawful; penalty."
11. ____: ____: ____: ____: ____. The definition of the offense in Neb. Rev. Stat. § 28-809 (Reissue 2008), along with the relevant definitions of key terms in Neb. Rev. Stat. § 28-807 (Reissue 2008), generally mirrors the specific definition of obscene in § 28-807(10), which requires a finding that an average person applying contemporary community standards would find that the work, material, conduct, or live performance taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity or sex, depicts or describes in a patently offensive way certain sexual conduct, and, taken as a whole, lacks serious literary, artistic, political, or scientific value.
12. ____: ____: ____: ____: ____. The definition of the offense in Neb. Rev. Stat. § 28-809 (Reissue 2008) and the relevant definitions of key terms in Neb. Rev. Stat. § 28-807 (Reissue 2008) specifically focus on whether the material predominantly pruriently, shamefully, or morbidly depicts nudity or sexual conduct; is patently offensive to prevailing community standards; and lacks serious literary, artistic, political, or scientific value, just as the specific definition of obscenity does.

13. **Judgments: Obscenity.** A determination of obscenity requires the trier of fact to look at the work as a whole and determine whether its dominant theme is one which goes beyond customary limits of candor in appealing to a shameful or morbid interest in sex. Even though a matter depicts hardcore sexual conduct appealing to the prurient interest, it is not obscene unless, taken as a whole, it depicts or describes sexual conduct in a patently offensive way.
14. **Obscenity.** Even if material appeals to the prurient interest and is patently offensive, it is not obscene unless the work taken as a whole lacks serious literary, artistic, political, or scientific value.
15. **Obscenity: Minors: Convictions: Proof.** The State bears the burden of proving the necessary elements to establish that a work satisfies the requirements for a finding of obscenity. So, too, the State bears the burden of proving beyond a reasonable doubt all necessary elements to sustain a conviction under Neb. Rev. Stat. § 28-809 (Reissue 2008).
16. **Criminal Law: Obscenity: Minors.** Neb. Rev. Stat. § 28-809(1) (Reissue 2008) indicates that the prohibition is on exhibiting to a minor a work which, in whole or in part, predominantly pruriently, shamefully, or morbidly depicts nudity or sexual conduct. However, the statute also requires that the work, taken as a whole, is harmful to minors.
17. **Criminal Law: Obscenity: Minors: Statutes: Words and Phrases.** A finding that a work is harmful to minors requires consideration not only of whether the work predominantly appeals to the prurient, shameful, or morbid interest of minors, but also whether it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors and whether it is lacking in serious literary, artistic, political, or scientific value for minors. Thus, despite the "in whole or in part" language in Neb. Rev. Stat. § 28-809(1) (Reissue 2008), the general guidance of the Nebraska Supreme Court concerning obscenity is relevant to determining what is prohibited under Neb. Rev. Stat. § 28-807 (Reissue 2008).
18. **Criminal Law: Obscenity: Minors: Proof.** What is necessary to demonstrate a violation of Neb. Rev. Stat. § 28-809 (Reissue 2008) is something less than the standards for establishing obscenity in a free speech context.
19. **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.
20. **Double Jeopardy: Convictions: Appeal and Error.** Not all appellate reversals of criminal convictions prohibit retrial. Rather, if a defendant appeals a conviction and obtains a reversal based on a trial error, as distinguished from insufficiency of the evidence, he cannot assert double jeopardy to bar his retrial.

Appeal from the District Court for Saunders County, MARY C. GILBRIDE, Judge, on appeal thereto from the County Court for Saunders County, MARVIN V. MILLER, Judge. Judgment of District Court affirmed in part, and in part reversed and remanded with directions to dismiss.

Cynthia R. Lamm, of Law Office of Cynthia R. Lamm, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

IRWIN, PIRTLE, and RIEDMANN, Judges.

PER CURIAM.

I. INTRODUCTION

Dean L. Osborne appeals his convictions on charges of third degree sexual assault and admitting a minor to an obscene motion picture, show, or presentation. On appeal, Osborne challenges the sufficiency of the evidence to sustain his convictions, challenges various rulings made by the county and district courts, and asserts that he was denied effective assistance of counsel. We find the evidence adduced was sufficient to sustain the third degree sexual assault conviction, but legally insufficient to sustain the obscenity conviction. We affirm in part, and in part reverse and remand.

II. BACKGROUND

The events giving rise to this case occurred during the second half of 2009. At that time, Osborne was 47 years of age and the complainant, A.H., was 15 or 16 years of age. A.H. boarded a horse at a commercial stable in Ashland, Nebraska, where Osborne was employed. A.H. was a riding student of Osborne's girlfriend, Anne W.

A.H. testified that Osborne touched her inappropriately on a number of occasions during a 2-week period in August 2009, while Anne was out of town. A.H. testified that Osborne "touched [her] breasts and [her] sides and [her] butt." When asked how often Osborne touched her inappropriately, she indicated "[n]ot too often" and indicated the incidents happened only during a 2-week period; she also testified that it happened, during that 2-week period, "around 20 times, 15, 20 times," and she acknowledged that she had previously testified in a deposition that it happened 10 to 20 times.

On direct examination, A.H. was not asked to describe the circumstances of any instances of inappropriate touching.

She was asked if Osborne had ever touched her in a way that she considered inappropriate and was asked general questions about how often it happened and how she reacted to it. She testified that when Osborne touched her in a way she considered inappropriate, she "would just kind of leave the area," but testified that she did not try to avoid Osborne after it happened. She testified that she told her father about the touching "a month later" and that she also told Anne and "asked her to say something to [him] when [Anne] got back [from being out of town]."

Anne testified that A.H. never said anything to her about Osborne's allegedly engaging in inappropriate touching. Anne testified that she received a minimum of 10 text messages per day and a minimum of 3 telephone calls per day from A.H. while she was out of town, but that A.H. never said anything about Osborne's touching her inappropriately. Anne also testified that she and Osborne spent several hours with A.H. playing keno and pool on the day Anne returned to town, but that A.H. did not say anything about inappropriate conduct on Osborne's part.

Osborne testified that he could recall two occasions on which he had touched A.H.'s buttocks, over her clothing. He testified that there were a number of other people present at the time and that the contact was not in any way sexual or for sexual arousal or gratification. He described the contact as a "twang" of A.H. on the buttocks, and he testified that A.H. laughed about the incidents. He testified that A.H. never asked him to stop such conduct and never indicated that she was disturbed or had a negative reaction to the incidents. He further testified that he believed A.H. "was sweet on" him and had a crush on him, and he described it as "puppy dog love."

Osborne testified that he did not believe he had ever touched A.H. on the breast, but acknowledged that he may have accidentally touched her in an area that she considered to be her breast. He described that a common practice around the stables during the summer of 2009 was for one person to "scare" or "startle" another person by approaching from behind and grabbing his or her sides. Osborne testified that A.H. "started doing it to the kids and then everybody started doing it to everybody"

and that "she would do it to [him]," "[he] would do it to her," and "[t]he kids would do it to her, and we would do it to Ann[e]." He testified that the contact was not a sexual act and was not intended for any sexual purpose. He also testified that A.H. did this to him "about the same amount" of times as he did it to her. He testified that A.H. never asked him to stop this conduct or indicated that it was an unwanted gesture.

Anne testified that there was "a lot of horseplay, a lot of joking around, a lot of genuine affection between everyone in [the] group" at the stables during the summer of 2009. She testified that she observed Osborne "on several occasions return the same type of joking pinch to her waist area that everyone in the group was exchanging" and that A.H. did this to Osborne, to Anne, and to the younger children around the stables. Anne further testified that she observed two occasions when Osborne "snapped [A.H.'s] bottom" and that during one of those occasions, Osborne commented to A.H., "'You're not wearing any underwear today, are you?'" Anne testified that she never observed Osborne touch A.H.'s breast. Despite Anne's characterization of the touching as "horseplay," she testified that after seeing Osborne "snap" A.H.'s buttocks, she told him not to do that anymore because it was inappropriate, as he was a grown man, A.H. was a teenage girl, and Anne and he were in a relationship. There was no testimony from Anne that she asked Osborne to refrain from similar touching of anyone else in the group.

In December 2009, Anne was again out of town. On Christmas Day, A.H. contacted Osborne to request a ride to the stables. Osborne drove A.H. to the stables in the morning, and the two worked cleaning stalls. They eventually got cold and returned to Osborne's home "to warm up a little bit and get something to eat." Osborne testified that his home was also where they "kept the grain."

Osborne testified that the two watched "the Weather Channel" for some time and that they then decided to watch a video. Osborne testified that he went through the available videos, reading their names to A.H. According to Osborne, A.H. said "no" to "King Kong" and said "no" to "how to take care of your horse." Osborne testified that he then suggested a

video labeled "Florida girls," which Osborne testified was not his video and which he believed belonged to a neighbor who had watched Osborne's home when he was not there; Osborne testified that he had not seen the video before, that it was not in any box or packaging, and that there was nothing to indicate its content. A.H. testified that Osborne suggested the two watch a video titled "Florida Girls Sunny Side Up."

When Osborne put the "Florida girls" video into the video player, it did not work properly and it froze on still images. A.H. testified that the video froze on "pornographic images." She testified that Osborne attempted to get the video to play, but that it kept freezing on still images. She testified that she observed only still pictures on the video and that she observed three different images. She testified that of the three images she observed, she could only recall that one image included "[a] girl [who] was giving [a] man a blow job." She testified that she did not recall the other images and that she was exchanging text messages with her mother at the time, although she did not mention the video to her mother.

Osborne testified that when he put the video into the player, it froze immediately and that "all there was was a blond bimbo sitting there." Osborne testified that he could tell the woman on the video was shirtless, but that he "could barely see her top half" and that "[i]t was blurred out" so that her nipples were not visible. He testified that he attempted to get the video to play, but that no other image appeared on the screen. He testified that he did not observe anyone on the video performing any sexual act. When the investigating police officer asked Osborne about the video's being pornographic, Osborne indicated that it was, and he testified that he believed it to be a pornographic video because he observed "the lady with her shirt off."

Osborne testified that A.H.'s reaction to the video was that she indicated that she "watch[ed] them all the time with [her] boyfriend." He also testified that A.H. was exchanging text messages at the time and did not seem shocked at all by the video. Osborne testified that the two watched more of "the Weather Channel," "grabbed" some grain, and returned to the stables.

A.H. testified that she told Anne about the video "a few days later." Anne testified that A.H. told her the video "was put in [in] jest" and that "[s]he was not uncomfortable by it, bothered by it." Anne testified A.H. told her that the video malfunctioned, that "[t]he only thing she was able to see was part of a woman's breast," and that "she saw more of Janet Jackson in the Super Bowl halftime show than she did of the video."

The investigating police officer testified that "[a]s far as [he knew, the video was] still at . . . Osborne's apartment" at the time of the trial. He testified that he had not seen the video and did not know where it was. He testified that he had no personal knowledge about the content of the video. The State did not produce or offer the video or any still images from the video during the trial.

A.H. testified that in late January or early February 2010, Anne asked her to stop boarding her horse at the stable. Anne testified that she "expelled [A.H.] from [her] riding group." A.H. testified that the request for her to leave the stables had nothing to do with Osborne. A.H. testified that she contacted law enforcement about Osborne's alleged inappropriate touching and the video incident after being asked to remove her horse from the stables.

Osborne testified that he was not aware that A.H. felt he had made inappropriate contact with her until he was contacted by law enforcement. He was surprised at the allegations and had not previously been given any reason to believe that A.H. had considered his conduct inappropriate.

On March 22, 2010, Osborne was charged in county court by complaint with third degree sexual assault and with admitting a minor to an obscene motion picture, show, or presentation. Both charges were Class I misdemeanor offenses. In February 2011, the county court found Osborne guilty on both charges and sentenced him to concurrent sentences of 6 months' imprisonment in jail for each conviction. In addition, Osborne was required to register as a sex offender.

Osborne appealed to the district court. On August 29, 2011, the district court entered an order reversing Osborne's convictions based upon a finding that the record presented to the

district court did not demonstrate that Osborne had properly waived his right to a jury trial. The State filed a motion for rehearing, along with a request to file a supplemental bill of exceptions containing the hearing at which Osborne had waived his right to a jury trial. Osborne sought to quash the attempt to file a supplemental bill of exceptions, but the trial court allowed its filing and granted rehearing. The district court ultimately found no merit to Osborne's assignments of error and affirmed his convictions. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Osborne has assigned a variety of errors challenging the sufficiency of the evidence to sustain his convictions, challenging various rulings of the county and district courts, and challenging the effectiveness of his trial counsel. We specifically address Osborne's assertions that the district court erred in overruling his motion to quash the State's presentation of a supplemental bill of exceptions in the appeal of the county court's judgment and that there was insufficient evidence to sustain the convictions. Our resolution of these two issues makes it unnecessary for us to address the remaining assignments of error. See *State v. Rouse*, 13 Neb. App. 90, 688 N.W.2d 889 (2004) (appellate court is not obligated to engage in analysis not needed to adjudicate controversy before it).

IV. ANALYSIS

1. Record on Appeal to District Court

Osborne first asserts that the district court erred in overruling his motion to quash. In Osborne's appeal to the district court, the district court initially found that the record did not demonstrate that Osborne had properly waived his right to a trial by jury and, accordingly, reversed the decision and remanded the cause to the county court. The State sought rehearing and offered a supplemental bill of exceptions containing a transcription of the hearing wherein Osborne did waive his right to a trial by jury. It was this supplemental bill of exceptions that Osborne sought to quash. We find no error in the district court's overruling of the motion to

quash and acceptance of the supplemental bill of exceptions on rehearing.

[1,2] In *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009), the Nebraska Supreme Court clarified the law in Nebraska concerning the authority of a district court, sitting as an intermediate appellate court, to reconsider and modify its own rulings. The court noted that the notion that a district court sitting as an intermediate appellate court may timely modify its opinions is consistent with the generally recognized common-law rule that an appellate court has the inherent power to reconsider an order or ruling until divested of jurisdiction. *Id*. Judicial efficiency is served when any court, including an appellate court, is given the opportunity to reconsider its own rulings, either to supplement its reasoning or to correct its own mistakes. *Id*.

In the present case, the district court initially reached a conclusion that the record presented to it, as an intermediate appellate court, did not demonstrate that Osborne had properly waived his right to a trial by jury. As such, the district court initially reversed the convictions and remanded.

The district court's initial ruling, however, was clearly an erroneous one, as Osborne did waive his right to a jury trial and simply did so in a hearing that had not been presented in the record prepared for the district court. In allowing the State's motion for rehearing and accepting the supplemental bill of exceptions, the district court concluded that both parties had contributed to the error concerning the record. In fact, we conclude that there really was no error concerning the preparation of the record by either of the parties.

Instead, it is clear that the question of whether there was a proper waiver of the right to a trial by jury was simply not raised by Osborne in his appeal to the district court. His statement of errors to the district court and his amended statement of errors do not include an assertion that he never waived his right to a jury trial. Indeed, he assigned as error to the district court that his counsel had provided ineffective assistance in advising him to waive his right to a trial by jury, which necessarily suggests that he did, in fact, waive that right. As a result, because he was not alleging that he had not waived his right

to a trial by jury, he did not commit an error in the preparation of the record by not including that hearing. Similarly, the State did not commit an error by failing to supplement the record more quickly; there was no reason for the State to supplement the record to provide hearings unrelated to the assertions of error on appeal.

Because the district court clearly erred in finding error where none was asserted and based on the lack of a record that was understandably not provided because there was no error presented in relation to it, it was not reversible error for the district court to exercise its inherent power to reconsider its ruling and correct itself. We find no merit to Osborne's assertions that he should have been allowed to reap the benefit of the district court's error and that the error should not have been correctable by the district court.

2. Sufficiency of Evidence on Sexual Assault Conviction

Osborne asserts that the evidence adduced at trial was insufficient to support his conviction of third degree sexual assault. He asserts that there was insufficient evidence to establish that there was "sexual contact" under Neb. Rev. Stat. § 28-320(1) (Reissue 2008). We conclude that the State adduced sufficient evidence to demonstrate that the contact between Osborne and A.H. could reasonably be construed as for sexual arousal or gratification, and we therefore conclude that there was sufficient evidence to support this conviction.

[3] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: 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. *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012). 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. *Id.*

[4,5] According to § 28-320(1), a conviction for third degree sexual assault requires proof that the defendant subjected

another person to sexual contact without the consent of the victim or where the defendant knew or should have known that the victim was physically or mentally incapable of resisting or appraising the nature of the conduct. Neb. Rev. Stat. § 28-318(5) (Reissue 2008) defines sexual contact as meaning intentional touching of the victim's sexual or intimate parts or intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact includes only such conduct which can reasonably be construed as being for the purpose of sexual arousal or gratification.

[6] In the present case, there is no issue presented concerning whether Osborne intentionally touched A.H.'s sexual or intimate parts as those terms are defined in the statutes. Section 28-318(2) defines intimate parts to mean the genital area, groin, inner thigh, buttocks, or breast. Osborne does not dispute that he intentionally touched A.H.'s buttocks on at least two occasions. A.H. testified that he also touched her breast on one occasion, while Osborne denied intentionally doing so. Regardless, there was sufficient evidence to demonstrate that Osborne intentionally touched A.H.'s intimate parts.

Nonetheless, Osborne's touching of A.H.'s buttocks or breast in this case can be classified as sexual contact only if there was sufficient evidence adduced to support a finding that it could reasonably be construed as having been for the purpose of sexual arousal or gratification.

The allegations in this case must be analyzed in the context in which they occurred. First, Osborne is a 47-year-old male; A.H. was 15 or 16 at the time of the incidents. Osborne testified that he thought A.H. probably had a crush on him, but despite this, he spent time alone with her and engaged in "horseplay" that involved physical touching of her intimate or sexual parts over her clothing. He made suggestive remarks such as "'No panties, today, huh?'" and, according to Anne, he ran his finger up the back side of A.H.'s thigh and buttocks, an act Anne later denied having said happened. Together Osborne and A.H. viewed portions of a video, "Florida Girls Sunny Side Up," which Osborne himself described as pornographic. After seeing what Osborne described as a shirtless "blond bimbo" on

the screen, he kept trying to get the video to play. Osborne's conviction of third degree sexual assault must be analyzed against this backdrop.

[7] The Nebraska Supreme Court has held that in proving sexual contact, the State need not prove sexual arousal or gratification, but only circumstances and conduct which could be construed as being for such a purpose. See *State v. Berkman*, 230 Neb. 163, 430 N.W.2d 310 (1988). Even sexual contact done for the defendant's amusement can be reasonably construed as being for the purpose of sexual arousal or gratification. See *State v. Charron*, 226 Neb. 871, 415 N.W.2d 474 (1987).

In *Charron*, the defendant approached a woman in a parking lot and grabbed her vaginal area. Affirming a conviction of third degree sexual assault, the Nebraska Supreme Court stated:

> The act[s] of the defendant in grabbing a woman from behind, pressing forcefully in the vaginal area, and then walking away, laughing and bobbing his head, were circumstances from which the trial court could find that the conduct of the defendant was for the purpose of his sexual arousal or gratification.

Id. at 873, 415 N.W.2d at 476.

In the present action, we are not dealing with two strangers; rather, the defendant and the complainant were very familiar with each other, and Osborne believed A.H. "was sweet on" him. In such a situation, when an adult male makes a suggestive comment to an adolescent female, coupled with physical contact of her intimate parts, a rational juror could have reasonably construed such acts as having been for the purpose of sexual arousal or gratification, especially when the adult suspects the minor has a crush on him. Even Anne, Osborne's adult girlfriend, believed the contact was inappropriate and asked him to stop.

It is important to note that the statutory definition of sexual contact includes sexual arousal or gratification of *either* party. § 28-318(5). Therefore, if the acts can be reasonably construed as having been for the purpose of arousing either Osborne or A.H., then Osborne's touching comes within the purview of

prohibited contact. See, also, *In re Interest of Kyle O.*, 14 Neb. App. 61, 703 N.W.2d 909 (2005).

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. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012). We conclude, based on the evidence presented, that a rational trier of fact could have found beyond a reasonable doubt that Osborne's acts were for the purpose of sexual arousal or gratification, either of himself or A.H. Accordingly, we find no merit to his assertion on appeal, and we affirm the sexual assault conviction.

3. Sufficiency of Evidence on Obscenity Conviction

Osborne asserts that the evidence adduced at trial was insufficient to support his conviction of admitting a minor to an obscene motion picture, show, or presentation. He asserts that the State failed to adduce sufficient evidence to support a finding that the video displayed was obscene within the definition of the applicable statutes. Because the State failed to adduce any evidence concerning the content of the video as a whole, we find the evidence was insufficient.

In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: 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. *State v. Freemont, supra*. 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. *Id*.

[8,9] According to Neb. Rev. Stat. § 28-809 (Reissue 2008), a conviction for admitting a minor to an obscene motion picture, show, or presentation requires proof that the defendant knowingly exhibited to a minor or knowingly provided to a minor an admission ticket or pass or knowingly admitted a

minor to premises whereon there is exhibited a motion picture, show, or other presentation which, in whole or in part, predominantly pruriently, shamefully, or morbidly depicts nudity, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors. Neb. Rev. Stat. § 28-807(6) (Reissue 2008) defines harmful to minors as meaning that the description or representation of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse predominantly appeals to the prurient, shameful, or morbid interest of minors; is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and is lacking in serious literary, artistic, political, or scientific value for minors.

[10-12] The offense defined in § 28-809 is labeled in the statute as "Obscene motion picture, show, or presentation; admit minor; unlawful; penalty." The definition of the offense in § 28-809, along with the relevant definitions of key terms in § 28-807, generally mirrors the specific definition of obscene in § 28-807(10), which requires a finding that an average person applying contemporary community standards would find that the work, material, conduct, or live performance taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity or sex, depicts or describes in a patently offensive way certain sexual conduct, and, taken as a whole, lacks serious literary, artistic, political, or scientific value. Indeed, the definition of the offense in § 28-809 and the relevant definitions of key terms in § 28-807 specifically focus on whether the material predominantly pruriently, shamefully, or morbidly depicts nudity or sexual conduct; is patently offensive to prevailing community standards; and lacks serious literary, artistic, political, or scientific value, just as the specific definition of obscenity does.

[13,14] In *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999), the Nebraska Supreme Court provided a lengthy discussion of obscenity under Nebraska law. Although the discussion in that case was in the context of whether purported speech was obscene, such that it was not entitled to constitutional protections afforded free speech, the court's discussion of what constitutes obscene material under Nebraska law is

pertinent to our consideration in the present case. In *Harrold*, the court recognized that a determination of obscenity requires the trier of fact to look at the work as a whole and determine whether its dominant theme is one which goes beyond customary limits of candor in appealing to a shameful or morbid interest in sex. The court also noted that even though a matter depicts hardcore sexual conduct appealing to the prurient interest, it is not obscene unless, taken as a whole, it depicts or describes sexual conduct in a patently offensive way. Moreover, the court also noted that even if material appeals to the prurient interest and is patently offensive, it is not obscene unless the work taken as a whole lacks serious literary, artistic, political, or scientific value.

[15] In *Harrold*, the court recognized that the State bears the burden of proving the necessary elements to establish that a work satisfies the requirements for a finding of obscenity. So, too, the State bears the burden of proving beyond a reasonable doubt all necessary elements to sustain a conviction under § 28-809.

[16,17] We recognize that § 28-809(1) indicates that the prohibition is on exhibiting to a minor a work which, "*in whole or in part*, predominantly pruriently, shamefully, or morbidly depicts nudity [or] sexual conduct." (Emphasis supplied.) However, § 28-809(1) also requires that the work, "*taken as a whole*, is harmful to minors." (Emphasis supplied.) Moreover, the accompanying definitions of key terms make clear that a finding that the work is harmful to minors requires consideration not only of whether the work predominantly appeals to the prurient, shameful, or morbid interest of minors, but also whether it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors and whether it is lacking in serious literary, artistic, political, or scientific value for minors. Thus, despite the "in whole or in part" language in § 28-809(1), the general guidance of the Nebraska Supreme Court concerning obscenity is relevant to determining what is prohibited under § 28-807.

In the present case, A.H. testified that the video Osborne attempted to display did not work properly and that the images

froze on the screen. She testified that she observed only still pictures with no movement and that she observed three images, although she could recall only one of them because she was exchanging text messages with her mother at the time. With respect to the one image she recalled seeing frozen on the screen, she testified that it depicted people "doing sexual things" and that "[t]he girl was giving the man a blow job." She also testified that "the people were naked and touching each other." A.H. was not asked, and did not testify, whether she was able to observe the sexual or intimate parts of the people on the image. She was not asked and did not testify in any detail about what she saw, beyond the above general descriptions. There are any number of nonobscene depictions that she might have observed that would be consistent with her testimony, including, for example, having observed the man in the video from behind and having observed the girl in front of the man and on her knees; there was no evidence adduced to indicate that she observed either depicted party's intimate parts.

Osborne testified that the only image he recalled seeing depicted a woman who was obviously shirtless, but that the image was blurry when it froze and that no actual nudity was visible. In addition, although A.H. testified that it was a "pornographic" image, she was never asked and did not testify about what that term meant to her.

The State did not present the video or any still images from the video to the court; nor did the State present any still images for Osborne or A.H. to identify as having been seen by A.H. When the investigating police officer was asked about the video, he testified that he had not seen it, did not know what was on it, and assumed it was still in Osborne's possession.

We conclude that this limited testimony is legally insufficient to sustain a conviction under § 28-809. Without impermissible speculation, there is no way for a finder of fact to determine whether the image or images displayed to A.H. depicted nudity or sexual conduct in a predominantly prurient, shameful, or morbid fashion. Without impermissible speculation, there is no way for a finder of fact to determine

whether the image or images displayed to A.H. were patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors. Without improper speculation, there is no way for a finder of fact to determine whether the image or images displayed to A.H. were lacking in serious literary, artistic, political, or scientific value for minors. In short, the evidence adduced by the State in this case simply does not allow any meaningful determination of whether the image or images displayed to A.H. were obscene.

To conclude that A.H.'s testimony about what she recalled seeing, recounted above, is legally sufficient to sustain a conviction under § 28-809 would be tantamount to allowing a conviction anytime a minor is shown an image that the minor describes as "pornographic" and that the minor testifies depicted sex. Section 28-809 and the definitions of key terms in that statute clearly require more to allow a meaningful determination by the finder of fact and to allow a meaningful review by the appellate courts.

[18] Even recognizing that what is necessary to demonstrate a violation of § 28-809 is something less than the standards for establishing obscenity in a free speech context, as in *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999), the evidence adduced in this case was legally insufficient to support a conclusion that the State proved, beyond a reasonable doubt, the necessary prerequisites for a conviction. As such, we reverse the obscenity conviction.

4. Resolution

[19] In this case, we have concluded that the State adduced insufficient evidence to sustain a conviction on the obscenity charge. In *Burks v. United States*, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978), the U.S. Supreme Court held that 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." Because we necessarily afford absolute finality to a finder of fact's verdict of acquittal, no

matter how erroneous its decision, it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the finder of fact could not properly have returned a verdict of guilty. See *Burks v. United States, supra*.

[20] The Court in *Burks* noted that not all appellate reversals of criminal convictions prohibit retrial. Rather, if a defendant appeals a conviction and obtains a reversal based on a trial error, as distinguished from insufficiency of the evidence, he cannot assert double jeopardy to bar his retrial. *Id*. See, also, *State v. Noll*, 3 Neb. App. 410, 527 N.W.2d 644 (1995).

V. CONCLUSION

We find that the State adduced sufficient evidence to sustain the sexual assault conviction, but insufficient evidence to sustain the obscenity conviction. Accordingly, we affirm in part, and in part reverse and remand with directions to dismiss.

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

IRWIN, Judge, dissenting.

I concur with the majority in all respects except with regard to Osborne's conviction on the charge of third degree sexual assault. Because I find the evidence was legally insufficient to sustain a conviction for third degree sexual assault, I respectfully dissent from that portion of the per curiam opinion which affirms the sexual assault conviction.

I agree with the majority's recitation of the relevant standards of review and propositions of law that govern review of the sexual assault conviction in this case. I disagree, however, with the majority's characterization of the record in this case and its conclusion that the State adduced sufficient evidence to support a reasonable conclusion that Osborne's actions could be construed as having been for sexual arousal or gratification. I find the evidence adduced by the State and the examination of witnesses by the State to be devoid of evidence to support such a conclusion.

In this case, the State's evidence concerning the touching established only that Osborne actually made contact with A.H.'s buttocks and breast. A.H. was never asked a single

question by the State about the circumstances or surrounding context of the touching, and she did not provide any testimony or explanation of how any of the incidents happened. Osborne, while acknowledging the touching, testified that it was solely playful "twang[ing]" of her buttocks and grabbing her sides from behind to startle her, always over her clothing. Similarly, Anne testified that the touching she observed was consistent with touching that happened between A.H. and the children at the stables and consistent with touching of Osborne by A.H. There was no testimony or explanation of how the touching could reasonably be construed as having been for sexual arousal or gratification, and no testimony by anyone to even suggest that the touching could be construed as having been for sexual arousal or gratification.

While the majority provides a persuasive backdrop concerning the factual context in the present case, I believe it also leaves out other important factual context. First, the majority does not acknowledge that the complained-of conduct in this case was something which the victim regularly did herself to others and which the testimony indicated was done with frequency by the employees at the stables — it was essentially just slapping someone on the buttocks. The majority's rationale would suggest that everyone in the stable who engaged in this conduct could be guilty of sexual assault. In addition, the factual context presented by the majority leaves the impression that the touching and the facts surrounding the alleged obscenity incident (which we all agree was not supported by legally sufficient evidence) all occurred somewhat concurrently. In fact, these incidents were separated by several months and bore no relation to one another. The touching, the "'[n]o panties'" comment, and the viewing of the video were not in any way related to one another, according to my review of the record.

While I agree that the underlying rationale of the Supreme Court in *State v. Charron*, 226 Neb. 871, 415 N.W.2d 474 (1987), was that if a rational trier of fact could construe the facts as demonstrating something done for sexual arousal or gratification then an appellate court should not second-guess that conclusion, I do not believe the record presented in the

instant case is remotely similar to the factual situation in *Charron*. In that case, the facts that the defendant and the victim were complete strangers, that there was no other surrounding context to the touching, and that the defendant had no contact—at all—with the victim, beyond approaching her from behind and forcefully grabbing at her buttocks and vaginal area, left no rational explanation for the defendant's conduct other than that he was committing a sexual assault. The fact that he purported to have been acting solely for amusement certainly left ample evidence to allow a rational trier of fact to conclude that the acts were, in fact, done for sexual arousal or gratification.

In the present case, on the other hand, the longstanding relationship between Osborne and A.H., along with the evidence of this touching's having been commonplace by numerous people at the stables, including A.H. herself, and the lack of any evidence to suggest that Osborne's actions might have been for sexual arousal or gratification when nobody else's were present what I believe is a very different situation and merit a different result.

To conclude that the evidence adduced by the State in this case is sufficient to allow a finder of fact to conclude that Osborne's touching could reasonably be construed as having been for sexual arousal or gratification would be tautological, tantamount to a conclusion that every instance of contact made with a person's buttocks or breast could, without more, be construed as being sexual contact simply because it was contact with the buttocks or breast. I do not believe such a void of evidence in this case should support a conviction that will result in Osborne's being a registered sex offender, and I would reverse the sexual assault conviction.

I agree with the majority in all other respects.

LAUREN M. WILLIS, APPELLEE, V. BRANDON L. ROSENCRANTZ BRAMMER, APPELLANT.

826 N.W.2d 908

Filed February 19, 2013. No. A-12-132.

1. **Judgments.** Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court by an order nunc pro tunc at any time on the court's initiative or on the motion of any party.
2. ____. Nunc pro tunc orders are generally limited only to situations of remedying clerical or scrivener's errors committed by the court.
3. ____. An order nunc pro tunc cannot be used when the mistake or error at issue is a party's oversight.
4. ____. A nunc pro tunc order operates to correct a clerical error or a scrivener's error, not to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even if such order was not the order intended.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Reversed.

Randall Wertz and Susan L. Kirchmann, of Recknor, Wertz & Associates, for appellant.

Thomas J. Klein, of Haessler, Sullivan & Klein, Ltd., for appellee.

IRWIN, MOORE, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

In this action to clarify child support obligations, Brandon L. Rosencrantz Brammer appeals a nunc pro tunc order entered by the district court for Saunders County, Nebraska, on its own motion. Because the record does not reflect that any clerical or scrivener's error had been committed by the court, it was error for the court to enter a nunc pro tunc order. We reverse.

II. BACKGROUND

The parties initially appeared in district court in July 2008 with a joint stipulation and parenting plan. Pursuant to that joint stipulation and parenting plan, Brammer agreed to pay child support in the amount of $325 per month, to be retroactively assessed commencing September 1, 2005. Brammer

was in the military at the time, so the $325 was to be paid in part by himself ($100 per month) and in part by his military housing allowance ($225 per month). In July 2008, the court entered an order that included the wording of the parties' joint stipulation word for word.

Over the next couple of years, the $325 per month was received by the Nebraska Department of Health and Human Services child support enforcement division (DHHS), but DHHS indicated in its records that Brammer's obligation was only $100 per month. As a result, DHHS' records showed Brammer's having a substantial surplus in payments by July 2011.

On July 21, 2011, Willis filed an application to "correct" the court's order to direct DHHS that the proper support amount was, in fact, $325 per month and to direct DHHS to correct its records. In October 2011, the parties entered a joint stipulation. That stipulation included language indicating that Brammer's child support obligation was supposed to be $325 per month "retroactive to date of Order of July 14, 2008." In October 2011, the court entered an order that reproduced the parties' language word for word.

There is no bill of exceptions and no filing in the transcript by any party subsequent to the October 2011 court order. Willis indicates in her brief that she was contacted by the clerk of the district court about the need for an order nunc pro tunc, but this communication does not appear to be in our record.

Nonetheless, in January 2012, the district court entered an order nunc pro tunc, apparently on its own motion, reflecting that the $325 per month child support obligation was "retroactive to date of Order of September 1, 2005." On the record presented to this court, there does not appear to have ever been any such order of September 1, 2005.

Brammer now brings this appeal.

III. ASSIGNMENT OF ERROR

Brammer assigns that the district court erred in entering a nunc pro tunc order to modify the language of a stipulated order entered during the court's prior term and without authority.

IV. ANALYSIS

Brammer brought this appeal, asserting that the nunc pro tunc order was improper because the record does not reflect any clerical error by the district court in the October 2011 order, because the nunc pro tunc order was used to correct a stipulated order entered during the prior term, and because there was no authority for entering a nunc pro tunc order in this case. He points to the language of the parties' stipulation and argues that the court used the parties' identical language in its October 2011 order. He also argues that there was no other basis for modifying the order on the court's own motion and outside of term.

Willis argues that it is clear from all of the materials in the record that the parties stipulated for Brammer to pay $325 per month child support retroactive to September 1, 2005; that there was a clerical error by DHHS; and that all of the 2011 filings were intended to make it clear to DHHS what everyone had stipulated to. She argues that the October 2011 order (and by implication the October 2011 stipulation) contained a clerical error by providing for the support to be retroactive to the date of the July 14, 2008, order, instead of September 1, 2005.

[1,2] Neb. Rev. Stat. § 25-2001(3) (Reissue 2008) provides that "[c]lerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court by an order nunc pro tunc at any time on the court's initiative or on the motion of any party . . . ." Nunc pro tunc orders are generally limited only to situations of remedying clerical or scrivener's errors committed by the court. See, *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009); *Bevard v. Kelly*, 15 Neb. App. 960, 739 N.W.2d 243 (2007).

[3,4] In *Bevard v. Kelly, supra*, this court specifically recognized that an order nunc pro tunc cannot be used when the mistake or error at issue is a party's oversight and that the reference in § 25-2001(3) to "[c]lerical mistakes" and "errors therein arising from oversight or omission" refer only to mistakes or errors made by the court, and not those made by a party or the party's attorney. A nunc pro tunc order operates to correct a clerical error or a scrivener's error, not to change or

revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even if such order was not the order intended. *Bevard v. Kelly, supra*; *In re Interest of Antone C. et al.*, 12 Neb. App. 466, 677 N.W.2d 190 (2004).

In the present case, there was no clerical or scrivener's error committed by the court. Rather, the court entered an order in October 2011 that accurately reflected the stipulation of the parties. Indeed, the court reproduced the language of the parties' stipulation word for word. There was no clerical error committed by the court, and it does not appear that anyone moved the court to enter any order altering the language of the court's order from what the parties specifically stipulated to. There does not appear to be any other authority for the court to enter a nunc pro tunc order in this case.

Although it seems a logical conclusion from the entire record presented that the parties were attempting to once again have the court enter an order providing for Brammer to be obligated to pay child support in the amount of $325 per month, to be retroactively assessed commencing September 1, 2005, as the original order in July 2008 clearly provided, an order nunc pro tunc was not proper. The district court, in its October 2011 order, reproduced the language of the parties' stipulation word for word. If that language did not accurately reflect the intent of the parties, any such defect could not be remedied by an order nunc pro tunc. As noted, a nunc pro tunc order is not proper to remedy an alleged clerical or scrivener's error committed by the parties (or, as urged by Willis, DHHS). Moreover, the record presented on appeal does not allow us to conclude that the parties' October 2011 stipulation contained a scrivener's error committed by the parties. While it seems a logical conclusion that everyone intended the support to start September 1, 2005, we do not have any record to indicate what might have led to the October 2011 stipulation or what the parties really might have intended. It is not inconceivable that the parties might have agreed to stipulate to a different starting date for whatever reason and that is why they chose to say "retroactive to date of Order of July 14, 2008," instead of September 1, 2005.

We also note that this nunc pro tunc order did not do anything to correct any potential clerical error committed by DHHS in carrying out the July 14, 2008, order, which was clear and unambiguous. If DHHS made an error in carrying out the July 2008 order, then these proceedings simply resulted in an entirely new order in October 2011, and the nunc pro tunc order impacted only that October 2011 order, and did not directly correct DHHS' potential clerical error related to the July 2008 order.

Finally, the nunc pro tunc order itself would have been problematic because it specifically indicates that the support is supposed to be "retroactive to date of Order of September 1, 2005"—but there is, as far as we can tell, no such order. Assuming the court was trying to say (again) that support should be retroactive to September 1, 2005 (which is what the original order in July 2008 already clearly said), it did not say that in the nunc pro tunc order.

In summary, the July 14, 2008, order was clear and unambiguous. It clearly and specifically indicated that the parties had stipulated to $325 child support per month, retroactive to September 1, 2005, and it very clearly indicated exactly how that $325 per month was to be paid. DHHS apparently simply erred in its means of recordkeeping. It is unclear why the parties chose to file an action to alter or "correct" what was already a clear order, instead of pursuing other means of directing DHHS to correct its record. Nonetheless, the October 2011 order effectuated the language of the parties' most recent stipulation, which provides that Brammer's child support obligation is $325 per month "retroactive to date of Order of July 14, 2008." Regardless of whether that effectuates the parties' intent, there was no clerical or scrivener's error committed by the court, and a nunc pro tunc order was improper.

V. CONCLUSION

There was no clerical or scrivener's error committed by the court. As such, a nunc pro tunc order, on the court's own motion, was erroneous. We reverse.

REVERSED.

TRACEY BEEMER, APPELLEE, V. MIKE HAMMER, APPELLANT.

826 N.W.2d 599

Filed February 19, 2013. No. A-12-397.

1. **Injunction.** A domestic violence protection order is analogous to an injunction.
2. **Judgments: Appeal and Error.** The grant or denial of a domestic violence protection order is reviewed de novo on the record. In such de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court.
3. ____: ____. Where the credible evidence is in conflict on a material issue of fact, an 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.
4. **Words and Phrases.** The term "physical menace," within the meaning of the abuse definition under the Protection from Domestic Abuse Act, means a physical threat or act and requires more than mere words.
5. ____. The term "imminent bodily injury," within the abuse definition under the Protection from Domestic Abuse Act, means a certain, immediate, and 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.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Reversed and remanded with directions.

Harry A. Moore for appellant.

John H. Sohl for appellee.

IRWIN, MOORE, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Tracey Beemer filed a petition for a domestic abuse protection order against her father, Mike Hammer (Mike). The district court entered an ex parte order granting her request. Subsequently, the district court held a hearing to determine whether the order should remain in effect. After the hearing, the court affirmed the entry of the protection order.

Mike appeals from the district court's order. On appeal, he asserts that the district court erred in finding sufficient evidence to warrant granting the protection order. For the reasons set forth herein, we reverse, and remand with directions.

II. BACKGROUND

On March 7, 2012, Tracey filed a petition in the district court requesting a domestic abuse protection order against Mike for herself and her two minor children. That same day, Tracey also filed an affidavit containing allegations to support her request. The preprinted affidavit form asks the affiant to list the most recent incidents of domestic abuse, giving dates and times. In Tracey's affidavit, she describes three separate instances which occurred between her and Mike and which made her "very afraid of him."

The first incident Tracey described occurred on March 4, 2012, a few days before she filed her petition and affidavit. On that day, Tracey learned that Mike was visiting her children when they were with their father, Lance Beemer. Tracey did not want Mike around the children. As such, she called Lance and indicated that she wanted to come get the children. Subsequently, Mike called Tracey and left a message. On the message, Mike called Tracey names and said, "'I'll see you in [p]rison.'"

The second incident Tracey described occurred approximately a year earlier, in March 2011. Tracey stated that Lance told her that he was taking the children to visit Mike, despite her objections. Tracey telephoned Mike prior to the visit so that she could assess "his state of mind [and] disposition." During that telephone conversation, Mike yelled at Tracey and called her names. Mike told Tracey that he was "through" with her.

The final incident Tracey described in her affidavit occurred in November 2010. Tracey stated that during this incident, Mike became angry and yelled at her in front of the children. He told her that if she left with the children, she would regret it. The children became upset and one of them told Mike that he was "mean." Tracey also stated that Mike was in possession of "illegal substances" in the children's presence.

Based on Tracey's petition and affidavit, the district court entered an ex parte domestic abuse protection order for Tracey and the children.

On April 5, 2012, the district court held a hearing allowing Mike to show cause why the protection order should

not remain in effect. Both Mike and Tracey testified at the hearing.

Mike testified that the allegations in Tracey's affidavit are not true. He admitted to leaving Tracey a message on March 4, 2012, after she told Lance that she wanted to pick up the children in order to keep them away from Mike. He testified that he told Tracey not to tell lies or she would go to prison. He admitted to calling her a "bitch," but stated that he did not raise his voice during the message.

Mike testified that he did speak with Tracey on the telephone in March 2011. Tracey was angry that Lance was bringing the children to see Mike. Mike stated that Tracey was yelling and using strong language, but he did not yell at her. Mike admitted that he called Tracey a "bitch" during the telephone call.

Mike testified that in November 2010, he and Tracey argued because Mike refused to assist Tracey in paying for her home after she and Lance divorced. He indicated that Tracey was angry with him and started to cry during their conversation. However, he denied that he was angry at her, that he called her names, or that he used inappropriate language with her.

Tracey's testimony concerning the three incidents reiterated the allegations in her affidavit. In addition, she testified that Mike never threatened physical violence toward her, nor did he ever make physical contact with her. She indicated that the basis for her protection order application was Mike's "rage, anger, [and] outbursts." Tracey also indicated that between March 2011 and March 4, 2012, there was virtually no contact between her and Mike except when she sent him a card in an effort to try and better the situation between the two of them.

On April 5, 2012, the district court entered a modified domestic abuse protection order. The court made no specific factual findings, but concluded that Tracey had proven that Mike "(1) attempted to cause, or intentionally, knowingly, or recklessly caused, bodily injury to [Tracey], or (2) by physical menace, placed [Tracey] in fear of imminent bodily injury." The order prohibited Mike from telephoning or otherwise

contacting Tracey and prohibited him from coming to her home. The district court dismissed that part of the ex parte protection order which concerned Mike's being restricted from Tracey's children.

Mike appeals from the district court's order granting Tracey a protection order against him.

III. ASSIGNMENT OF ERROR

On appeal, Mike asserts that the district court erred in determining that Tracey produced sufficient evidence to grant the protection order against him.

IV. STANDARD OF REVIEW

[1-3] A domestic violence protection order is analogous to an injunction. See, Neb. Rev. Stat. § 42-924 (Reissue 2008); *Hronek v. Brosnan, ante* p. 200, 823 N.W.2d 204 (2012). See, also, *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010). Accordingly, the grant or denial of a domestic violence protection order is reviewed de novo on the record. See *Hronek v. Brosnan, supra*. 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, an 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*.

V. ANALYSIS

The Protection from Domestic Abuse Act (the Act), Neb. Rev. Stat. § 42-901 et seq. (Reissue 2008 & Cum. Supp. 2010), allows any victim of domestic abuse to file a petition and affidavit for a protection order pursuant to § 42-924. "Abuse" is defined under the Act 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.

§ 42-903(1).

The Act defines "household member" to include "persons related by consanguinity." § 42-903(3). As such, any abuse perpetrated by a father against his daughter is covered by the Act.

In this case, the district court's form order states that Tracey showed that Mike "(1) attempted to cause, or intentionally, knowingly, or recklessly caused, bodily injury to [Tracey], or (2) by physical menace, placed [Tracey] in fear of imminent bodily injury." However, Tracey did not allege, nor does the record show, that Mike ever caused Tracey bodily injury. In fact, Tracey testified at the show cause hearing that Mike never made physical contact with her. Accordingly, we limit our consideration to whether Tracey has shown that Mike, by physical menace, placed her in fear of imminent bodily injury as required by § 42-903(1)(b).

Mike argues that there is no credible evidence that he engaged in any conduct constituting abuse as defined in § 42-903. Specifically, he argues that even if all of Tracey's allegations are assumed to be true, the alleged conduct does not rise to the level of abuse within the meaning of the statute. Upon our review of the record, we find that Mike's assertions have merit.

[4] This court has recently concluded that the term "physical menace," within the meaning of the abuse definition under the Act, means a physical threat or act and requires more than mere words. See, § 42-903(1)(b); *Cloeter v. Cloeter*, 17 Neb. App. 741, 770 N.W.2d 660 (2009). There is no evidence in the record that Mike physically threatened Tracey or engaged in any inappropriate behavior beyond mere words. Tracey testified at the hearing that Mike never threatened her with physical violence. Moreover, the three instances of abuse that she described in her affidavit and reiterated at trial include one telephone message, one telephone call, and one face-to-face interaction. Tracey alleged that in each of these instances, Mike raised his voice at her and called her inappropriate names. Even if we assume Tracey's allegations to be true,

Mike's conduct cannot be considered to be physically menacing because it amounts to nothing more than harsh, inappropriate language.

[5] We must also note that there is no evidence to suggest that Mike's conduct placed Tracey in fear of imminent bodily injury. The term "imminent bodily injury," within the abuse definition under the Act, means a certain, immediate, and 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. See, § 42-903(1)(b); *Cloeter v. Cloeter, supra*.

Here, two of the alleged instances of abuse occurred over the telephone. In fact, one of those instances was a telephone message. Neither instance could have placed Tracey in fear of imminent bodily injury because Mike was nowhere near Tracey at the time of the telephone calls, nor did he threaten that he was going to come near her.

The other alleged instance of abuse did involve a face-to-face confrontation between Mike and Tracey. And, while Tracey did testify that she had "some concern for her physical safety" during this interaction, she also testified that she and Mike were able to work out their differences after the argument and that when she left Mike's house, things were "fine." In addition, this confrontation occurred well over a year before Tracey filed her request for a protection order. Since this confrontation, it is clear that Mike and Tracey have had very little interaction, either in person or over the telephone. When viewed as a whole, Tracey's testimony about this interaction does not provide sufficient evidence to warrant a finding that she was placed in fear of imminent bodily injury.

Upon our review of the record, we conclude that the allegations of abuse contained in Tracey's affidavit cannot sustain the entry of a domestic abuse protection order within the meaning of §§ 42-903 and 42-924. As such, we find that the district court erred in granting Tracey a domestic abuse protection order against Mike.

VI. CONCLUSION

We find that the record does not support a conclusion that Mike, by physical menace, placed Tracey in fear of imminent

bodily injury. We therefore reverse the district court's order affirming the ex parte domestic abuse protection order and remand the matter with directions that the district court enter an order dismissing the domestic abuse protection order against Mike.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. JOSE JESUS LLERENAS-ALVARADO, APPELLANT.

827 N.W.2d 518

Filed February 26, 2013. No. A-12-131.

1. **Pleas: Appeal and Error.** A ruling on a withdrawal of a plea will not be disturbed on appeal absent an abuse of discretion.
2. ____: ____. The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.
3. **Pleas: Waiver.** To support a finding that a plea of guilty or nolo contendere has been voluntarily and intelligently made, the court must (1) inform the defendant concerning (a) the nature of the charge, (b) the right to assistance of counsel, (c) the right to confront witnesses against the defendant, (d) the right to a jury trial, and (e) the privilege against self-incrimination; and (2) examine the defendant to determine that he or she understands the foregoing. Additionally, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime for which he or she is charged. A voluntary and intelligent waiver of the above rights must affirmatively appear from the face of the record.
4. **Pleas: Proof.** The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea.
5. **Constitutional Law: Waiver: Records.** A court may conclude that an accused has waived a constitutional or statutory right if the waiver, knowingly and intelligently made, appears affirmatively on the record.
6. **Pleas: Waiver: Proof.** Even if a defendant was not sufficiently advised of his or her rights under Neb. Rev. Stat. § 29-1819.02(1) (Reissue 2008), failure to give the advisement is not alone sufficient to entitle a convicted defendant to have the conviction vacated and the plea withdrawn pursuant to § 29-1819.02(2). A defendant must also allege and show that he or she actually faces an immigration consequence which was not included in the advisement given.

Appeal from the District Court for Madison County: JAMES G. KUBE, Judge. Affirmed.

Charles W. Balsiger for appellant.

Jon Bruning, Attorney General, Carrie A. Thober, and James D. Smith for appellee.

IRWIN, MOORE, and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

Jose Jesus Llerenas-Alvarado appeals from the judgment of the district court for Madison County convicting him of attempted kidnapping, a Class II felony, after a plea of no contest. Llerenas-Alvarado submitted a motion to withdraw the plea prior to sentencing, and after a hearing on the issue, the motion was denied. For the reasons that follow, we affirm.

BACKGROUND

Llerenas-Alvarado was originally charged in the county court for Madison County with kidnapping, a Class IA felony. Prior to his initial arraignment, he was provided with an interpreter who read to him the complaint and a rights advisory form. The rights advisory informed him of, among other things, the right to assistance of counsel, the right to confront witnesses, the right to a jury trial, and the privilege against self-incrimination. It also included the following immigration advisement:

> [I]f you were not a citizen of the United States of America at the time the crime was alleged to have been committed, you are hereby advised that a conviction for this crime could result in your removal from this country and that any request for citizenship be denied, as well as it may also affect any present and future proceeding before Immigration.

The court-appointed interpreter from the county court proceedings certified that she read the rights advisory to Llerenas-Alvarado in the Spanish language and asked him if he understood it and that Llerenas-Alvarado responded he did. It was the interpreter's opinion that Llerenas-Alvarado understood the rights advisory and the possible pleas.

Llerenas-Alvarado appeared before the county court on June 7, 2011. With the assistance of an interpreter, the court

advised Llerenas-Alvarado of his rights, as well as the nature of the charge, the possible penalties, and the effect of conviction on noncitizens. The case was then bound over to the district court.

When Llerenas-Alvarado appeared for the first time in the district court for proceedings in this case, he was provided with a different court-appointed interpreter. The interpreter stated he believed that Llerenas-Alvarado was in need of interpretive services and that he continued to require interpretive services throughout the pendency of the case. The same interpreter assisted Llerenas-Alvarado each time he appeared in district court.

On July 14, 2011, Llerenas-Alvarado appeared before the district court for Madison County for a group arraignment. The district court advised the group of their rights, including the right to counsel, the right to confront witnesses, the right to a jury trial, and the privilege against self-incrimination. It also gave the following immigration advisement: "[I]f you're not a United States citizen, the conviction for the offense or the offenses for which you have been charged may have the consequence of removal from the United States or the denial of naturalization pursuant to the laws of the United States."

After the group arraignment, the district court identified Llerenas-Alvarado and advised him of the following, through an interpreter:

> THE COURT: . . . .
>
> . . . Sir, did you — were you in the courtroom when the court explained to the group your statutory and constitutional rights?
>
> . . . LLERENAS-ALVARADO: Yes.
>
> THE COURT: And do you have any questions about those?
>
> . . . LLERENAS-ALVARADO: No.
>
> . . . .
>
> THE COURT: Did you also hear and understand the advisement I gave about the possibility of deportation from the United States?
>
> . . . LLERENAS-ALVARADO: Yes.

Llerenas-Alvarado pled not guilty, and the case was set for trial.

On August 29, 2011, the parties appeared for a pretrial conference. Pursuant to a plea agreement, the State requested and was granted leave to file an amended information. However, Llerenas-Alvarado was not ready to enter a plea at that time, so the State withdrew the amended information and the matter was continued.

The parties came before the court again on September 1, 2011, and the parties indicated a plea agreement had been reached. In exchange for Llerenas-Alvarado's plea, the State amended the charge to attempted kidnapping. The district court then reiterated its prior advisements to Llerenas-Alvarado as follows:

> THE COURT: . . . And, sir, when we were in court on July 14th of 2011 I explained to you your statutory and constitutional rights. Do you recall that?
>
> [Llerenas-Alvarado]: (By Interpreter) Yes.
>
> THE COURT: Do you want me to repeat any of that information for you?
>
> [Llerenas-Alvarado]: (By Interpreter) No, that's not necessary.
>
> THE COURT: I also on that date advised you of the possibility of deportation from the United States. Do you recall that?
>
> [Llerenas-Alvarado]: (By Interpreter) Yes.
>
> THE COURT: Do you need for me to repeat that advisement for you at this time?
>
> [Llerenas Alvarado]: (By Interpreter) No, it's not necessary.

The court then advised Llerenas-Alvarado of his right to wait 24 hours after service of the amended information before entering his plea. He indicated that he was ill and wished to continue the hearing until the following day.

The parties appeared the next day, September 2, 2011. After Llerenas-Alvarado indicated that he was ready to proceed, the court continued the plea hearing from the point where the proceedings had been stopped the previous day. The district court explained to Llerenas-Alvarado the nature of the amended

charge, the possible penalties, and the four pleas he could enter. Llerenas-Alvarado indicated he understood and entered a plea of no contest to attempted kidnapping.

The court questioned Llerenas-Alvarado about his plea. The court asked whether the no contest plea was given freely and voluntarily, and Llerenas-Alvarado answered, "Yes." The court asked whether Llerenas-Alvarado was under the influence of drugs or alcohol and whether anyone made threats of force or promises to him, other than the plea agreement. Llerenas-Alvarado answered, "No." The court asked whether Llerenas-Alvarado understood his rights, including the right to a jury trial, the right not to incriminate himself, and the right to confront and cross-examine any witnesses. The court explained that by pleading no contest, Llerenas-Alvarado would be waiving those rights. Llerenas-Alvarado indicated that he understood. He also indicated he understood that by pleading no contest, he would also be waiving any defenses, the presumption of innocence, the right to subpoena witnesses and evidence on his behalf, and any technical defects on the record. Llerenas-Alvarado indicated he understood. Finally, the court asked whether it was still his desire to plead no contest to the charge of attempted kidnapping, a Class II felony, and Llerenas-Alvarado responded, "Yes."

The State provided evidence of the factual basis for the charged offense. This included evidence that on June 4, 2011, Llerenas-Alvarado propositioned a 14-year-old boy and his 12-year-old brother to have sex with him for $20 and $100. The boys refused and walked away, but Llerenas-Alvarado grabbed the older boy and forced him into his vehicle by threatening him with violence. All of those events took place in Madison County, Nebraska. Llerenas-Alvarado then drove the boy out of town to a gravel road in Boone County, Nebraska, where Llerenas-Alvarado took off his shirt, unzipped his pants, and then attempted to take off the boy's shirt and pants. The boy began hitting Llerenas-Alvarado and escaped from the vehicle. He ran through fields to a farmhouse, and the homeowner took him to a local fire station. In addition to the present attempted kidnapping charge in Madison County, Llerenas-Alvarado also pled no contest to

attempted sexual assault of a child in Boone County in connection with this offense.

The district court announced its findings beyond a reasonable doubt that (1) there was a factual basis for Llerenas-Alvarado's no contest plea; (2) his plea was intelligently, voluntarily, and knowingly entered; (3) he understood and voluntarily waived his statutory and constitutional rights; and (4) he understood the nature of the charge, the consequences of his plea, and the possible penalties. The court accepted Llerenas-Alvarado's plea and found him guilty beyond a reasonable doubt of attempted kidnapping, a Class II felony.

Prior to sentencing, Llerenas-Alvarado filed a motion to set aside and vacate his no contest plea, alleging that his plea was not knowingly, intelligently, and voluntarily made. A hearing was held on the motion on November 18, 2011. The parties agreed that the motion should be addressed as a motion to withdraw his plea, rather than a motion to vacate and set aside his plea, and the court agreed to construe it as such. Llerenas-Alvarado was the sole witness for the defense at the hearing.

Llerenas-Alvarado testified, through an interpreter, that he was a resident alien from Mexico. The defense also offered five exhibits into evidence: (1) the court's journal entry from the hearing held on September 1, 2011; (2) the court's journal entry from the hearing held on September 2; (3) a bill of exceptions containing all of the district court proceedings that had taken place in the case; (4) a copy of Neb. Rev. Stat. § 29-1819.02 (Reissue 2008), setting forth the immigration advisement the court must give before accepting a plea of guilty or no contest; and (5) a copy of a federal statute governing deportation of aliens, see 8 U.S.C. § 1227 (2006). Then the defense rested.

A deputy clerk of the county court for Madison County testified for the State. The clerk described the process for ensuring foreign nationals are advised of their rights. The clerk said that when the court is aware a person needs an interpreter, the court makes sure one is available. Prior to entering the courtroom, the interpreter reads the complaint to

the defendant. The interpreter then reads a copy of the rights advisement and records a file-stamped copy of the advisement, signed by the interpreter. The rights advisement for Llerenas-Alvarado is in the record. The State asked the court to take judicial notice of the county court transcript, including the rights advisory form that was given to Llerenas-Alvarado on June 7, 2011.

After argument from both parties, the court took a short recess to review the record and relevant case law before announcing its decision with regard to the withdrawal of the plea. The district court ultimately overruled Llerenas-Alvarado's motion to withdraw the plea and sentenced him to 10 to 15 years' imprisonment.

Llerenas-Alvarado now appeals the denial of his motion to withdraw his plea.

ASSIGNMENTS OF ERROR

Llerenas-Alvarado's assignments of error, consolidated and restated, are that the court erred in denying his motion to withdraw his plea of no contest and in failing to warn him of the immigration consequences of his plea as required under the Nebraska Revised Statutes.

STANDARD OF REVIEW

[1] A ruling on a withdrawal of a plea will not be disturbed on appeal absent an abuse of discretion. *State v. Molina-Navarrete*, 15 Neb. App. 966, 739 N.W.2d 771 (2007).

ANALYSIS

Llerenas-Alvarado alleges the district court erred by overruling his motion to withdraw his no contest plea because (1) the plea was not voluntarily and intelligently made and (2) the district court failed to advise him of the immigration consequences of his plea.

[2] The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal. *State v. Gonzalez*, 283 Neb. 1, 807 N.W.2d 759 (2012).

Plea Voluntarily and Intelligently Made.

[3] In *State v. Lee*, 282 Neb. 652, 659, 807 N.W.2d 96, 103 (2011), the Nebraska Supreme Court set forth the requirements for determining whether a plea has been voluntarily and intelligently made:

> To support a finding that a plea of guilty or nolo contendere has been voluntarily and intelligently made,
>
> "'1. The court must
>
> "'a. inform the defendant concerning (1) the nature of the charge; (2) the right to assistance of counsel; (3) the right to confront witnesses against the defendant; (4) the right to a jury trial; and (5) the privilege against self-incrimination; and
>
> "'b. examine the defendant to determine that he or she understands the foregoing.
>
> "'2. Additionally, the record must establish that
>
> "'a. there is a factual basis for the plea; and
>
> "'b. the defendant knew the range of penalties for the crime for which he or she is charged.'" A voluntary and intelligent waiver of the above rights must affirmatively appear from the face of the record.

Llerenas-Alvarado "readily concedes" that the court informed him of the necessary rights. Brief for appellant at 9. However, he contends the court failed to adequately examine him to determine that he understood those rights. Llerenas-Alvarado contends the circumstances indicate he did not understand all of the consequences of his plea of no contest. Such circumstances include the apparent desire to seek other counsel, the illness Llerenas-Alvarado allegedly suffered during the arraignment, and the fact that he required an interpreter because he does not speak or understand English.

The record shows that the same experienced interpreter was available to Llerenas-Alvarado each time he appeared in district court, and he proceeded with the assistance of that same interpreter in each instance in district court.

Llerenas-Alvarado was informed of his rights for the first time prior to and during his initial arraignment in the county court, also through an interpreter, on June 7, 2011. The court-appointed interpreter certified that she read the advisory to

Llerenas-Alvarado in Spanish and that she asked Llerenas-Alvarado, in Spanish, whether he understood the advisory and possible pleas. The certificate states that Llerenas-Alvarado replied he understood and that it is the interpreter's opinion he did understand.

Llerenas-Alvarado was informed of his rights during a group arraignment in the district court; the district court personally questioned him regarding his understanding of his rights, and Llerenas-Alvarado pled not guilty.

During a change of plea hearing on September 1, 2011, the court asked Llerenas-Alvarado whether he recalled the advisement of his statutory and constitutional rights. Llerenas-Alvarado responded that he remembered and that it was not necessary to repeat any of that information for him. Llerenas-Alvarado invoked his right to wait 24 hours after the service of the amended information before entering his plea. The parties reconvened to continue the proceeding the next day. Prior to asking for the plea, the district court explained to Llerenas-Alvarado the nature of the amended charge, the possible penalties, and the four pleas he could enter. Llerenas-Alvarado entered his plea of no contest, and the district court questioned him about his plea, including whether it was given freely and voluntarily; confirmed that he was not under the influence of drugs or alcohol; and confirmed that no one made threats or used force to compel his plea. The court asked whether Llerenas-Alvarado understood his rights and warned him of the consequences of waiving such rights. Finally, the court asked whether it was still his desire to plead no contest to the charge of attempted kidnapping, a Class II felony, and Llerenas-Alvarado responded, "Yes."

Throughout the record, there is no indication that Llerenas-Alvarado had difficulty understanding the rights advisory. He was given the opportunity to have his rights repeated or explained, and he stated that it was not necessary. He responded to each question in a way that indicated he understood his rights and what was being asked of him. In a few instances, Llerenas-Alvarado asked the court, and the interpreter, to repeat portions of his advisements, and after the portions were repeated, he indicated he understood and gave a response appropriate to the

question posed by the court. The evidence shows that Llerenas-Alvarado was informed of his rights multiple times and that he understood the consequences of his plea.

In this action, Llerenas-Alvarado also asserts that his plea was not voluntarily, knowingly, and intelligently made, because he required the assistance of an interpreter. However, he was provided with an experienced, sworn, and court-appointed Spanish language interpreter for every proceeding in the county and district courts. The record does not show Llerenas-Alvarado had any difficulty communicating with the interpreters, and there is no evidence the interpreters failed to accurately translate the proceedings. The mere fact that Llerenas-Alvarado required a translator is not sufficient proof that his plea was not voluntarily, knowingly, and intelligently made.

As stated above, the right to withdraw a plea previously entered is not absolute, and in the absence of an abuse of discretion, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal. *State v. Gonzalez*, 283 Neb. 1, 807 N.W.2d 759 (2012).

We find the district court did not abuse its discretion in overruling Llerenas-Alvarado's motion on the ground that the plea was not voluntarily, knowingly, and intelligently made.

Advisement of Immigration Consequences.

[4] The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea. *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008). Section 29-1819.02 requires that a court advise a defendant, prior to accepting a plea of guilty or nolo contendere, that a conviction for the crime charged may have adverse immigration consequences.

Llerenas-Alvarado also asserts the court erred at the time of his plea of no contest on September 2, 2011, in failing to contemporaneously advise him regarding possible deportation. Specifically, he argues that the advisement was not made *immediately* prior to the plea. Llerenas-Alvarado asserts that although he was given the necessary advisement in July 2011, he was not so advised at the time of the entry of his plea of no

contest. He asserts that the failure to make the advisement on the day of the plea mandates the withdrawal of the plea and the entry of a plea of not guilty.

In *State v. Mena-Rivera*, 280 Neb. 948, 954, 791 N.W.2d 613, 619 (2010), the Nebraska Supreme Court evaluated the meaning of the word "'prior,'" in the statute, and determined it must mean "'immediately before'" the entering of a plea of guilty or nolo contendere. The Supreme Court supported this determination by interpreting the legislative intent of § 29-1819.02. The court found the Legislature's intent was twofold. First, the defendant may forget a court's advisement during the weeks or months which may pass between the initial arraignment and when the defendant enters his plea. And second, if the defendant is arraigned on a charge and then pleads to a less severe charge, the defendant may reasonably expect less severe penalties to flow from a less severe charge. The court reasoned that a defendant who pleads to a lesser charge may believe the prior advisement does not apply. *State v. Mena-Rivera, supra*.

In this case, Llerenas-Alvarado was not read the complete immigration advisement on September 1 or 2, 2011. However, on September 1, Llerenas-Alvarado was asked whether he recalled the court's explanation of his statutory and constitutional rights on July 14 and whether he would like them to be repeated. He replied that he remembered and that it was not necessary to repeat that information. He was specifically asked whether he recalled the court's advisement about the possibility of deportation from the United States. Again, he replied that he remembered and that it was not necessary to repeat that information. When the time came for Llerenas-Alvarado to enter his plea, he invoked his right to continue the matter for 24 hours to consider his plea. Llerenas-Alvarado entered his plea of no contest when the court reconvened the next day.

An evaluation of the facts reveals the legislative intent of the statute is not frustrated in this case. Llerenas-Alvarado was reminded of the advisement and acknowledged that he understood its meaning. He was specifically reminded that the immigration advisement applied, though the charge had been

amended from the time of the initial arraignment. Further, though Llerenas-Alvarado was not reminded of the advisement on the day that he entered his plea of no contest, he was specifically reminded of the advisement on the previous day, as part of the same proceeding, and the charge had not changed from September 1 to 2, 2011.

[5] In addition, a court may conclude that an accused has waived a constitutional or statutory right if the waiver, knowingly and intelligently made, appears affirmatively on the record. *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990). The record clearly shows that Llerenas-Alvarado was reminded of the rights advisements, indicated his understanding, and declined the court's offer to repeat the advisements again.

There is sufficient evidence that it was not an abuse of discretion for the court to overrule Llerenas-Alvarado's motion to withdraw his plea on the ground that he was not read the rights advisement under § 29-1819.02(1).

[6] Even if we were to determine Llerenas-Alvarado was not sufficiently advised of his rights under § 29-1819.02(1), failure to give the advisement is not alone sufficient to entitle a convicted defendant to have the conviction vacated and the plea withdrawn pursuant to § 29-1819.02(2). *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009). A defendant must also allege and show that he or she actually faces an immigration consequence which was not included in the advisement given. *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010).

In *Mena-Rivera*, the defendant introduced into evidence a detainer from the Department of Homeland Security stating that it had initiated an investigation to determine whether he was subject to removal from the United States. The court recognized that this was sufficient to show the defendant actually faced an immigration consequence and noted that a defendant is not required to show that immigration consequences are an absolute certainty to meet this requirement. The statute uses the word "may" as opposed to "will."

In this case, Llerenas-Alvarado's motion to withdraw did not allege that he could be subject to immigration consequences.

At the hearing on the motion to withdraw his plea, he requested that the court take judicial notice of a six-page portion of the U.S. statutes. The court took judicial notice of the section titled "Immigration and Nationality" which contains numerous provisions regarding different classes of "Deportable Aliens." See 8 U.S.C. § 1227. He did not identify which section of the statute was applicable to him. The mere introduction of pages of federal statutory language is not sufficient to find Llerenas-Alvarado alleged and showed that he is subject to an immigration consequence which was not included in the advisement given. Llerenas-Alvarado failed to meet both prongs of the test required to withdraw his plea pursuant to § 29-1819.02.

CONCLUSION

We find that the district court did not abuse its discretion in overruling Llerenas-Alvarado's motion to withdraw his plea of no contest, because Llerenas-Alvarado knowingly, intelligently, and voluntarily entered his plea, and that the advisements given by the court satisfied the requirements of § 29-1819.02. The decision of the district court is affirmed.

AFFIRMED.

JOSE LUIS AGUIRRE, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE.

828 N.W.2d 180

Filed March 12, 2013. No. A-12-493.

1. **Judgments: Res Judicata.** The applicability of the doctrine of res judicata is a question of law.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Judgments: Res Judicata.** The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action.
4. **Res Judicata.** The doctrine of res judicata rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause of action.

5. **Federal Acts: Railroads: Workers' Compensation.** The Federal Employers' Liability Act, much like the Nebraska Workers' Compensation Act, is a railroad employee's exclusive remedy for a workplace accident.
6. **Federal Acts: Railroads: Employer and Employee.** If the plaintiff is not an employee of the defendant railroad, the Federal Employers' Liability Act does not apply.
7. **Dismissal and Nonsuit: Claims.** Dismissal of a claim on the ground that the claim is not the proper remedy is not an adjudication on the merits.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Reversed and remanded.

James R. Welsh and Christopher Welsh, of Welsh & Welsh, P.C., L.L.O., for appellant.

Kyle Wallor and John M. Walker, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

RIEDMANN, Judge.

INTRODUCTION

Jose Luis Aguirre appeals the decision from the district court for Douglas County granting the motion to dismiss of Union Pacific Railroad Company (Union Pacific). The district court found Aguirre's claim was barred by the doctrine of res judicata, because he had filed a previous claim against Union Pacific based on the same set of facts. Because we find that the district court's decision Aguirre was not a Union Pacific employee was not a judgment on the merits and that therefore, res judicata does not apply, we reverse, and remand.

BACKGROUND

Aguirre filed a cause of action against Union Pacific under the Federal Employers' Liability Act (FELA) in the district court for Douglas County on December 22, 2009. Aguirre alleged that he was an employee of Union Pacific and sustained injuries in an accident which occurred on October 21, 2007, as a result of Union Pacific's negligence. The district court granted Union Pacific's motion for summary judgment, finding that Aguirre was not an employee of Union Pacific at the time of the accident.

Aguirre filed a second action in the district court for Douglas County against Union Pacific on September 27, 2011. In this claim, Aguirre sought to recover under a common-law negligence theory for the same injuries he sustained in the October 21, 2007, accident. Union Pacific filed a motion to dismiss, which the district court granted. The district court concluded that the doctrine of res judicata barred Aguirre's second action because there had been a previous judgment on the merits and both causes of action arose from the same basic facts.

Aguirre filed a motion to alter or amend the court's decision, which motion the district court denied. This timely appeal followed.

ASSIGNMENTS OF ERROR

Aguirre assigns the district court erred in (1) finding that the present claim and the FELA claim were the same cause of action, (2) finding that the prior summary judgment in the FELA claim was "'on the merits,'" and (3) dismissing the present claim on the doctrine of res judicata when the FELA claim was a mistake as to the proper remedy for his claim.

STANDARD OF REVIEW

[1,2] The applicability of the doctrine of res judicata is a question of law. See *Kiplinger v. Nebraska Dept. of Nat. Resources*, 282 Neb. 237, 803 N.W.2d 28 (2011). On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

ANALYSIS

Aguirre argues on appeal that the district court erred in applying the doctrine of res judicata to dismiss his common-law negligence action. Because the applicable law for each of Aguirre's assignments of error is the same, we address them all together.

[3,4] The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. *Cole v. Clarke*, 10 Neb.

App. 981, 641 N.W.2d 412 (2002). The doctrine of res judicata rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause of action. *Id.*

[5,6] In his first action, Aguirre claimed he was an employee of Union Pacific and sought recovery under the FELA. See 45 U.S.C. § 51 et seq. (2006). The FELA, much like the Nebraska Workers' Compensation Act, is a railroad employee's exclusive remedy for a workplace accident. See *Chapman v. Union Pacific Railroad*, 237 Neb. 617, 467 N.W.2d 388 (1991). If the plaintiff is not an employee of the defendant railroad, the FELA does not apply. See 45 U.S.C. § 51 et seq. The district court granted Union Pacific's motion for summary judgment and dismissed Aguirre's complaint, finding that he was not a Union Pacific employee. We conclude this was not a judgment on the merits.

[7] The Nebraska Supreme Court has not addressed whether a common-law negligence claim can be maintained following the dismissal of a FELA claim, but it has held that dismissal of a claim on the ground that the claim is not the proper remedy is not an adjudication on the merits. See *Warren v. County of Stanton*, 145 Neb. 220, 15 N.W.2d 757 (1944). See, also, *U.S.D. No. 464 v. Porter*, 234 Kan. 690, 676 P.2d 84 (1984) (doctrine of res judicata does not apply where remedy is denied as not being appropriate, rather than upon merits of case).

In a decision more analogous to the FELA, the Nebraska Supreme Court has addressed whether a determination by the Workers' Compensation Court that a plaintiff's injury did not arise out of the course and scope of her employment had collateral estoppel effect on a subsequent suit for negligence. See *Marlow v. Maple Manor Apartments*, 193 Neb. 654, 228 N.W.2d 303 (1975).

In *Marlow*, the plaintiff brought a workers' compensation action against her employer for injuries she sustained when she slipped outside her place of business while returning from a personal errand. The compensation court found that the injury did not occur within the course and scope of her employment and dismissed her claim. She then filed a negligence action in

district court for the same injuries. The district court granted summary judgment for her employer, finding that the action was barred because she had previously filed a workers' compensation action.

The Nebraska Supreme Court reversed, stating:

> The operative fact is one of coverage, not of election to file a claim for compensation. If coverage exists, even though for some reason compensation may not be payable, the Workmen's Compensation Act is exclusive. If the accident does not arise out of and in the course of the employment, there is no coverage, and the parties then are not subject to the act. An adjudication that an injury does not arise out of or in the course of the employee's employment is a conclusive determination only of the fact that the Workmen's Compensation Court lacks jurisdiction in the matter. This determination does not bar recourse to the tort remedy, if one exists.

Marlow, 193 Neb. at 659, 228 N.W.2d at 306.

As in *Marlow*, the operative fact in the instant case is one of coverage, not of election to file a claim for compensation. While we recognize the district court did not dismiss Aguirre's FELA claim because it lacked jurisdiction in the matter, the rationale of *Marlow* applies here because the district court determined Aguirre was not subject to the provisions of the FELA. In finding that Aguirre was not a Union Pacific employee, the district court determined the FELA was not the proper remedy. This decision was not a judgment on the merits of the claim, and Aguirre was, therefore, entitled to file a second suit under a common-law negligence theory. Accordingly, we find that the district court erred in applying the doctrine of res judicata and dismissing the action.

CONCLUSION

For the foregoing reasons, we conclude the district court erred in granting Union Pacific's motion to dismiss based on the doctrine of res judicata. Therefore, we reverse, and remand.

REVERSED AND REMANDED.

In re Estate of Donald J. Evans, deceased. Ted L. Evans, former Copersonal Representative of the Estate of Donald J. Evans, deceased, appellant, v. Mary C. Evans, former Copersonal Representative of the Estate of Donald J. Evans, deceased, et al., appellees.

827 N.W.2d 314

Filed March 12, 2013. No. A-12-527.

1. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
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. **Decedents' Estates: Words and Phrases.** When there are surviving nieces and nephews of a deceased person who has left no living issue or parent, these nieces and nephews are issue of the parents under Neb. Rev. Stat. § 30-2303 (Reissue 2008), pursuant to Neb. Rev. Stat. § 30-2209(23) (Cum. Supp. 2012).
4. ____: ____. Neb. Rev. Stat. § 30-2306 (Reissue 2008) provides the operative definition of the phrase "by representation," as used in Neb. Rev. Stat. § 30-2303(3) (Reissue 2008).
5. **Decedents' Estates.** Pursuant to Neb. Rev. Stat. § 30-2306 (Reissue 2008), the probate court is required to divide the estate into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent.
6. **Decedents' Estates: Words and Phrases.** The difference between strict per stirpes and modern per stirpes is the generation at which shares of the estate are divided: Strict per stirpes begins at the generation closest to the decedent, regardless of whether there are any surviving individuals in that generation, whereas modern per stirpes begins at the first generation where there is living issue.
7. **Decedents' Estates.** Neb. Rev. Stat. § 30-2306 (Reissue 2008) is modeled after the original Uniform Probate Code, which adopted a form of modern per stirpes.
8. ____. An oral request via testimony does not equate to filing a petition for removal of a personal representative for cause under Neb. Rev. Stat. § 30-2454(a) (Reissue 2008).
9. **Decedents' Estates: Notice.** The presence of interested persons at a hearing does not equate to notice to a personal representative that his or her status is at issue under Neb. Rev. Stat. § 30-2454(a) (Reissue 2008).
10. **Decedents' Estates: Executors and Administrators.** Taken together, Neb. Rev. Stat. §§ 30-2454 and 30-2457 (Reissue 2008) set forth the procedure by which to suspend and remove a personal representative and appoint a special administrator.

11. **Decedents' Estates.** When the procedural steps under Neb. Rev. Stat. § 30-2454 (Reissue 2008) to remove a personal representative before appointing a successor personal representative are not followed by the petitioner, the probate court cannot remove the personal representative, particularly because service of the removal petition on the personal representative results in statutory restrictions on the personal representative's ability to act on behalf of the estate during the pendency of a removal petition.

Appeal from the County Court for Lincoln County: MICHAEL E. PICCOLO, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Christopher S. Bartling, of Bartling & Hinkle, P.C., for appellant.

Kent E. Florom, of Lindemeier, Gillett & Dawson, for appellees Mary C. Evans and Susan Evans Olson.

Steven P. Vinton, of Bacon & Vinton, L.L.C., pro se.

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

SIEVERS, Judge.

FACTUAL BACKGROUND

The decedent, Donald J. Evans, died intestate on October 2, 2011. At the time of his death, Donald was domiciled in Wallace, Nebraska. Donald was not married at the time of his death, and he had no surviving children or issue. Donald's parents were deceased at the time of his death. Donald had three brothers, Robert Evans, Stewart Evans, and Frederick Evans, but all three brothers predeceased Donald. Of the brothers, Robert did not have any children. Stewart had three children: Susan Evans Olson (Susan), Anna Evans, and Mary C. Evans. Anna predeceased Donald and did not have any children. Frederick had two children: Ted L. Evans and John Evans. John predeceased Donald and did not have any children. Thus, Donald was survived by nieces Susan and Mary (via Stewart) and nephew Ted (via Frederick).

PROCEDURAL BACKGROUND

On March 8, 2012, Ted filed a petition for a formal adjudication of intestacy, a determination of heirs, and an appointment

of a personal representative of Donald's estate. Ted alleged that a statement of informal probate was entered on November 1, 2011, appointing Ted and Mary as copersonal representatives of the estate. Although the appointment does not appear in our record, their prior appointment as copersonal representatives is an undisputed fact. In his petition, Ted nominated himself as the sole personal representative of the estate and alleged that he had priority status as an heir entitled to at least 50 percent of the estate as a resident of Nebraska, whereas Susan and Mary were Colorado residents.

On March 23, 2012, Mary filed an objection and responsive pleading, alleging that Ted was not entitled to 50 percent of the estate. Mary asked that the court continue its appointment of copersonal representatives, as entered on November 1, 2011, and that it make a determination as to the share to which each heir is entitled. Mary did not petition for Ted's removal as copersonal representative.

A hearing was held on April 16, 2012, on Ted's petition for formal adjudication. Ted testified on direct examination that he believed Donald died without a will. However, on cross-examination, Ted testified that Donald set up a will in 2010 with a bank, but that Donald tore up the will in September 2011, a month prior to his death. Ted testified that he, along with the bank officer who wrote the will, was present when Donald tore up his will. Ted testified that Donald also had the bank draw up a trust, but that he tore the trust document up at the same time he tore up his will. Exhibits 2 and 3, copies of Donald's destroyed will and trust, were received into evidence, but are not part of the requested bill of exceptions. Ted testified that exhibits 2 and 3 were copies of the documents that Donald had torn up. He also agreed that under the will and trust documents that were torn up, the estate was to be divided one-third each to Susan, Mary, and Ted. There is no claim in this appeal that either of such documents is effective.

Ted testified that as copersonal representative, he sent Mary various requests to sign checks to reimburse Ted for various expenses, including expenses incurred prior to Donald's death and expenses for Donald's funeral. Some of the expenses incurred prior to Donald's death included hotel rooms for Ted

and his wife to be close to Donald, such as when Donald was in the hospital. Ted testified that he asked Mary to sign off on a total of $5,600 to $5,700 worth of reimbursements to him. While Ted did not testify that Mary refused the requests for reimbursements, Mary later testified that she did in fact refuse such requests. Ted asked the court to appoint him to be the sole personal representative of Donald's estate.

Mary testified that a preliminary inventory of Donald's estate showed a value of $2.9 to $3 million. Mary testified that Ted sent bills to her and wanted her to sign off on checks so that he could be paid for various claims that he had filed. Mary testified that she was reluctant to sign because some of the bills seemed to be duplicative or did not pertain to estate business. Mary also testified that she did not sign the estate inventory sent to her by Ted's attorney because she felt there were some omissions and because she and her attorney were trying to investigate. Mary testified that she had also not yet signed the paperwork to transfer certain stock to the estate—she stated that she had not refused to sign the paperwork, but, rather, that she had not signed it yet. She also testified that she and Ted each proposed a different bank for the estate account. Mary testified that she had no personal communication with Ted and that they each have an attorney.

Mary testified that she has been an officer-director and coowner of an investment advisory firm in Denver, Colorado, for the past 20 years. She testified that her firm manages "high, aggressive growth portfolios" and that they "invest them in securities for high net growth and ultra high net worth clients." Mary testified that she holds a securities license as a stockbroker or advisor. Mary testified that Ted lacks the securities experience needed for an estate as large as Donald's. While Mary initially testified that she would like to continue as copersonal representative of the estate, she later verbally asked during her testimony that the court appoint her to be the sole personal representative or, in the alternative, that the court appoint a neutral third party. Finally, Mary testified that she objects to Ted's claim that he is entitled to 50 percent of the estate. She thinks that the estate should be divided one-third each to Susan, Mary, and Ted.

In its journal entry and order filed on May 31, 2012, the county court found that Donald died intestate on October 2, 2011. The court found that prior to his death, Donald executed a last will and testament and the "Donald J. Evans Revocable Trust" (exhibits 2 and 3), but that the documents were allegedly destroyed by Donald. Therefore, the court determined that the estate would be divided in accordance with the provisions of intestate succession as set out in Neb. Rev. Stat. § 30-2303 (Reissue 2008). The court stated that in accordance with § 30-2303(5) relative to intestate succession, "'if there is no surviving issue, parent, issue of a parent, grandparent or issue of a grandparent, the entire estate passes to the next of kin in equal degree.'" The court determined that Susan, Mary, and Ted were Donald's "'next of kin'" and that each heir stands in equal degree of kinship to the other. The court specifically found and ordered that under § 30-2303, Susan, Mary, and Ted shall each inherit one-third of the entire estate.

The court noted that Ted and Mary had previously accepted appointment as copersonal representatives. However, the court found that Ted and Mary were "annoyed" with each other, that communication between them had in essence stopped, and that any interaction had been handled through their respective attorneys. The court found that the conflict substantially hinders the administration of the estate and removed them both as copersonal representatives. The court, citing Neb. Rev. Stat. §§ 30-2412(b)(2) and 30-2456 (Reissue 2008), appointed Steven P. Vinton, an attorney, as successor personal representative. Ted appeals.

ASSIGNMENTS OF ERROR

Ted assigns, restated, that the trial court erred in (1) determining that the estate passes to Susan, Mary, and Ted in equal shares; (2) removing Ted as a personal representative; and (3) appointing a successor personal representative who does not have priority for appointment.

STANDARD OF REVIEW

[1,2] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Estate of*

Cooper, 275 Neb. 322, 746 N.W.2d 663 (2008). On a question of law, however, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id*.

ANALYSIS

Division of Donald's Estate.

Ted's first assignment of error is that the trial court erred in determining that the estate passes to the next of kin in equal shares. All of the parties, including Ted, Mary, and Vinton, agree that § 30-2303 applies, which statute provides:

> The part of the intestate estate not passing to the surviving spouse under section 30-2302, or the entire intestate estate if there is no surviving spouse, passes as follows:
>
> (1) to the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation;
>
> (2) if there is no surviving issue, to his parent or parents equally;
>
> (3) if there is no surviving issue or parent, to the issue of the parents or either of them by representation;
>
> (4) if there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half;
>
> (5) if there is no surviving issue, parent, issue of a parent, grandparent or issue of a grandparent, the

> entire estate passes to the next of kin in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through a more remote ancestor.

[3] All parties agree that § 30-2303(3) applies and that the entire estate passes to the issue of the parents by representation. Further, the parties agree that the trial court incorrectly applied § 30-2303(5) after finding that there was no issue of the parents. The trial court failed to identify Susan, Mary, and Ted as the issue of Donald's parents. Susan, Mary, and Ted, as the three surviving grandchildren of Donald's parents, are the "issue of the parents" of Donald. "Issue of a person means all his or her lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in the Nebraska Probate Code." Neb. Rev. Stat. § 30-2209(23) (Cum. Supp. 2012). Thus, it is clear from the record that § 30-2303(3) controls and that Donald's entire estate should be distributed to the issue of his parents, by representation.

Ted claims that Susan, Mary, and he should take proportionate shares of the estate by representation, with Susan and Mary each inheriting one-quarter of the estate through their deceased father and Ted inheriting one-half of the estate through his deceased father. Ted reaches this result because § 30-2303(3) states that the issue of the parents take "by representation," rather than providing that issue take when they are "next of kin in equal degree," as provided in § 30-2303(5). Mary counters that the estate is to be divided equally among the surviving heirs in the nearest degree of kinship, with Susan, Mary, and Ted each receiving an equal one-third share because they all have the same degree of kinship to Donald.

[4,5] Neb. Rev. Stat. § 30-2306 (Reissue 2008) provides the operative definition of the phrase "by representation," as used in § 30-2303(3), as follows:

> If representation is called for by this code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in

> the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner.

Ted argues § 30-2306 means that the surviving issue of Stewart, namely Susan and Mary, would receive one share and that he, as the sole surviving issue of Frederick, would receive one share. Ted's end result would have Susan and Mary splitting Stewart's one-half share and Ted receiving Frederick's one-half share.

Ted misapplies § 30-2306. The portion applicable to our facts here provides: "If representation is called for by this code, the estate is divided into as many shares as there are *surviving heirs in the nearest degree of kinship* . . . ." § 30-2306 (emphasis supplied). Because none of Donald's brothers survived him, there are no surviving heirs in the nearest degree of kinship, namely Donald's siblings. Thus, the probate court must look to the next degree of kinship, or the next generation, which contains at least one surviving heir. The first generation which has living issue is composed of Donald's parents' grandchildren, who also are Donald's two nieces and his nephew. There must be at least one survivor in a degree of kinship. Here, because none of Donald's siblings survived him, the nearest degree of kinship to him containing a survivor was the generation containing two nieces and a nephew. And we note that Donald had no deceased nieces or nephews who have surviving issue. Susan, Mary, and Ted, who are all in an equal degree of kinship to one another, should, therefore, each receive a one-third share.

Ted relies on *In re Estate of Tjaden*, 225 Neb. 19, 402 N.W.2d 288 (1987), for the proposition that the term "right of representation" under Nebraska law means distribution on a per stirpes basis, resulting in a 50-percent share. However, *In re Estate of Tjaden* involved the construction of a testator's intent where there was a will and, thus, is distinguishable:

> "This Court is of the opinion that the clear intent of the testator was to provide for a division by a 'per stirpes' division among identified beneficiaries, their issue or

> descendents. Clearly, the decedent intended to divide her estate, after specific requests [sic], equally among her brothers and sisters and the issue of deceased brothers and sisters or the issue of deceased issue of deceased brothers and sisters. . . ."

225 Neb. at 22, 402 N.W.2d at 291. The *In re Estate of Tjaden* court quotes *Gaughen v. Gaughen*, 172 Neb. 740, 112 N.W.2d 285 (1961), for the description of distribution per stirpes:

> "Distribution per stirpes is a division with reference to the intermediate course of descent from the ancestor. It gives the beneficiaries each a share in the property to be distributed, not necessarily equal, but[, rather,] the proper fraction of the fraction to which the person through whom he claims from the ancestor would have been entitled."

225 Neb. at 27, 402 N.W.2d at 293. The court concludes, "in a per stirpes distribution, ordinarily applicable in an intestate's estate, there is a division of property among a class or group of distributees who take the share which a decedent would have taken if such decedent were alive, taking such share by the right of representing the decedent." *Id.* at 28, 402 N.W.2d at 294.

[6] The parties are all applying a form of distribution traditionally referred to as "per stirpes distribution" in interpreting the words "by representation" found in § 30-2303(3) and defined in § 30-2306, but Ted is applying the older version of per stirpes distribution, referred to as "strict per stirpes," "classic per stirpes," or "English per stirpes." Mary and Vinton are applying the modern version of per stirpes distribution, referred to as "modern per stirpes," "modified per stirpes," or "American per stirpes." These terms are well explained in Samuel B. Shumway, Note, *Intestacy Law—the Dual Generation Dilemma—Wyoming's Interpretation of Its 130-Year-Old Intestacy Statute*. Matter of Fosler*, 13 P.3d 686 (Wyo. 2000)*, 2 Wyo. L. Rev. 641 (2002). We borrow liberally from that article and summarize as follows: The difference between strict per stirpes and modern per stirpes is the generation at which shares of the estate are divided. Strict per stirpes begins at the generation closest to the decedent,

regardless of whether there are any surviving individuals in that generation, whereas modern per stirpes begins at the first generation where there is living issue. Thus, the distinction between strict per stirpes and modern per stirpes will be most evident in instances where all of the heirs in the closest degree of kinship are deceased. In the present case, as earlier detailed, all of Donald's closest heirs, his parents and siblings, were deceased at the time of his death, and thus, the next generation with living members is Donald's parents' grandchildren: Susan, Mary, and Ted. Shumway concludes that although the strict per stirpes system was the early standard for America, the majority of states now follow a different system of distribution.

[7] According to Shumway's article, 23 states have adopted some variation of modern per stirpes distribution, including Nebraska. Shumway explains that the distinction between modern per stirpes and strict per stirpes is that, in the latter system, the estate is divided into shares at the generation nearest the decedent regardless of whether there are living members, whereas in modern per stirpes, the estate is divided into equal shares at the nearest generation with surviving heirs. Nebraska is one of the 23 states that has adopted some variation of modern per stirpes distribution, because it has adopted the original 1969 Uniform Probate Code, a form of modern per stirpes. See Shumway, *supra*. See, also, 1974 Neb. Laws, L.B. 354. Section 30-2306 is modeled after the original Uniform Probate Code. See Unif. Probate Code, rev. art. II, § 2-106, 8 (part I) U.L.A. (1998). In comparing the language of the two provisions, they are the same. See, Restatement (Third) of Property: Wills and Other Donative Transfers § 2.3 (1999); Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century's End*, 88 Cal. L. Rev. 1877, 1904-05 (2000) ("a modernized *per stirpes* (or taking 'by right of representation' with the representation beginning with equal division in the nearest descendant generation in which there are living members (the 'stock' generation) with representation thereafter for deceased members' issue) has come to be the prevalent current view, with reinforcement from the original (1969) Uniform Probate Code").

Therefore, in the end, it is clear that the county court applied the incorrect statutory provision, but achieved the correct result. The probate court applied § 30-2303(5) when it should have applied § 30-2303(3), because the parents of Donald did have surviving issue as defined in § 30-2209(23). Susan, Mary, and Ted each take a one-third share of the estate, as they take by representation as defined in § 30-2306. Therefore, we affirm the county court's division of Donald's estate.

Removal of Personal Representative.

Ted's second assignment of error is that the trial court should not have removed him as a personal representative. Neb. Rev. Stat. § 30-2454 (Reissue 2008) provides in part:

> (a) A person interested in the estate may petition for removal of a personal representative for cause at any time. Upon filing of the petition, the court shall fix a time and place for hearing. Notice shall be given by the petitioner to the personal representative, and to other persons as the court may order. Except as otherwise ordered as provided in section 30-2450, after receipt of notice of removal proceedings, the personal representative shall not act except to account, to correct maladministration or preserve the estate. If removal is ordered, the court also shall direct by order the disposition of the assets remaining in the name of, or under the control of, the personal representative being removed.

[8] While the statute continues on to discuss cause for removal, we need not discuss that portion given the result we reach. Ted petitioned for appointment as the sole personal representative on March 8, 2012. On March 23, Mary filed an objection to the appointment of Ted as the sole personal representative and requested that the court continue its appointment of copersonal representatives, as entered on November 1, 2011. Mary never filed a petition to remove Ted as copersonal representative. During her testimony at the April 16, 2012, hearing, Mary said she wanted the court to appoint her sole personal representative or, in the alternative, to appoint a third party. But, before that statement, she testified she would like to continue as copersonal representative with Ted. Ted argues

that her oral request via her testimony does not equate to filing a petition for his removal as a personal representative pursuant to § 30-2454(a), and we agree. Moreover, because no petition was filed seeking Ted's removal, the court did not fix a time and place for a hearing nor give notice to Ted that his status as a personal representative was at issue in the hearing on April 16, 2012.

[9] Mary asserts that all surviving heirs were present before the trial court at the hearing on April 16, 2012, and that therefore, notice to Ted was satisfied under § 30-2454(a). But the presence of interested people does not equate to notice that Ted's removal as copersonal representative was an issue before the court to be tried and decided that day. Mary also points out that the trial court heard testimony from both copersonal representatives before finding that removal of both copersonal representatives was necessary for the estate to move forward. Mary claims that such action is authorized by § 30-2412(f). Mary also asserts that Ted did not object to the request to remove him as copersonal representative, an argument which begs the question given that she did not petition for his removal, and in any event, what was actually before the court via a proper petition was Ted's request that he be the sole personal representative—a request that necessarily asks for Mary's removal.

[10,11] The procedural steps under § 30-2454 to remove a personal representative before appointing a successor personal representative were not followed by Mary, and in the absence of a petition for Ted's removal and a notice and hearing thereupon, the court could not remove him as a personal representative. Taken together, § 30-2454 and Neb. Rev. Stat. § 30-2457 (Reissue 2008) set forth the procedure by which to suspend and remove a personal representative and appoint a special administrator. See *In re Estate of Cooper*, 275 Neb. 322, 746 N.W.2d 663 (2008). The requirement for the filing of a petition for removal of a personal representative takes on added importance given that under § 30-2454, service of the removal petition on the personal representative results in statutory restrictions on the personal representative's ability to act on behalf of the estate during the pendency of a removal

petition. We hold that the county court erred in ordering the removal of Ted as copersonal representative, because the statutorily mandated procedure for doing so was not followed, and thus the court lacked the power to order his removal. We reverse the order removing Ted as copersonal representative of Donald's estate.

Appointment of Successor Personal Representative.

Ted's third assignment of error is that the trial court should not have appointed a personal representative without priority. Because we have found that Ted was improperly removed as copersonal representative, it is clear that the successor personal representative was not properly appointed. Thus, as an adjunct of the finding of the improper removal of Ted, it necessarily follows that the order appointing Vinton as successor personal representative must be reversed. We should note Mary did not cross-appeal her removal as copersonal representative and, therefore, that portion of the county court's order stands.

CONCLUSION

Although the trial court incorrectly applied § 30-2303(5), the correct end result was reached with regard to the distribution of Donald's estate. Susan, Mary, and Ted are each entitled to a one-third share of the estate. Further, we find that the trial court improperly removed Ted as copersonal representative, and as a result, Ted remains personal representative of Donald's estate. The order appointing Vinton as successor personal representative is reversed. We remand the cause to the county court for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

[By order of the court on May 29, 2013, *Tuttle v. Bunge Milling*, 20 Neb. App. 615, 828 N.W.2d 183 (2013), withdrawn. (Pages 616-33 omitted.)]

YASIEL ISAAC HERNANDEZ, APPELLEE AND CROSS-APPELLANT, V. JBS USA, L.L.C., APPELLANT AND CROSS-APPELLEE.

828 N.W.2d 765

Filed March 26, 2013. No. A-12-435.

1. **Workers' Compensation.** The Workers' Compensation Court may not award vocational rehabilitation benefits until the applicant is at maximum medical improvement and the court makes a finding of permanent impairment.
2. **Workers' Compensation: Appeal and Error.** The findings of fact made by a workers' compensation judge on original hearing are reviewed for clear error.
3. **Workers' Compensation.** Employees who are entitled to workers' compensation benefits remain entitled to workers' compensation benefits if their employment is subsequently terminated.
4. **Employment Security: Workers' Compensation.** Neb. Rev. Stat. §§ 48-130, 48-147, and 48-628 (Reissue 2010) advise that unemployment benefits should not be deducted from a workers' compensation award.
5. **Workers' Compensation: Liability.** Benefits secured by an injured employee from collateral sources are not to be considered in fixing compensation under the Nebraska Workers' Compensation Act, nor are they to affect liability for compensation to the injured employee.
6. **Employment Security: Workers' Compensation.** Neb. Rev. Stat. § 48-628(5)(b) (Reissue 2010) of the Employment Security Law disqualifies a person from receiving unemployment benefits while receiving compensation for temporary disability under the Nebraska Workers' Compensation Act, unless the amount of workers' compensation benefits is less than the amount recoverable for unemployment.
7. ____: ____. The ability to offset the amount of unemployment benefits by the amount of workers' compensation benefits paid to an injured employee does not permit the converse.
8. ____: ____. When read together, Neb. Rev. Stat. §§ 48-130 and 48-628 (Reissue 2010) suggest that if an individual qualifies for both workers' compensation benefits and unemployment benefits, workers' compensation benefits should be paid and unemployment benefits should cease.
9. **Workers' Compensation: Liability.** The Nebraska Workers' Compensation Act holds an employer liable for an employee's job-related injury and requires the employer to compensate the employee so long as the employee is not willfully negligent.
10. **Workers' Compensation.** The Nebraska Workers' Compensation Act is remedial in nature, and its purpose is to do justice to workers.
11. **Employment Security: Workers' Compensation.** Neb. Rev. Stat. § 48-628 (Reissue 2010) disqualifies individuals from receiving unemployment compensation from the Unemployment Compensation Fund if they are receiving workers' compensation temporary disability benefits.
12. **Workers' Compensation.** The Nebraska Workers' Compensation Act prohibits an employer from considering benefits derived from any other source than those

paid or caused to be paid by the employer when determining the amount of workers' compensation benefits to be paid.

Appeal from the Workers' Compensation Court: J. MICHAEL FITZGERALD, Judge. Affirmed in part, and in part reversed and remanded.

Abigail A. Wenninghoff, of Larson, Kuper & Wenninghoff, P.C., L.L.O., for appellant.

Lee S. Loudon and Ami M. Huff, of Law Office of Lee S. Loudon, P.C., L.L.O., for appellee.

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

RIEDMANN, Judge.

INTRODUCTION

JBS USA, L.L.C. (JBS), appeals the Workers' Compensation Court's award of temporary partial disability benefits and a vocational rehabilitation evaluation to Yasiel Isaac Hernandez. Hernandez cross-appeals.

On appeal, JBS argues that (1) the trial court should not have awarded a vocational rehabilitation evaluation because Hernandez is not at maximum medical improvement (MMI) and (2) Hernandez is not entitled to workers' compensation benefits because he voluntarily abandoned his job. Hernandez concedes that the court erred in awarding a vocational rehabilitation evaluation, and we agree. Therefore, we reverse that portion of the award. We affirm, however, the award of other benefits, because we find that the court did not err in finding that JBS terminated Hernandez' employment.

Hernandez argues on cross-appeal that the court erred in reducing the amount of his workers' compensation benefits by the amount he was receiving in unemployment benefits. We agree and reverse the reduction of benefits.

BACKGROUND

Hernandez began working for JBS in January 2009. He sustained injuries in the course of his duties on three different occasions. In June 2009 and January 2010, Hernandez injured his back when large pieces of meat, which were hanging from

a chain and swinging back and forth, struck him from behind. In November 2010, he aggravated his back injury while pushing a cow carcass. Both parties agree that Hernandez sustained these injuries in the course of his duties at JBS.

Hernandez' Job Duties and Injuries.

Hernandez filed his first report of an alleged occupational injury or illness with the Workers' Compensation Court in January 2010. That month, a 3-foot-wide piece of meat struck him in the back while he was working. He reported the incident to JBS, and JBS sent him to see Dr. Douglas Herbek. Dr. Herbek assigned restrictions prohibiting Hernandez from bending over or twisting and referred him to Dr. Steven Volin. Dr. Volin restricted repetitive bending, lifting, twisting, and stooping.

In June 2010, Hernandez underwent an MRI examination that showed several mild degenerative abnormalities including stenosis, hypertrophy, bulging, disk disease, and a small tear. A handwritten note on the back of his medical file says: "NO Bending or Lifting at all," and "NO Twisting of Back." The note also says that orders were given to "Kim" at JBS.

In October 2010, JBS reduced Hernandez' duties to a light-duty job "stamping carcasses." This job required Hernandez to put a stamp on each carcass as it passed by his position on the line.

In November 2010, Hernandez reported another injury after experiencing pain in his back and leg when a carcass hanging from a chain "jammed" while he was pushing it. That same month, Hernandez underwent a functional capacity evaluation (FCE). His FCE showed he could perform activities within the medium physical demand level so long as he restricted "[f]orward bending through end range of motion . . . to an occasional basis," 1 to 33 percent of the day, and "forward bending through mid range of motion on a frequent basis," 34 to 66 percent of the day. The FCE also limited squatting to a frequent basis, 34 to 66 percent of the day. In its response to Hernandez' request for admissions, JBS admitted that Hernandez should minimize repetitive bending maneuvers and that it should follow the FCE findings. In JBS'

"Employee Restricted/Modified Duty Form," JBS adopted the FCE's restrictions, including the restrictions on bending, as Hernandez' official restrictions.

In February 2011, JBS added "tail tucking" to Hernandez' duties. This change required him to "stamp the cow and then . . . grab the tail and squat down and hide the tail." At trial, Hernandez testified he tucked around 3,500 tails each day, requiring him to bend over repetitively. Maxamed Xasan, JBS' human resources manager, disagreed with Hernandez' calculations, testifying that Hernandez had to tuck only 2,300 to 2,500 tails per day. Hernandez testified that the job was outside his work restrictions because he had to squat down and bend over constantly.

Hernandez' Termination From JBS.

Shortly after assigning Hernandez the extra duty, JBS terminated his employment. The parties dispute the events surrounding the termination. Hernandez testified that he told his supervisor that the "tail tucking" job was outside his restrictions and was hurting his back. Hernandez said that JBS terminated his employment for complaining and that he has not worked since. He testified that he talked with Xasan, the human resources manager, 3 days after his employment was terminated and that Xasan told him that the supervisors did not want him at JBS any longer. Hernandez denied that Xasan offered to help him find another position or offered to evaluate the job to see if it was within his restrictions.

Xasan testified that JBS initially suspended Hernandez for 2 to 3 days because he refused to tuck tails after he was told to do so. When Hernandez returned to work after the suspension, Xasan explained to Hernandez, in the presence of JBS' superintendent, why he was suspended. Xasan testified that Hernandez told him he believed his job was outside of his restrictions. According to Xasan, the superintendent believed the job was within Hernandez' restrictions.

Xasan testified that he told Hernandez to "go down to the floor [and] start working" and someone would evaluate the job to see if it was within Hernandez' restrictions. Xasan testified that Hernandez refused to go back to work. Xasan said he

explained to Hernandez that he would likely be terminated if he continued to refuse.

Xasan testified by deposition that he did not have a chance to talk to Hernandez' supervisor about the issue because after Hernandez refused to return to the floor, it "was the end of that whole deal because he was refusing to work." He also stated in his deposition that he had no knowledge of Hernandez' restrictions. He stated that if Hernandez had returned to work, he would have met with the safety monitor to "follow the process, but [he] never had a chance to do anything like that." JBS' "Employment Termination Checklist" sheet states the reason for Hernandez' termination was "Refus[al] to do work." On the checklist, there is a checkmark in the box next to the word "In-voluntary."

JBS' ergonomics manager testified that part of her job involved tracking individuals, including Hernandez, who are placed on light-duty work to determine whether their duties needed to be modified. She stated that she observed Hernandez daily and frequently checked in with him. She testified that she told him he could report any concerns he had about his restrictions to her and that he never complained about his duties.

Posttermination Medical Care.

At the request of JBS, Dr. David Benavides examined Hernandez in February 2011. Dr. Benavides diagnosed Hernandez with a "[l]umbar strain superimposed on an early degenerative disk phenomenon." He suggested that Hernandez lose weight and begin a stretching program as well as minimize repetitive bending maneuvers. Dr. Benavides wrote that Hernandez "would do better in a position of working between the waist and shoulders." JBS agreed with Dr. Benavides' diagnosis and recommendations.

Hernandez saw Dr. Timothy Burd in March 2011. Dr. Burd noted that all conservative treatment options had been exhausted and recommended an "anterior lumbar muscle sparing interbody fusion at L5-S1." As of the date of trial, Hernandez had not undergone surgery and had not yet reached MMI.

In March 2011, Hernandez filed his workers' compensation action seeking past and future medical expenses and temporary disability benefits. At trial, Hernandez testified that he was receiving $268 per week in unemployment compensation.

The Workers' Compensation Court awarded Hernandez past and future medical expenses, a vocational rehabilitation evaluation, intermittent temporary total disability benefits, and temporary partial disability benefits beginning on March 1, 2011. The court determined that Hernandez was entitled to temporary total disability benefits from March 1, but that the amount should be reduced by the amount of unemployment benefits Hernandez was receiving, resulting in temporary partial benefits instead of temporary total benefits. This timely appeal and cross-appeal followed.

ASSIGNMENTS OF ERROR

On appeal, JBS argues that the trial court erred in awarding (1) a vocational rehabilitation evaluation and (2) temporary disability benefits. Hernandez argues on cross-appeal that the trial court erred in reducing his disability benefits by the amount of unemployment benefits he was receiving.

ANALYSIS

Awarding Vocational Rehabilitation Before MMI.

The parties agree that the trial court erred as a matter of law in awarding a vocational rehabilitation evaluation because Hernandez was not at MMI. We agree.

[1] A trial court may not award vocational rehabilitation benefits until the applicant is at MMI and the court makes a finding of permanent impairment. See *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002). Because the trial court determined that Hernandez was not at MMI, the trial court erred as a matter of law in awarding a vocational rehabilitation evaluation; therefore, we reverse this portion of the award.

Voluntary Abandonment.

[2] JBS argues that the trial court did not make a finding as to whether Hernandez abandoned his job and erred as a matter

of law in awarding temporary disability benefits after March 1, 2011, because Hernandez voluntarily abandoned his job. We find that the trial court did make a supportable finding that Hernandez did not voluntarily abandon his job. The findings of fact made by a workers' compensation judge on original hearing are reviewed for clear error. See *Hale v. Standard Meat Co.*, 251 Neb. 37, 554 N.W.2d 424 (1996).

[3] We note that employees who are entitled to workers' compensation benefits remain entitled to workers' compensation benefits if their employment is subsequently terminated. See, *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000); *Aldrich v. ASARCO, Inc.*, 221 Neb. 126, 375 N.W.2d 150 (1985). Thus, if JBS terminated Hernandez from his position, Hernandez remained eligible for disability benefits.

The trial court found that Hernandez stamped carcasses until

> early February of 2011 when he was required to not only stamp carcasses, but also to tuck tails. When [Hernandez] tucked tails, he had to bend. [Hernandez] claimed the bending hurt and that he was unable to do the job of tucking tails because of back pain. [JBS] argues that the job was within the restrictions of the [FCE]. The finding is that bending was limited by the physicians. [Hernandez] testified that he was unable to do the job without bending. [Hernandez] is entitled to temporary partial benefits beginning March 1, 2011.

Although JBS is correct that the trial court did not explicitly make a finding as to whether or not Hernandez voluntarily abandoned his job, the trial court did make specific findings that the job requirements were outside of Hernandez' restrictions. The evidence supports this finding.

Hernandez testified that the job required him to squat or bend over repetitively. Hernandez' bending was restricted by the FCE and all the physicians, including Dr. Benavides, whose findings JBS conceded should be followed.

JBS argues that it does not matter whether or not the job violated Hernandez' work restrictions, because Xasan, the human resources manager, offered to accommodate him. Hernandez denied that JBS made this offer. The trial court had discretion

to believe Hernandez' testimony and reject that of Xasan. See *Estate of Coe v. Willmes Trucking*, 268 Neb. 880, 689 N.W.2d 318 (2004). Therefore, the trial court was not clearly wrong in finding Hernandez' employment was terminated.

Finally, JBS itself did not consider Hernandez to be leaving voluntarily. Instead, JBS checked the box for an involuntary termination on its "Employment Termination Checklist" sheet. Hernandez did not voluntarily abandon his job; he was terminated from it. Because Hernandez was terminated from his position, the trial court did not err in awarding temporary disability benefits.

Cross-Appeal.

Hernandez argues on cross-appeal that the Workers' Compensation Court erred as a matter of law in reducing Hernandez' temporary total disability benefits due to his receipt of contemporaneous unemployment benefits. We agree.

Nebraska's Employment Security Law and the Nebraska Workers' Compensation Act are different forms of wage-loss legislation designed to restore a worker to a portion of his lost wages. See 9 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 157.01 (2007). Both pieces of legislation are designed to satisfy the goal of restoring a portion of a worker's wage, but they do not provide specifically for coordination of benefits. See, Neb. Rev. Stat. § 48-101 et seq. (Reissue 2010 & Cum. Supp. 2012); Neb. Rev. Stat. § 48-601 et seq. (Reissue 2010 & Cum. Supp. 2012); 9 Larson & Larson, *supra*, § 157.02.

Professor Larson's treatise notes that the majority of unemployment statutes deny benefits to someone receiving workers' compensation, but that workers' compensation laws generally do not contain a specific provision denying workers' compensation benefits to those receiving unemployment benefits. 9 Larson & Larson, *supra*. When an employee receiving unemployment benefits petitions the court for workers' compensation, the court faces an "awkward problem: The obvious legislative intention is to prevent dual benefits, but the specific act before the court—the workers' compensation act—contains no authorization for reduction of benefits on this ground." *Id*. at

157-4. The optimal solution is to have the Legislature coordinate the benefits.

[4] In Nebraska, the Legislature has addressed the coordination of unemployment benefits and workers' compensation benefits in §§ 48-130, 48-147, and 48-628. These statutes advise that unemployment benefits should not be deducted from a workers' compensation award. Section 48-130 states:

> No savings or insurance of the injured employee or any contribution made by him or her to any benefit fund or protective association independent of the Nebraska Workers' Compensation Act shall be taken into consideration in determining the compensation to be paid thereunder; nor shall benefits derived from any other source than those paid or caused to be paid by the employer as herein provided be considered in fixing compensation under such act.

Section 48-147 likewise provides:

> [L]iability for compensation under [the Nebraska Workers' Compensation Act] shall not be reduced or affected by any insurance of the injured employee, or any contribution or other benefit whatsoever, due to or received by the person entitled to such compensation, and the person so entitled shall, irrespective of any insurance or other contract, have the right to recover the same directly from the employer . . . .

[5] The Nebraska Supreme Court has interpreted these statutes to mean that "benefits secured by an injured employee from collateral sources are not to be considered in fixing compensation under the Workmen's Compensation Act, nor are they to affect liability for compensation to the injured employee." *Maxey v. Fremont Department of Utilities*, 220 Neb. 627, 634, 371 N.W.2d 294, 300 (1985).

The amounts Hernandez received in unemployment benefits were paid from a collateral source, the Unemployment Compensation Fund, pursuant to the Employment Security Law. See § 48-601 et seq.

[6] Section 48-628(5)(b) of the Employment Security Law disqualifies a person from receiving unemployment benefits while receiving compensation for temporary disability under

the Nebraska Workers' Compensation Act, unless the amount of workers' compensation benefits is less than the amount recoverable for unemployment. In that situation, the employee is entitled to receive the difference.

[7,8] The ability to offset the amount of unemployment benefits by the amount of workers' compensation benefits, however, does not permit the converse. We find no provision in the Nebraska Workers' Compensation Act that limits an employee's ability to receive workers' compensation benefits because he or she is simultaneously receiving unemployment benefits. Rather, when read together, §§ 48-130 and 48-628 suggest that if an individual qualifies for both workers' compensation benefits and unemployment benefits, workers' compensation benefits should be paid and unemployment benefits should cease.

The Michigan appellate courts, interpreting statutes similar to §§ 48-130, 48-147, and 48-628, reached the same conclusion. See *Maner v Ford Motor Co*, 196 Mich. App. 470, 493 N.W.2d 909 (1992), *affirmed* 442 Mich. 620, 502 N.W.2d 197 (1993). In *Maner*, the Michigan Court of Appeals reviewed various prior decisions involving the setoff of workers' compensation benefits. It concluded that the operative language for determining whether an employer could set off workers' compensation benefits was whether the collateral benefits were "'caused to be paid by the employer *as provided in the act*.'" 196 Mich. App. at 482, 493 N.W.2d at 917.

Section 48-130 contains a similar requirement that only payments made by the employer as provided in the act may be considered in determining the amount of workers' compensation benefits due. It states, in part, "nor shall benefits derived from any other source than those paid or caused to be paid by the employer as herein provided be considered in fixing compensation under such act." *Id*.

Other jurisdictions interpreting statutory schemes containing a provision similar to § 48-628 but silent as to the setoff of workers' compensation for unemployment benefits have also concluded that workers' compensation benefits cannot be reduced. See, *Crow's Hybrid Corn Co. v. Indus. Com.*, 72 Ill. 2d 168, 380 N.E.2d 777, 20 Ill. Dec. 568 (1978); *Williams*

v. Molded Electronics, Inc., 305 Minn. 562, 233 N.W.2d 895 (1975); *Edwards v. Metro Tile Company*, 133 So. 2d 411 (Fla. 1961); *Wells v. Jones*, 662 S.W.2d 849 (Ky. App. 1983); *Florence Enameling Co., Inc. v. Jones*, 361 So. 2d 564 (Ala. Civ. App. 1978); *Utica Mutual Ins. Co. v. Pioda*, 90 Ga. App. 593, 83 S.E.2d 627 (1954).

In reaching the conclusion that a setoff from unemployment benefits for workers' compensation benefits does not allow the converse, we also consider the distinct characteristics of the Nebraska Workers' Compensation Act and Nebraska's Employment Security Law.

[9,10] The Nebraska Workers' Compensation Act holds an employer liable for an employee's job-related injury and requires the employer to compensate the employee so long as the employee is not willfully negligent. See § 48-101. "The Workmen's Compensation Act is remedial in nature and its purpose is to do justice to workmen . . . ." *Gill v. Hrupek*, 184 Neb. 436, 439, 168 N.W.2d 377, 379 (1969).

[11] Section 48-617, on the other hand, creates the Unemployment Compensation Fund. The fund holds money in trust to pay unemployment benefits to qualifying individuals in the event that they become unemployed. See, also, §§ 48-623 and 48-627. Section 48-628 disqualifies individuals from receiving unemployment compensation from the fund if they are receiving workers' compensation temporary disability benefits.

The Michigan Supreme Court detailed the "distinct character and objectives" of the two different institutions in Michigan in *Paschke v Retool Industries*, 445 Mich. 502, 512, 519 N.W.2d 441, 445 (1994). The court explained that the Michigan Legislature "'set up two independent organizations for the administration of two kinds of compensation, payable from different funds or sources,'" and explained that permitting a "'set-off by the department of labor and industry would in effect extend relief to the employer beyond the express terms of the workmen's compensation act.'" *Id.* (emphasis omitted) (quoting *Bartels v. Ford Motor Co.*, 292 Mich. 40, 289 N.W. 322 (1939)).

Like the Michigan statutes, Nebraska statutes establish two distinct institutions that provide compensation payable from different funds or sources. A court cannot apply the statutes determining an individual's eligibility for unemployment benefits as affecting his eligibility for workers' compensation benefits unless the Legislature expressly provides the authority to do so.

[12] The Nebraska Workers' Compensation Act prohibits an employer from considering "benefits derived from any other source than those paid or caused to be paid by the employer as herein provided" when determining the amount of workers' compensation benefits to be paid. § 48-130. Although the act does not specifically reference unemployment benefits, such benefits are derived from a collateral source. Furthermore, the Employment Security Law allows a setoff of unemployment benefits when a person is receiving temporary disability benefits under the Nebraska Workers' Compensation Act, thereby preventing a double recovery.

Accordingly, the trial court erred as a matter of law in reducing Hernandez' workers' compensation benefits by the amount he was receiving from the unemployment insurance fund. The trial court reduced Hernandez' benefits from temporary total disability benefits to temporary partial disability benefits when it reduced his benefits by the amount he was receiving in unemployment compensation. Because the trial court erred in reducing the amount of Hernandez' benefits, it erred also in awarding temporary partial disability benefits instead of temporary total disability benefits from March 1, 2011.

CONCLUSION

We find that the trial court properly awarded disability benefits, but that it erred in awarding a vocational rehabilitation evaluation and in reducing Hernandez' disability benefits award as of March 1, 2011. Accordingly, we affirm in part, and in part reverse and remand.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

IN RE INTEREST OF ANGELINA G. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JULIAN G., APPELLANT.

830 N.W.2d 512

Filed April 2, 2013. Nos. A-12-281 through A-12-284.

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. **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. **Judgments: Appeal and Error.** When an appellate court reviews questions of law, it resolves the questions independently of the lower court's conclusions.
4. **Parental Rights: Proof.** Neb. Rev. Stat. § 43-292 (Cum. Supp. 2012) provides 11 separate conditions, any one of which can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child.
5. **Parental Rights.** Neb. Rev. Stat. § 43-292(9) (Cum. Supp. 2012) allows for terminating parental rights when the parent of the juvenile has subjected the juvenile or another minor child to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse.
6. **Parental Rights: Words and Phrases.** The term "aggravated circumstances" embodies the concept that the nature of the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize and compromise the safety of the child and would place the child in a position of unreasonable risk to be reabused.
7. ____: ____. While aggravated circumstances must be determined on a case-by-case basis, where the circumstances created by the parent's conduct create an unacceptably high risk to the health, safety, and welfare of the child, they are aggravated to the extent that reasonable efforts of reunification may be bypassed.
8. **Judgments: Minors: Time.** Courts may consider whether the offer or receipt of services would correct the conditions that led to the abuse or neglect of a child within a reasonable time.
9. **Parental Rights.** Parental rights can be terminated only when the court finds that termination is in the child's best interests.
10. ____. 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. With such severe and final consequences, parental rights should be terminated only in the absence of any reasonable alternative and as the last resort.
11. ____. Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights.

12. ____. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.
13. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy.
14. **Actions: Parties: Standing.** The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
15. **Standing: Claims: Parties.** In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties.

Appeal from the County Court for Scotts Bluff County: KRISTEN D. MICKEY, Judge. Affirmed.

Bernard J. Straetker, Scotts Bluff County Public Defender, for appellant.

Tiffany A. Wasserburger, Deputy Scotts Bluff County Attorney, for appellee.

Lindsay R. Snyder, of Smith, Snyder & Petitt, G.P., guardian ad litem.

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

RIEDMANN, Judge.

INTRODUCTION

Julian G. appeals from the decision of the county court for Scotts Bluff County sitting as a juvenile court which terminated his parental rights to his minor children, Phillip G., Angelina G., Adriana G., and Marciano G. The four cases have been consolidated for briefing, argument, and disposition. The issues presented on appeal are (1) whether the State proved by clear and convincing evidence that aggravated circumstances existed, (2) whether the State proved by clear and convincing evidence that termination of Julian's parental rights was in the children's best interests, and (3) whether Julian was prejudiced by the State's filing supplemental juvenile petitions subsequent to trial. We find that the State sufficiently proved the existence of aggravated circumstances and that termination was in the children's best interests. We further find that Julian lacks standing to challenge the supplemental petitions, and therefore, we affirm.

BACKGROUND

Julian and Peggy T. are the parents of Phillip, born in 1996; Angelina, born in 2000; Adriana, born in 2003; and Marciano, born in 2008. The record reveals a lengthy history of violence in Julian and Peggy's relationship, with police involvement dating back to August 2001.

In August 2001, law enforcement responded to a call at Julian and Peggy's residence. There was a party at the residence and numerous people had been drinking, smoking marijuana, and "huffing" paint. Peggy's oldest child, Roman T., who is not a part of this case; Phillip; and Angelina were present at the residence during the party. A fight broke out, and Julian assaulted Peggy and another man in front of the children. Officers noted that all adults present were intoxicated and in no condition to care for the children. Additionally, marijuana and "huffing" materials were accessible to the children. Officers eventually located Julian walking down a highway at 4 a.m. carrying Angelina, then 1 year old. Julian was very intoxicated and was arrested for assault. As a result of that incident, Roman, Phillip, and Angelina were removed from their parents' home, placed in the custody of the Nebraska Department of Health and Human Services (DHHS), and found to come within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002).

Due to the ongoing violence in Julian and Peggy's relationship, in July 2002, Peggy applied for and received a protection order against Julian. In her application for the order, Peggy stated, "[My children and I] are afraid for our lives." Despite the protection order, police responded to another domestic disturbance involving Julian and Peggy the following month. After arriving at the family's residence, the officers discovered that Julian had stabbed Peggy in the throat with a steak knife inside the residence where three of their children were present. Julian was arrested and convicted of second degree assault and violating the protection order. Nevertheless, in November, Julian and Peggy requested that the protection order be vacated. The following month, Julian was sentenced to 36 to 60 months in prison for the assault and to 6 months in prison for the protection order violation, sentences to be served concurrently.

After Julian was released from prison, he and Peggy resumed their relationship.

Julian and Peggy were involved in another altercation in September 2005 where law enforcement responded to a complaint of a loud verbal disturbance between the two of them. Julian and Peggy both appeared very intoxicated, and police placed Julian on a civil protective custody hold and transported him to the Scotts Bluff County jail, where he was placed in the "drunk tank" on a minimum 6-hour hold.

In February 2006, Julian was arrested for driving under the influence. Julian had a previous conviction for driving under the influence from July 2001. Two months later, in April 2006, police responded to another incident at Julian and Peggy's residence. During an argument, Julian spit in Peggy's face and threw rocks at her, hitting her in the back of the head. Peggy locked herself inside the house, and Julian began pounding on the doors and windows. There were young children inside the home at the time. Police arrested Julian for domestic assault. As a result of this incident, Adriana was removed from the home and placed in the custody of DHHS and Roman, Phillip, and Angelina were returned to DHHS' custody.

In August 2007, Julian was convicted on another charge of driving under the influence. In August 2008, Phillip, Angelina, and Adriana were returned to their mother's care, and their cases were closed in January 2009. During the 7-year period that the children were in the custody of DHHS, numerous services were provided to Julian and Peggy, including but not limited to case management services; drug and alcohol evaluations; daycare services; individual therapy; aftercare programs; group therapy; assistance with paperwork; Alcoholics Anonymous and Narcotics Anonymous classes for support groups; parenting classes; supervised visitation; intensive family preservation services; protection orders; anger management services; visits by law enforcement; marriage counseling; family therapy; psychological service evaluation; gas vouchers; transportation; and assistance paying for groceries, gas and electric bills, clothing, household supplies, and rent. Despite this, the family made very little progress between 2001 and 2008.

Shortly after the children were returned to Peggy, she and the children moved to Texas to escape from Julian, but Julian discovered where they had gone and followed them to Texas. Peggy reunited with Julian while living in Texas because he told her he had changed and she believed him. In early 2011, while the family was still living in Texas, Julian was involved in an argument with Roman and hit Roman in the head with a crowbar. After this incident, Peggy left Julian and moved back to Nebraska with the children.

Once back in Nebraska, Peggy applied for an ex parte protection order against Julian in March 2011. In her application, Peggy stated that Julian followed her and the children back to Nebraska and that he "continue[d] to [harass] and stalk" them. Peggy also stated that Julian continued to harass her family by telephone and threatened to "leav[e] the state with [their] boy[s]." In the application, Peggy recounted an incident in February where Phillip was hospitalized and she called hospital security because Julian "threatened several times with his hands pretending to shoot and kill [Peggy]." Peggy stated, "I do not feel safe without turning my back and thinking he is there to attack." The protection order was issued, but Julian was never located for service, and in August, the parties requested that the ex parte order be vacated.

In April 2011, Julian and Peggy were both arrested for domestic assault after an argument at a park. Julian and Peggy were sitting in their van when Julian got upset, took away Peggy's telephone, and "ripped the glasses off of her face," breaking the glasses and scratching her face. After they both got out of the van, Peggy hit Julian twice in the face while he was holding Marciano.

Three months later, in July 2011, the family went to a lake to celebrate Marciano's third birthday. Julian and Peggy were involved in another argument, and when Peggy said she was going to take the car and leave, Julian, in front of the children, threatened to burn the car. Angelina testified at trial that Julian's threat made her feel scared because she did not know what would happen. As a result of this incident at the lake, the court ordered that the minor children be placed in the temporary custody of DHHS. Currently, Julian and Peggy have

visits with Adriana and Marciano, but Phillip and Angelina refuse to go on visits.

On October 11, 2011, the State filed second amended motions to terminate Julian's and Peggy's parental rights as to all four minor children. The termination hearing was held January 9 and 20, 2012. The State presented numerous witnesses, including Angelina, who testified that Julian and Peggy are "mean," that they do not treat her and her siblings "right," and that Julian calls her names like "bitch."

Angelina recalled an incident where Julian put Marciano "in the dryer" when Marciano was just 1 or 2 years old, which made Angelina feel scared. Angelina and Adriana pushed Julian away to help Marciano, but Julian pushed them back. Angelina stated that Julian would also throw toys at Marciano, which made Marciano cry. Angelina testified that she does not feel safe living with Julian because he does not treat her and her siblings "right" and that she would not feel safe if she had to live with him again because she would "have to go through everything [all] over again."

Jeanna Townsend, a licensed mental health practitioner and certified professional counselor, also testified. Townsend worked with Phillip, Angelina, and Adriana for several sessions each. Townsend stated that she has never met a child as angry, hostile, and homicidally inclined as Phillip. She observed that Phillip does not want a relationship with either of his parents and that any mention of his parents makes him "incredibly angry."

Townsend observed signs that Phillip had been exposed to violence in his parents' home. Specifically, she observed the symptoms typically associated with posttraumatic stress disorder, including an effort to avoid any discussion about his parents or any discussion regarding physical violence, and incredible agitation at the mention of his parents or any of the historical violence in his family. In addition, Phillip has exhibited violent behaviors toward small children; he had reportedly made threats against school personnel, specifically male authority figures; and he was "in a chronic state of agitation . . . where he was just looking for the next moment that he would have to fight." Based on her training and experience,

Townsend stated Phillip's symptoms were typical of exposure to violence in the home. Townsend opined that it would be harmful to Phillip if he were returned to his parents' care because returning him to the same environment would be returning him to a place that would continue to traumatize him psychologically.

Townsend observed that Angelina presented as a traumatized child and was very depressed. Angelina wanted absolutely no contact with her parents, which is not a normal response Townsend sees from children. Angelina appeared to be functioning better insofar as she had been removed from the stressor, presumed to be her parents. Townsend believed it would be harmful to Angelina to be returned to her parents' care because she seemed to be using all of her strength to keep things together, and Angelina had expressed that she did not think she could take being in the family home any longer.

Townsend noted that neither Phillip nor Angelina showed signs of normal bonding with their parents. It was significant to Townsend that Phillip and Angelina wanted no contact or interaction with their parents because most children, on some level, still want some relationship with their parents regardless of the level of abuse they have endured. This, Townsend testified, indicated chronic and ongoing severe abuse or trauma.

Townsend observed that Adriana was struggling with emotional difficulty which most children suffer when removed from their home but that there was no indication Adriana had been traumatized. Adriana, because of her age, felt more connected to her parents and was still at an age where she desired a relationship with her parents.

Townsend expressed concern, however, that if Adriana is returned home and the conditions remain the same, she will grow up to believe that violent interaction is the norm and might emulate those behaviors. Townsend testified that if the conditions at home remain the same, it would be harmful for Adriana to return home, because she worries about Adriana's continuing the cycle of violence whether as the victim or as an aggressor. Townsend diagnosed Adriana with adjustment disorder with depressed mood, which means that when Adriana

is in the presence of a stressor, her mood is depressed and she feels helpless and despondent, but when the stressor is removed, there is improvement in her mood.

Townsend noted that chronic exposure to domestic violence and substance abuse adversely affects children because they learn to cope negatively, they learn maladjustive ways of dealing with stress and relationships, they are likely to identify with either the abuser or the victim and perpetuate such relationships throughout their lives, and they are more likely to suffer from depression, anger outbursts, criminal activity, and substance abuse. In Townsend's opinion, terminating Julian's parental rights to Phillip, Angelina, and Adriana would be in the children's best interests.

Dr. Matthew Hutt, a licensed psychologist who conducted mental status evaluations on Phillip, Angelina, and Adriana, also testified. Dr. Hutt stated that Phillip's mood became more dark and angry when Phillip was asked about his parents. Phillip indicated that he preferred not to have any contact with his parents. Dr. Hutt diagnosed Phillip with anxiety disorder, not otherwise specified. Angelina acknowledged a sense of anger and resentment toward her parents similar to Phillip's. Dr. Hutt diagnosed Angelina with adjustment disorder, not otherwise specified. Adriana reported to Dr. Hutt that she felt safe in her current environment with her maternal aunt and denied any sadness, despondency, or anger. Dr. Hutt diagnosed Adriana with adjustment disorder, not otherwise specified.

The court also heard testimony from Katherine Batt, a children and family services supervisor with DHHS who supervised Julian and Peggy's case. Batt testified that Julian would consistently follow through with services provided by DHHS for 3 or 4 weeks, but never longer than that. More significantly, Julian had never been able to admit any wrongdoing and did not think he had a problem, which had been a roadblock in the progression of the case. Ultimately, Batt opined that terminating Julian's parental rights would be in the best interests of the children because, despite services offered to the family, Julian and Peggy continued to have a very violent relationship, the children were fearful of their parents, and DHHS had been

involved with the family for over 11 years by offering services to them, but they had been noncompliant.

Rickie Wynne, a children and family services specialist with DHHS, also testified. When the current case was opened in August 2011, Wynne interviewed Julian and Peggy, and they both blamed DHHS' current involvement on the two older children, claiming that Phillip and Angelina were out of control and lying. Julian and Peggy indicated they were not willing to participate in the services provided by DHHS because they had "'already done all of this stuff'" and did not understand why they should be expected to do it again.

In September 2011, Julian's and Peggy's visits with Adriana and Marciano were separate because Peggy had a protection order against Julian, and Wynne recounted an incident where Peggy's visit had to be moved to a different location because Julian showed up during Peggy's visit and started shouting at her through her car windows with the children present. After that, Peggy's visits had to be held at a center for supervised visitation and family support for several months to protect her visits from Julian.

The court also heard testimony from two visitation aides who testified that Julian generally showed up for his visits and was on time, that he was good with the children, and that he and the children always seemed excited to see each other.

Julian testified in his own behalf during the termination hearing. When asked about his discipline practices, Julian testified that he never touched his children physically. When asked again, he stated that he has "tapped" them, which means "like a slap on the hand, you know, a tap on the rear." He stated that he has yelled at the children quite a bit but never threatened them. However, on cross-examination, Julian admitted that he told Wynne that he has threatened to "beat the kids' asses," stating, "[W]ho hasn't heard that from their parent?"

When asked about his relationship with Peggy, Julian replied that their relationship is "no worse or better than most others. It's pretty good, as far as the relationship." When asked what steps he has taken to address the issues of domestic violence in his relationship with Peggy, Julian stated, "I don't believe I need to. I'm sorry, I don't. I haven't taken any."

Overall, Julian tended to either downplay or outright deny many of the events described above. When asked about the incident in the hospital when Peggy called security, Julian stated, "Security was called because she wanted to call them." Julian denied putting Marciano in the dryer, stating that it was Angelina and Adriana who were trying to put Marciano in the dryer and that Julian had to discipline them for doing so. Julian testified that the incidents where he threw rocks and spit at Peggy and where he hit Roman in the head with a crowbar "didn't happen."

The court also heard testimony from Peggy. Peggy admitted that her relationship with Julian was violent and that sometimes the violence occurred in front of the children. Peggy stated that Julian cannot control his anger. Peggy did not think the children would be safe with her and Julian because Julian does not think he has a problem, but he is the one who "causes everything."

Peggy arrived to court on the second day of the hearing with a black eye as a result of an incident that occurred on January 13, 2012, between the 2 days of trial. Scottsbluff police responded to the incident and found Peggy, who was very intoxicated, with a black eye. Peggy told police that she and Julian began arguing, she hit him twice, and then he punched her in the eye. Julian told police that Peggy had gotten into a fight with his mother and that his mother had given Peggy the black eye. Police noted that Julian's mother also had a black eye. A few days later, Julian told Batt during a team meeting that he had not caused Peggy's injuries, that he was tired of covering for Peggy, and that Peggy is the one who beats him.

At trial, Peggy testified that Julian had given her the black eye and that after the incident, she contacted police, moved into a women's shelter, and obtained a protection order against Julian. Peggy testified that she was not going to go back to Julian again and stated that she was afraid of Julian because he has threatened to kill her.

After all parties had rested at trial, the State requested to withdraw the motion to terminate Peggy's parental rights to Adriana and Marciano and file a "fault petition" for each under

§ 43-247(3)(a) (Reissue 2008) instead. Peggy indicated that she agreed to this amendment. Julian objected to the timing of the amended petition because all the evidence had already been presented and all parties had rested. The court noted the objection but allowed the State to file first supplemental juvenile court petitions for Adriana and Marciano on January 30, 2012, alleging they were children within the meaning of § 43-247(3)(a).

In an order dated February 29, 2012, the court terminated Julian's parental rights to Phillip, Angelina, Adriana, and Marciano. The court noted that the evidence presented at the termination hearing showed a history of more than 10 years of various incidents exposing the children to domestic violence, alcohol abuse, physical violence, threats of physical violence, and a failure to protect the children. The court also noted that the record includes a documented history of prior interventions by DHHS because of issues of substance abuse and domestic violence. Overall, the court found by clear and convincing evidence that the substantial history of violent domestic disputes between Julian and Peggy over the course of more than 10 years, the exposure of the minor children thereto, and the parents' failure to protect the minor children constitute chronic abuse.

The court found the credibility of Julian's testimony was suspect in view of his argumentative nature and confrontational behavior throughout the course of trial. The court noted the "astonishing absence" of any accountability on his part for his history of violent behavior or recognition of anything abnormal about that history, and his aggressive and inappropriate reactions to caseworkers and law enforcement attempting to intervene on behalf of the children. The court found the testimony of Angelina, Townsend, Dr. Hutt, and Batt to be "extraordinarily compelling" in support of a finding that termination of parental rights is in the children's best interests. Regarding Julian specifically, the court found there was an absence of evidence indicating the likelihood of significant rehabilitation of his behavior anytime in the foreseeable future. Julian timely appeals.

In the February 29, 2012, order, the court also terminated Peggy's parental rights to Phillip and Angelina. Peggy did not appeal the decision.

ASSIGNMENTS OF ERROR

Julian asserts the juvenile court erred in (1) failing to establish by clear and convincing evidence that the children were subjected to aggravated circumstances as set out in Neb. Rev. Stat. § 43-292(9) (Cum. Supp. 2012), (2) permitting the State to file first supplemental juvenile court petitions in the cases involving Adriana and Marciano after the State rested its case during trial and after the court adjourned the trial and prior to the issuance of the court's order ruling on the merits of the second amended motions to terminate parental rights, and (3) finding that the State had established by clear and convincing evidence that termination of Julian's parental rights was in the best interests of the children.

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. See *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (2009). 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] When an appellate court reviews questions of law, it resolves the questions independently of the lower court's conclusions. *In re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007).

ANALYSIS

Grounds for Termination.

[4] The bases for termination of parental rights are codified in § 43-292. Section 43-292 provides 11 separate conditions, any one of which can serve as the basis for the termination of parental rights when coupled with evidence that termination is

in the best interests of the child. *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010).

[5] In its order terminating Julian's parental rights, the juvenile court found by clear and convincing evidence that the minor children are within the meaning of § 43-292(9) and that it is in the children's best interests that Julian's parental rights be terminated. Section 43-292(9) allows for terminating parental rights when "[t]he parent of the juvenile has subjected the juvenile or another minor child to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse."

[6-8] The term "aggravated circumstances" embodies the concept that the nature of the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize and compromise the safety of the child and would place the child in a position of unreasonable risk to be reabused. See *In re Interest of Jac'Quez N.*, 266 Neb. 782, 669 N.W.2d 429 (2003). While aggravated circumstances must be determined on a case-by-case basis, where the circumstances created by the parent's conduct create an unacceptably high risk to the health, safety, and welfare of the child, they are aggravated to the extent that reasonable efforts of reunification may be bypassed. *Id.* Courts may also consider whether the offer or receipt of services would correct the conditions that led to the abuse or neglect of a child within a reasonable time. *Id.*

While aggravated circumstances have not yet been found in a situation like the present case, we conclude on our de novo review that the evidence clearly and convincingly establishes the children were subject to chronic abuse in the form of repeated exposure to domestic violence.

The record sets out the violent history of Julian and Peggy's relationship, with many incidents occurring in the presence of their children. Townsend and Dr. Hutt testified that this repeated exposure to violence has caused psychological damage to the children, particularly Phillip and Angelina, and that returning them to the same environment would cause further damage. Even though there was no evidence that

Adriana and Marciano have been as negatively impacted by the exposure to violence, § 43-292(9) allows for termination of parental rights if the juvenile *or another minor child* has been subjected to aggravated circumstances. Thus, the evidence as to the trauma sustained by Phillip and Angelina is sufficient to terminate Julian's parental rights to Adriana and Marciano as well.

We find it compelling that Julian blamed Phillip and Angelina for DHHS' current involvement with the family and refused to acknowledge any abnormality or problems in his relationship with Peggy. Because Julian indicated he would not accept services offered by DHHS, we cannot find that the conditions which led to the chronic abuse would be corrected in a reasonable amount of time, particularly in light of the fact that the family previously received DHHS services for 89 months and made very little progress in that time.

We also cannot find that the current conditions would be corrected based on Peggy's testimony that she ended her relationship with Julian and will not return to him. The history of the relationship is compelling, especially Peggy's history of ending the relationship, obtaining a protection order, and then returning to Julian and moving to vacate the order.

Our de novo review of the record shows that grounds for termination of Julian's parental rights under § 43-292(9) were proved by clear and convincing evidence. Once a statutory basis for termination has been proved, the next inquiry is whether termination is in the children's best interests.

Best Interests.

[9-12] Section 43-292 requires that parental rights can be terminated only when the court finds that termination is in the child's best interests. 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. See *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004). Therefore, given such severe and final consequences, parental rights should be terminated only "'[i]n the absence of any reasonable alternative and as the last resort . . . .'" See *In re*

Interest of Kantril P. & Chenelle P., 257 Neb. 450, 467, 598 N.W.2d 729, 741 (1999). However,

> [w]here a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights. *In re Interest of Andrew M. et al.*, 11 Neb. App. 80, 643 N.W.2d 401 (2002). Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of Phyllisa B.*, 265 Neb. 53, 654 N.W.2d 738 (2002).

In re Interest of Stacey D. & Shannon D., 12 Neb. App. 707, 717, 684 N.W.2d 594, 602 (2004).

The evidence reveals the children were initially placed in the custody of DHHS in 2001 due to domestic violence occurring in front of the children. Despite numerous services offered to Julian and Peggy from 2001 to 2008, the family made very little progress and Julian and Peggy's relationship remained virtually unchanged. The children were placed in DHHS' custody again, resulting in the present case after another incident of violence in their presence.

Townsend opined that terminating Julian's parental rights would be in the best interests of the children because the children have already been psychologically traumatized by the repeated exposure to domestic violence and returning them to the same environment would continue to damage them and potentially continue the cycle of violence with them as either abusers or victims. Batt also opined that terminating Julian's parental rights would be in the children's best interests because Julian and Peggy continue to have a very violent relationship, the children are fearful of their parents, and the family made very little progress during DHHS' prior involvement.

Additionally, Julian and Peggy blame Phillip and Angelina for DHHS' current involvement and deny any wrongdoing. They both indicated they were not willing to participate in services provided by DHHS because they had already done so and did not understand why they would have to do so again.

The evidence is clear that it is in the best interests of the children that Julian's parental rights be terminated.

Supplemental Juvenile Petitions.

Julian asserts the juvenile court erred in allowing the State to file first supplemental juvenile court petitions as to Adriana and Marciano after the State rested at trial. The State argues Julian lacks standing to challenge the supplemental petitions. We agree.

[13-15] Standing is the legal or equitable right, title, or interest in the subject matter of the controversy. *County of Sarpy v. City of Gretna*, 267 Neb. 943, 678 N.W.2d 740 (2004). The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Id.* In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties. *Id.*

In the present case, the State made an offer to both Julian and Peggy to dismiss the second amended motions to terminate parental rights to Adriana and Marciano and file a "fault petition" for each under § 43-247(3)(a) instead. Peggy agreed, but Julian did not. Thus, the State proceeded with its motions to terminate Julian's parental rights as to all of the children. Julian was not affected or prejudiced by the State's agreement with Peggy. Therefore, Julian lacks standing on appeal to challenge the State's supplemental petitions.

CONCLUSION

For the reasons stated above, we affirm the juvenile court's order terminating Julian's parental rights to Phillip, Angelina, Adriana, and Marciano.

AFFIRMED.

ENTERPRISE BANK, NA, APPELLEE, V. PHYLLIS M. KNIGHT, APPELLANT.

832 N.W.2d 25

Filed April 9, 2013. No. A-11-972.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
2. ____: ____. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Forcible Entry and Detainer: Title: Courts: Jurisdiction.** If the resolution of a forcible entry and detainer action requires a district court to determine a title dispute, it must dismiss the case for lack of jurisdiction.
4. **Forcible Entry and Detainer: Title: Courts.** A court may proceed with a forcible entry and detainer action until the evidence discloses that the question involved is one of title.
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. **Judgments: Appeal and Error.** If a judgment is not superseded, it is effective notwithstanding appeal.
7. **Judgments: Supersedeas Bonds: Appeal and Error.** In the absence of a supersedeas bond, the judgment retains its vitality and is capable of being executed upon during the pendency of the appeal.

Appeal from the District Court for Douglas County: DUANE C. DOUGHERTY, Judge. Affirmed.

Timothy L. Ashford for appellant.

Bryan S. Hatch, of Stinson, Morrison & Hecker, L.L.P., for appellee.

IRWIN, PIRTLE, and RIEDMANN, Judges.

PIRTLE, Judge.

INTRODUCTION

Enterprise Bank, NA, filed a forcible entry and detainer action against Phyllis M. Knight in the district court for Douglas County. The district court entered judgment in favor of Enterprise Bank, finding that Knight was unlawfully in

possession of the subject property, and ordered her to surrender the premises to Enterprise Bank. Knight appeals. We conclude that there is no merit to Knight's assignments of error and affirm the judgment of the district court.

BACKGROUND

On July 24, 2007, Knight executed a promissory note in favor of Enterprise Bank for $50,000. As security for the promissory note, Knight executed a deed of trust in favor of Enterprise Bank for Knight's residence located in Omaha, Nebraska. Knight defaulted on the note, and Enterprise Bank foreclosed upon the real property. A trustee's sale was held on September 7, 2011, wherein Enterprise Bank was the successful bidder. On October 13, a "Trustee's Deed Upon Sale" was filed and recorded with the Douglas County register of deeds. On October 14, Knight was notified that the subject property was sold on September 7 and was served with a 3-day notice to leave the real property and surrender possession of it. Knight refused to vacate the premises, and as a result, Enterprise Bank filed a complaint for restitution of premises on October 21. Knight failed to file an answer or any other responsive pleading on her behalf.

A hearing on Enterprise Bank's complaint for restitution of premises was held on November 7, 2011. Enterprise Bank presented evidence showing that it owned the property. Knight, who appeared at the hearing pro se, did not offer any evidence. Following the hearing, the trial court entered an order finding that Knight was unlawfully in possession of the property and ordered Knight to surrender the premises to Enterprise Bank within 5 days. If possession was not surrendered, the clerk of the district court was authorized to issue a writ of restitution.

Knight timely filed an appeal. Enterprise Bank subsequently filed a motion to set bond under Neb. Rev. Stat. § 25-21,235 (Reissue 2008). A hearing was held on the motion on December 2, 2011, at which time Enterprise Bank moved to withdraw the motion to set bond. The trial court allowed Enterprise Bank to withdraw its motion.

On December 2, 2011, Enterprise Bank filed a praecipe for writ of restitution, and on December 5, the court issued a writ of restitution and the Douglas County sheriff's office issued a notice to vacate the premises to Knight. On December 9, Knight filed a motion to quash the writ of restitution. Knight also filed a motion to stay proceedings in the district court pending her appeal to the Nebraska Court of Appeals. On December 23, the trial court entered an order stating that it lacked jurisdiction to rule on Knight's motions because Knight had filed the notice of appeal on November 10.

On January 3, 2012, Enterprise Bank filed another praecipe for writ of restitution, and on January 4, the court issued a writ of restitution. Knight was physically evicted from the subject property on January 13. On that same date, Knight filed a "second motion to quash writ of restitution and motion for order nunc pro tunc for supersedeas bond." On January 24, Knight filed a "motion to vacate judgment for writ of restitution." On January 26, following a hearing, the trial court entered an order stating that it did not have jurisdiction to rule on Knight's motions, because the matter had been appealed.

ASSIGNMENTS OF ERROR

Knight sets forth 30 assignments of error, but argues only 6 in her brief. Knight assigns and argues that (1) the trial court lacked jurisdiction to resolve this action as a forcible entry and detainer, because there was a title dispute between the parties; (2) the trustee's sale was not valid because she had filed for bankruptcy the day before the sale; (3) the sale of the home was never confirmed in accordance with Neb. Rev. Stat. § 25-1531 (Reissue 2008); (4) Enterprise Bank cannot enforce its writ of restitution against her during this appeal because it waived its right to a supersedeas bond; (5) the trial court erred in finding that it did not have jurisdiction to rule on her "second motion to quash the writ of restitution and motion for order nunc pro tunc for supersedeas bond" during the pendency of this appeal; and (6) the trial court had authority to correct its error in failing to set a bond after Knight filed her notice of appeal.

STANDARD OF REVIEW

[1] In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. *I.P. Homeowners v. Morrow*, 12 Neb. App. 119, 668 N.W.2d 515 (2003). See *Barnes v. Davitt*, 160 Neb. 595, 71 N.W.2d 107 (1955) (clearly erroneous standard applied in review of forcible entry and detainer actions). Accord *Mathiesen v. Bloomfield*, 184 Neb. 873, 173 N.W.2d 29 (1969).

[2] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *I.P. Homeowners v. Morrow, supra*.

ANALYSIS

District Court's Jurisdiction.

[3] Knight first assigns that the trial court lacked jurisdiction to resolve this action as a forcible entry and detainer because there was a title dispute between the parties. Knight relies on the rule that if the resolution of a forcible entry and detainer action requires a district court to determine a title dispute, it must dismiss the case for lack of jurisdiction. See *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003).

Based on the record before us, there was no title dispute before the court. The evidence presented at the hearing on the complaint for restitution of premises clearly showed that Enterprise Bank owned the subject property. Enterprise Bank purchased the property at the trustee's sale, and following the trustee's sale, Enterprise Bank filed and recorded a "Trustee's Deed Upon Sale" with the Douglas County register of deeds. Knight was subsequently given notice of the sale. There is nothing in the record to show that Knight challenged the trustee's sale. Knight alleges in her brief that she filed an action for wrongful title and that title will be a disputed issue in that case, but the record in the present case does not reflect a title dispute.

Although Knight argued at the hearing on the complaint for restitution of premises that the trustee's sale was invalid, the evidence before the court clearly showed that Enterprise

Bank had legal title to the subject property. Therefore, the only determination for the court was whether Knight was in unlawful possession of the property, which the court determined she was.

[4] A court may proceed with a forcible entry and detainer action until the evidence discloses that the question involved is one of title. *Cummins Mgmt. v. Gilroy, supra*. Given that the evidence did not disclose a title dispute, the district court had jurisdiction over the forcible entry and detainer action and properly entered its order on November 7, 2011.

Knight's Bankruptcy.

Knight next argues that the trustee's sale of the property was not valid because she had filed for bankruptcy the day before the sale. She contends that the trustee's sale should have been stayed due to her bankruptcy filing. Again, as previously noted, Knight did not challenge the trustee's sale at the time it took place.

Knight asserted at the hearing that she had filed for bankruptcy, but there is nothing in the record to show that she had in fact done so. Neb. Ct. R. § 6-1506 requires a party who has filed bankruptcy and has a civil case before the district court to file documentation with the court verifying such bankruptcy. Specifically, § 6-1506(A) provides in part:

> In any civil case pending before [a district] court in which a party has been named as a debtor in a voluntary or involuntary bankruptcy petition, a Suggestion of Bankruptcy and either (1) a certified copy of the bankruptcy petition, (2) a copy of the bankruptcy petition bearing the filing stamp of the clerk of the bankruptcy court, or (3) a copy of a "Notice of Bankruptcy Case Filing" generated by the Bankruptcy Court's electronic filing system shall be filed by the party named as a debtor or by any other party with knowledge of the bankruptcy petition.

Section 6-1506 further provides that it is only after the necessary filings have been made with the district court that no further action will be taken in the case by the court.

In the instant case, no suggestion of bankruptcy, copy of the bankruptcy petition, or notice of bankruptcy case filing was

submitted to the district court. Based on the record, the trial court did not know whether Knight had filed for bankruptcy as she contended, and it was not the court's responsibility to seek out such information. Without any documentation of the bankruptcy filed with the court, the court had no obligation to rely on Knight's statements. Thus, there is no merit to this assignment of error.

Confirmation of Sale.

[5] Knight next argues that the sale of the subject property was required to be confirmed by the district court in accordance with § 25-1531, and was not. Knight asserts this claim for the first time on appeal; she did not raise this argument before the district court. 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. Albrecht*, 18 Neb. App. 402, 790 N.W.2d 1 (2010). Having performed an extensive review of the record and finding no plain error, we need not address this assignment of error further.

Supersedeas Bond.

Knight's last three assignments of error are all related and will be addressed together. Knight assigns that Enterprise Bank could not enforce its writ of restitution against her while her appeal was pending because it waived its right to a supersedeas bond, that the district court erred in finding it did not have jurisdiction to rule on her "second motion to quash writ of restitution and motion for order nunc pro tunc for supersedeas bond" during the appeal, and that the district court had authority to correct its error in failing to set a bond. Although Knight set forth three separate assignments of error in her brief, she makes the same argument under all three assignments. She argues that after Enterprise Bank withdrew its motion to set bond, the court should have set bond on its own and had the power to do so even though an appeal had been filed.

[6,7] If a judgment is not superseded, it is effective notwithstanding appeal. See *Lincoln Lumber Co. v. Elston*, 1 Neb. App. 741, 511 N.W.2d 162 (1993). Similarly, in the absence of a supersedeas bond, the judgment retains its vitality and is capable of being executed upon during the pendency of the appeal. See *Production Credit Assn. of the Midlands v. Schmer*, 233 Neb. 785, 448 N.W.2d 141 (1989).

Knight contends that the court should have ordered a supersedeas bond in the interest of justice to prevent the writ of restitution from being issued, thereby allowing Knight to remain in her home while the appeal was pending. She contends that the district court had this authority, notwithstanding the pending appeal, pursuant to Neb. Rev. Stat. § 25-2001 (Reissue 2008), which gives the court the inherent power to correct a mistake arising from oversight or omission. Specifically, § 25-2001(3) provides:

> Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court by an order nunc pro tunc at any time on the court's initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the case is submitted for decision in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

We cannot conclude that the court's failure to set a supersedeas bond was a "clerical mistake" or that the court had any duty to set a bond. Rather, it was Knight who should have posted a supersedeas bond to prevent the writ of restitution from being issued pending appeal. Neb. Rev. Stat. § 25-21,234 (Reissue 2008) provides that no appeal shall operate as a supersedeas unless the appellant, within 30 days after the entry of judgment, deposits with the clerk of the court a cash bond that will satisfy the final judgment and costs and will pay a reasonable rent for the premises during the time unlawfully withheld. Knight, the appellant, failed to post a supersedeas bond, and therefore, Enterprise Bank was free to execute upon its

judgment. Knight's last three assignments of error are without merit.

CONCLUSION

Having found no merit to any of Knight's assignments of error, we affirm the judgment of the district court.

AFFIRMED.

MEREDITH MUZZEY AND ROBERT BUHR, APPELLEES, V. BOBBIE RAGONE, FORMERLY KNOWN AS BOBBIE BUHR, AND PAUL RAGONE, ON BEHALF OF LUCCA HADIN RAGONE, FORMERLY KNOWN AS LUCCA HADIN BUHR, A MINOR CHILD UNDER THE AGE OF 18 YEARS, APPELLANTS.

831 N.W.2d 38

Filed April 9, 2013. No. A-12-192.

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 of the lower court's decision.
2. **Visitation: Appeal and Error.** Determinations concerning grandparent visitation are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues.
5. **Parties: Standing: Jurisdiction.** A party must have standing before a court can exercise jurisdiction, and either a party or the court can raise a question of standing at any time during the proceeding.
6. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.
7. **Standing.** Under the doctrine of standing, a court may decline to determine merits of a legal claim because the party advancing it is not properly situated

to be entitled to its judicial determination. The focus is on the party, not the claim itself.

8. **Standing: Jurisdiction.** Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf.
9. **Declaratory Judgments: Justiciable Issues: Standing: Moot Question.** Both standing and mootness are key functions in determining whether a justiciable controversy exists, or whether a litigant has a sufficient interest in a case to warrant declaratory relief.
10. **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.

Appeal from the District Court for Scotts Bluff County: LEO DOBROVOLNY, Judge. Reversed and remanded with directions.

Rhonda R. Flower, of Law Office of Rhonda R. Flower, for appellants.

Leonard G. Tabor for appellees.

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

INBODY, Chief Judge.

INTRODUCTION

Bobbie Ragone and Paul Ragone, the biological parents of Lucca Hadin Ragone, formerly known as Lucca Hadin Buhr, appeal the order of the Scotts Bluff County District Court awarding Bobbie's parents, Meredith Muzzey (Meredith) and Robert Buhr, grandparent visitation of Lucca.

STATEMENT OF FACTS

In August 2009, Lucca was born to Bobbie and Paul, who were not married and were still in high school. On November 5, Meredith was designated and appointed, with Bobbie's consent, by the Scotts Bluff County Court as Lucca's guardian for the purpose of obtaining health insurance. Bobbie and Lucca resided with Meredith and Robert until December 18, 2010. Bobbie removed Lucca from the home and, on December 28, informed Meredith and Robert that they were no longer

allowed any contact with Lucca. The guardianship was terminated on December 29. On January 13, 2011, paternity was established finding that Paul was the father.

On March 23, 2011, Meredith and Robert filed in district court a motion to set visitations. The petition requested an order for specific visitation by Meredith and Robert with Lucca. Thereafter, Bobbie and Paul filed an answer admitting to some portions of the motion and denying the remaining allegations. On May 6, Meredith and Robert filed a motion to set the matter for trial, and a conference was held, after which the district court determined the case to be an appropriate case for mediation. The court ordered the parties to seek out and complete mediation counseling within 60 days.

On July 12, 2011, Bobbie and Paul filed a motion to dismiss, which indicated that in June 2011, they had been married in Montana, and that pursuant to Neb. Rev. Stat. § 43-1802 (Reissue 2008), the case no longer met the statutory requirements for grandparent visitation. After a hearing on the matter, the district court determined that even though Bobbie and Paul had married, Meredith and Robert had standing to seek grandparent visitation because Bobbie and Paul had not been married at the commencement of litigation, and that the issues were not moot, since the dispute which existed at the beginning of the litigation had not been eliminated.

Trial was held on the matter, during which the parties gave significant testimony about the tumultuous relationship between Meredith, Robert, and Bobbie. Very little testimony was actually elicited regarding their relationships with Lucca. Meredith testified that Bobbie was the youngest of her and Robert's three children. Meredith testified that Lucca, Bobbie's only child, was born in August 2009. After Lucca's birth, Bobbie and Lucca resided at Meredith and Robert's home. Meredith and Robert supported Bobbie and Lucca by providing food, diapers, clothing, and any other supplies needed. At the time of Lucca's birth, Bobbie and Paul were not married and both were still in high school.

Meredith testified that Bobbie was in high school until Lucca was born, at which time Bobbie became a full-time student at a community college and also worked part time at a restaurant.

During the day, both Meredith and Robert worked full time and they took Lucca to daycare, until Meredith lost her job and stayed home with Lucca. Meredith had a guardianship of Lucca after he was born so that she could provide health insurance for him. Meredith testified that the guardianship remained intact until December 2010.

Meredith testified that in December 2010, Bobbie and Lucca moved out of Meredith and Robert's home. Meredith explained that from December 2010 through July 2011, she had contact with Lucca only in January when Bobbie brought Lucca over for Meredith to babysit while Bobbie was at work, but that an argument ensued between Meredith, Robert, and Bobbie and that Bobbie forbade them from seeing Lucca ever again. Meredith explained that she, Robert, and Bobbie had a difficult relationship at times and that arguments took place between them. Meredith testified that she and Robert provided Bobbie with a car and cellular telephone, which frequently became the source of arguments. Meredith testified that on two occasions, police were contacted during those arguments. Meredith testified that Robert and Paul frequently argued, including some occasions when Lucca was present.

Meredith testified that she believed she and Robert had bonded with Lucca. Meredith testified that she missed having Bobbie and Lucca in her life and wanted to have visitations with Lucca. Meredith requested that if Bobbie and Lucca were in town, she would like to see Lucca and be allowed to give him gifts, that she would like to see him in the summertime, and that she would like to be able to contact Lucca on the telephone or via "Skype." Meredith testified that she and Robert would be willing to pay for all of the transportation and all expenses involved in any visitation.

Robert testified about many of the same issues and explained that he agreed with much of Meredith's testimony. Robert explained that many of the disagreements with Bobbie involved Bobbie's disobeying rules or "sneaking around" with Paul. Robert also added that his two other daughters had good relationships with Lucca.

Bobbie testified at the trial that she was 19 years old and was Lucca's mother. Bobbie explained that Lucca was 2 years

old and had been residing in Montana for the previous year. Bobbie testified that she was working as a "CNA" and had married Paul on June 22, 2011. Bobbie testified that Paul was living with his parents in the Scottsbluff, Nebraska, area. Bobbie testified that Paul had been working with his father and that she and Paul would be heading back to Montana a few days after the trial to live together.

Bobbie explained that she consented to a guardianship for Lucca with Meredith for medical reasons only and that she petitioned the court for termination of the guardianship in November 2010. Bobbie indicated that she terminated the guardianship so that Meredith and Robert would not be able to take advantage of their position. Bobbie testified that while she lived with them, Meredith and Robert cared for Lucca, took him to doctor appointments, and paid medical bills for him. Bobbie explained that neither of her parents had ever mistreated Lucca, but had always mistreated her in front of Lucca. Bobbie explained that when she and Lucca were living with Meredith and Robert, they were all constantly fighting, and that the environment was not good for Lucca. Bobbie testified that she moved out in December 2010, because she knew that a court hearing was coming up for removal of the guardianship and because she was tired of how she was being treated. Bobbie admitted that Meredith and Robert did not resist the guardianship termination.

Bobbie explained that she had a "[n]on-existent" relationship with Meredith and Robert and had not responded to any communication from them, because she did not want to have a relationship with either of them. Bobbie testified that there was not a significant beneficial relationship between Lucca and her parents and that it was not in Lucca's best interests to continue any relationship with them. Bobbie testified that Lucca was unable to have computer or telephone contact, because "he [would] rather be doing something else" and she did not want Lucca to have any type of visitation with her parents.

Paul's testimony and reflections of the relationship between Meredith, Robert, and Bobbie mirrored that of Bobbie's testimony. Paul testified that he had not been to Montana to

visit Bobbie or Lucca in 6 months, but that he was able to talk to Lucca on the telephone. Paul also explained that in those 6 months, Bobbie had not been back to Nebraska with Lucca either. Paul testified that he was helping his father build a horsebarn, but could not get a job in Montana. Paul explained that he applied for a job with the "Forest Service" and was hoping to get the job, but would also be applying for other jobs.

The district court found that a significant beneficial relationship exists, or had existed, between Meredith, Robert, and Lucca and that it is in Lucca's best interests that the relationship continue. The court found that Bobbie was 19 years old and residing in Montana, while Paul was 20 years old and residing in Scotts Bluff County with his parents. Although the two were married in June 2011, the district court found that Paul had continued to reside with his parents since July 2011 and that he and Bobbie had not lived with each other for any significant period since being married. The court ordered that reasonable visitation shall include 6 hours a month where Lucca resides, supervised by Bobbie or Paul. The court ordered that Meredith and Robert be allowed 15-minute telephone visits every 14 days and 1 hour of visitation for every 48 hours that Lucca is in Scotts Bluff County. Meredith and Robert were ordered to pay all costs of visitation, all of the parties were ordered to attend a minimum of 10 sessions of counseling, and visitation was not to commence until at least three sessions of counseling had been completed. It is from this order that Bobbie and Paul have timely appealed.

ASSIGNMENTS OF ERROR

Bobbie and Paul assign, rephrased and consolidated, that the district court erred by finding that Bobbie and Paul's marriage did not result in a loss of standing for Meredith and Robert and by granting Meredith and Robert's motion for grandparent visitation.

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 of the lower court's decision. *Waite v. City of Omaha*, 263 Neb. 589, 641 N.W.2d 351 (2002).

[2,3] Determinations concerning grandparent visitation are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. *Nelson v. Nelson*, 267 Neb. 362, 674 N.W.2d 473 (2004); *Vrtatko v. Gibson*, 19 Neb. App. 83, 800 N.W.2d 676 (2011). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Nelson v. Nelson, supra*.

ANALYSIS

Bobbie and Paul argue that the district court erred by determining that Meredith and Robert had standing to maintain the suit for grandparent visitation, because Bobbie and Paul were married. Bobbie and Paul contend that pursuant to § 43-1802, Meredith and Robert no longer had any right to request visitation.

[4] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues. See *Becerra v. United Parcel Service*, 284 Neb. 414, 822 N.W.2d 327 (2012).

[5-8] A party must have standing before a court can exercise jurisdiction, and either a party or the court can raise a question of standing at any time during the proceeding. *Frenchman-Cambridge Irr. Dist. v. Dept. of Nat. Res.*, 281 Neb. 992, 801 N.W.2d 253 (2011). Standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *Id*. Under the doctrine of standing, a court may decline to determine merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination. The focus is on the party, not the claim

itself. *Id*. And standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf. *Id*.

Section 43-1802(1) provides that a grandparent may seek visitation with a grandchild if:

> (a) The child's parent or parents are deceased;
>
> (b) The marriage of the child's parents has been dissolved or petition for the dissolution of such marriage has been filed, is still pending, but no decree has been entered; or
>
> (c) The parents of the minor child have never been married but paternity has been legally established.

At the inception of this case, when the motion for grandparent visitation was filed in March 2011, Bobbie and Paul had never been married, but Lucca's paternity had been legally established. Bobbie and Paul were not married until June 22. On July 12, Bobbie and Paul filed a motion to dismiss the motion, indicating that they were married and that, pursuant to § 43-1802, the case no longer met the statutory requirements for grandparent visitation. A hearing was held on the matter, after which the district court determined that even though Bobbie and Paul had married, Meredith and Robert had standing to seek grandparent visitation because Bobbie and Paul had not been married at the commencement of litigation, and that the issues were not moot, since the dispute which existed at the beginning of the litigation had not been eliminated.

In Nebraska, the specific question of standing with regard to the marriage of a child's parents subsequent to the filing of a motion for grandparent visitation has not been addressed. Based on our expanded search, it has likewise not been frequently addressed by other jurisdictions.

In the case of *In re Visitation of J.P.H.*, 709 N.E.2d 44 (Ind. App. 1999), the Indiana Court of Appeals determined that paternal grandparents of a child born out of wedlock but legitimated by establishment of the father's paternity and the parents' subsequent marriage lacked standing under the Indiana grandparent visitation statute, which statute is very similar to

Nebraska's § 43-1802, to petition for visitation against the parents' wishes. In that case, the child was born out of wedlock, paternity was established, and the parents married after the child's birth. The trial court dismissed the petition for grandparent visitation, and the Indiana Court of Appeals affirmed, reasoning that

> for all intents and purposes under the law, a child born out of wedlock, whose father establishes paternity and marries the child's mother, will be treated as if he were born during the marriage. We believe that this concept of legitimation by subsequent marriage and acknowledgment has such a long and consistent history that our legislature simply did not contemplate the situation posed in the present case when enacting the present version of the [grandparent visitation statute].

In re Visitation of J.P.H., 709 N.E.2d at 47. The Indiana Court of Appeals concluded that grandparent visitation under the circumstances wherein the parents were married constituted an "unwarranted encroachment into the right of the custodial parents to raise their child as they see fit." *Id.*

Although not in response to a case specifically involving grandparent visitation, the Nebraska Supreme Court has addressed the issue of continuing standing in the case of *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006), wherein the plaintiff appealed from an order dismissing a class action filed on behalf of the plaintiff and other taxpayers to recover an alleged illegal expenditure of state funds. The State alleged, among other issues, that the plaintiff lost standing during the proceedings, even though he initially had standing. *Id.* In rejecting the notion that standing had been lost, the court said:

> It is true that the "personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." See *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980) (quoted in *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989)). Further, the U.S. Supreme Court has held that a plaintiff bears the burden of establishing standing

> and that a defendant may "point out a *pre-existing* standing defect late in the day." (Emphasis supplied.) *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.4, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Yet, in the same case, the Court stated that jurisdiction, including standing, "is to be assessed under the facts existing when the complaint is filed." *Id*. The timing requirement is important because the plaintiff's personal interest "is to be assessed under the rubric of standing at the commencement of the case, and under the rubric of mootness thereafter." *Becker v. Federal Election Com'n*, 230 F.3d 381, 386 n.3 (1st Cir. 2000).
>
> The State cites only one decision in which a court held that a plaintiff can lose its standing during a lawsuit. See *Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477 (10th Cir. 1995). In a more recent case, however, the 10th Circuit held that "[s]tanding is determined as of the time the action is brought." *Nova Health Systems v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005). In a footnote, the court specifically addressed its earlier holding: "In *Powder River Basin Res. Council v. Babbitt*, we stated that a plaintiff had 'lost standing' in the middle of a lawsuit. . . . Although we used standing terminology, it seems that this was really a mootness question. Other courts have criticized *Powder River* for using standing terminology for what was really a mootness issue. See *Becker v. FEC*, 230 F.3d 381, 386 n. 3 (1st Cir.2000)."

Myers v. Nebraska Invest. Council, 272 Neb. at 682-83, 724 N.W.2d at 792-93. The court concluded that standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court. *Myers v. Nebraska Invest. Council, supra*.

In the case at hand, § 43-1802(1) provides the requirements that a grandparent must have in order to have standing to seek visitation with the grandchild pursuant to this statute, which requirements are as follows:

> (a) The child's parent or parents are deceased;
>
> (b) The marriage of the child's parents has been dissolved or petition for the dissolution of such marriage

has been filed, is still pending, but no decree has been entered; or

(c) The parents of the minor child have never been married but paternity has been legally established.

At the commencement of the present case, Meredith and Robert had standing to seek grandparent visitation with Lucca pursuant to § 43-1802(1)(c), because although paternity had been legally established, Bobbie and Paul were not married. Therefore, because they had standing at the inception of the proceedings, even though Bobbie and Paul subsequently married, Meredith and Robert did not lose standing. However, the inquiry does not end there because, based upon the determinations of the Nebraska Supreme Court in *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006), the issue is more accurately assessed as a mootness issue.

[9,10] Both standing and mootness are key functions in determining whether a justiciable controversy exists, or whether a litigant has a sufficient interest in a case to warrant declaratory relief. *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010); *Schneider v. Lambert*, 19 Neb. App. 271, 809 N.W.2d 515 (2011). 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); *Schneider v. Lambert, supra*.

Under the circumstances of this case, we conclude that the case has become moot. Section 43-1802(1)(c) allows for grandparent visitation when the parents of the child have never been married and paternity has been legally established. At the inception of the case, these circumstances were true; however, during the pendency of the case, as indicated in the statement of facts above, Bobbie and Paul were legally married. Thus, in accordance with the grandparent visitation statutes, Meredith and Robert no longer have the right to request grandparent visitation and the issue is moot.

CONCLUSION

In sum, we conclude that at the inception of the case, Meredith and Robert had the legal right to seek grandparent visitation and were entitled to invoke the jurisdiction of the court. However, as a result of the subsequent marriage of Bobbie and Paul, in accordance with the grandparent visitation statutes, the issue of grandparent visitation is moot. Therefore, we reverse the judgment and remand the matter to the district court with directions to deny Meredith and Robert's motion for grandparent visitation as moot.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF JACOB H. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. BRETT H., APPELLANT.

831 N.W.2d 347

Filed April 9, 2013. No. A-12-491.

1. **Pleadings: Appeal and Error.** Permission to amend a pleading is addressed to the discretion of the trial court, and an appellate court will not disturb the trial court's decision absent an abuse of discretion.
2. **Judges: Recusal: Appeal and Error.** A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court.
3. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
4. **Pleadings.** When a party seeks leave to amend a pleading in a civil proceeding, the general rule is that leave shall be freely given when justice so requires.
5. ____. A court's denial of a request to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.
6. **Judges: Recusal: Proof.** In order to demonstrate that a trial judge should have recused himself or herself, the moving party must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.
7. **Judges: Recusal: Presumptions.** A party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.

8. **Parental Rights: Proof.** For a juvenile court to terminate parental rights under Neb. Rev. Stat. § 43-292 (Cum. Supp. 2012), it must find that one or more of the statutory grounds listed in that section have been satisfied and that termination is in the child's best interests.
9. **Parental Rights.** 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, given such severe and final consequences, parental rights should be terminated only in the absence of any reasonable alternative and as the last resort.
10. **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.

Appeal from the County Court for Otoe County: ROBERT B. O'NEAL, Judge. Reversed and remanded for further proceedings.

Diane L. Merwin, Deputy Otoe County Public Defender, for appellant.

Timothy S. Noerrlinger, Deputy Otoe County Attorney, for appellee.

IRWIN, MOORE, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Brett H. appeals from the order of the county court which terminated his parental rights to his four minor children, Jacob H., Madison H., Megan H., and Morgan H. On appeal, Brett challenges the statutory basis for termination of his parental rights and the county court's finding that termination is in the children's best interests. In addition, Brett argues that the county court erred in allowing the State to amend its motion to terminate his parental rights and erred in not recusing itself from the termination proceedings. Upon our de novo review of the record, we conclude that the county court did not err in allowing the State to amend its motion to terminate Brett's parental rights or in failing to recuse itself from the termination proceedings. In addition, we find that there was a sufficient statutory basis for terminating Brett's parental rights. However, we also find that the State failed to adduce sufficient evidence to clearly and convincingly demonstrate

that termination of Brett's parental rights is in the children's best interests. Accordingly, we reverse, and remand for further proceedings.

II. BACKGROUND

Brett's appeal involves his four minor children: Jacob, born in August 2003, and Madison, Megan, and Morgan, triplets born in October 2004. The children's mother, Lisa H., relinquished her parental rights to all four of the children and is not a party to this appeal. In addition, Alexandria H., the fifth child named in the lower court proceedings, is not a subject of this appeal. Alexandria is Lisa's daughter and Brett's stepdaughter. Because Alexandria is not Brett's biological child, her involvement in this case will not be discussed further.

In October 2009, Jacob, Madison, Megan, and Morgan were removed from Brett and Lisa's home after police were called to the home due to a report of domestic violence. Ultimately, Brett was arrested on a charge of domestic assault, and subsequent interviews with the children revealed that Brett and Lisa often fought in front of the children and regularly consumed alcohol.

On October 9, 2009, the State filed a petition and an accompanying affidavit alleging that the children were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). Specifically, the State alleged that the children were at risk for harm because Brett had recently been arrested for domestic assault, there was a history of domestic violence in the home, both Brett and Lisa consume alcohol in the children's presence, and the children were afraid to be in the home.

On the same day the petition was filed, the county court entered an order placing the children in the custody of the Nebraska Department of Health and Human Services (the Department). The order stated that placement of the children was not to include Brett's home.

In January 2010, Brett admitted to the allegations in the petition. As a result of his admissions, the children were adjudicated to be within the meaning of § 43-247(3)(a).

In February 2010, approximately 1 month after Brett entered his admission to the allegations in the petition, a disposition

hearing was held. At this hearing, Brett was ordered to complete inpatient chemical dependency treatment and a domestic violence education program. In addition, he was permitted to have supervised visitation with the children.

In May 2010, another disposition hearing was held. By the time of this hearing, Brett had completed inpatient chemical dependency treatment and had attended substance abuse group meetings daily for approximately 3 months. In addition, he had regularly submitted to drug testing which revealed he was not using controlled substances. Brett was actively participating in supervised visitation with the children, and visits were going well. As a result of Brett's progress, the court ordered that Brett was to have "monitored" visitation with the children and that if Brett continued to make progress during the next 30 to 45 days, he was to be permitted overnight visitation with the children.

In August 2010, a third disposition hearing was held. At this hearing, the court ordered that the children may be transitioned back into Brett's home. All four children returned to Brett's home on September 10.

In December 2010, a fourth disposition hearing was held. At this hearing, the county court ordered Brett to complete a parenting education program and to continue to attend substance abuse group meetings. Shortly after this hearing, on December 28, the children were removed from Brett's home after the Department discovered that Brett was consuming alcohol in the home.

After the children were removed from Brett's home, he was permitted only supervised visitation. Visitations were held once a week and were scheduled such that Brett visited with Jacob one week and with the triplets the next week. As a result, Brett saw each child only once every other week.

In February 2011, Brett enrolled in another substance abuse treatment program; however, he did not successfully complete the program. Despite Brett's failure to complete the treatment program, there is no indication that Brett continued to use or abuse alcohol or controlled substances after January 2011.

On April 22, 2011, the State filed a motion to terminate Brett's parental rights to Jacob, Madison, Megan, and

Morgan. In the motion, the State alleged that termination was warranted pursuant to Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 2012) because Brett substantially and continuously or repeatedly neglected and refused to give the children necessary parental care and protection; § 43-292(4) because Brett was unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which conduct was seriously detrimental to the health, morals, or well-being of the children; and § 43-292(6) because following a determination that the children were as described in § 43-247(3)(a), reasonable efforts to preserve and reunify the family failed to correct the conditions leading to the determination. In addition, the State alleged that termination of Brett's parental rights was in the children's best interests.

At some point after the State filed its motion to terminate Brett's parental rights, but before a hearing was held on the motion, Brett indicated to the Department that he wanted to relinquish his parental rights to the children. As a result of Brett's decision, the Department stopped providing Brett visitation with the children in October 2011. However, Brett never finalized the relinquishment process. And, in December 2011, Brett changed his mind and decided he wanted to resume his efforts toward reunification with the children after learning that if he relinquished his parental rights, he would have no further contact with any of his children. After Brett changed his mind regarding the relinquishment, the Department did not reinstate his visitation with the children.

On March 29, 2012, a hearing on the State's motion to terminate Brett's parental rights began. At the start of the hearing, the State asked for leave to amend the motion to terminate in order to include an allegation that termination of Brett's parental rights was also warranted pursuant to § 43-292(7) because the children had been in an out-of-home placement for 15 or more months of the most recent 22 months. The State's request was apparently prompted by the court's asking the State to clarify if the original motion alleged that termination was warranted pursuant to § 43-292(7). Brett objected to such an amendment, arguing that the State's request was made too

close in time to the start of the hearing and that the court's prompting the State about the absence of an allegation regarding § 43-292(7) was improper. The court ultimately granted the State's request to amend the motion, but decided to give Brett additional time to prepare for the termination hearing.

The termination hearing resumed on April 3, 2012. While we have reviewed the evidence presented at the termination hearing in its entirety, we do not set forth the specifics of the voluminous testimony and exhibits here. Instead, we will set forth more specific facts as presented at the hearing as necessary in our analysis below.

After the termination hearing, the county court entered an order finding that the State proved by clear and convincing evidence that grounds for termination of Brett's parental rights existed under § 43-292(2), (4), (6), and (7). The county court found that Brett was an unfit parent and that termination of his parental rights was in the children's best interests. The court then terminated Brett's parental rights to Jacob, Madison, Megan, and Morgan.

Brett appeals from the county court's order.

III. ASSIGNMENTS OF ERROR

On appeal, Brett alleges, restated and consolidated, that the county court erred in (1) finding a sufficient statutory basis to terminate his parental rights pursuant to § 43-292, (2) finding that termination of his parental rights was in the children's best interests, (3) permitting the State to amend its motion to terminate his parental rights, and (4) failing to recuse itself from the termination proceedings.

IV. ANALYSIS

1. Standard of Review

[1] Permission to amend a pleading is addressed to the discretion of the trial court, and an appellate court will not disturb the trial court's decision absent an abuse of discretion. *Intercall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012).

[2] A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. *In*

re Interest of Kendra M. et al., 283 Neb. 1014, 814 N.W.2d 747 (2012).

[3] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of 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.*

2. Amendment to Motion to Terminate Parental Rights

Before we address Brett's specific assertions concerning the termination of his parental rights, we first address his assignments of error which relate to the amendment to the motion to terminate his parental rights. Brett alleges that the county court erred in permitting the State to amend the motion by adding an allegation that termination of Brett's parental rights was warranted pursuant to § 43-292(7). In particular, Brett alleges that the court erred in permitting such an amendment on the day the termination hearing was to begin. However, because Brett does not allege he was prejudiced by the court's decision to permit the amendment, his assertion has no merit.

The State filed its original motion to terminate Brett's parental rights on April 22, 2011. In that motion, the State alleged that termination was warranted pursuant to § 43-292(2), (4), and (6) and was in the children's best interests.

The termination hearing was scheduled to begin on March 29, 2012. At the start of the hearing, the county court asked the parties to make an opening statement. At the end of the State's opening statement, the prosecutor made the following remarks:

> The [S]tate believes that the children are — have been out of the home for 15 of the last 22 months, that the evidence will show that [Brett] is an unfit parent and that he also failed to comply with the court plan fully and creating a basis for his — the reason that we're here today for termination of his parental rights.

Based on the State's comments, the court indicated that "it [did not] appear that there [had] been an allegation of the 15 out of 22 months" on the original motion to terminate Brett's parental rights. The State told the court that it was correct, but that the absence of such an allegation was a mistake because "it [was] one of the main bases for proceeding." The State then requested to amend the motion to terminate Brett's parental rights in order to include an allegation that termination was also warranted pursuant to § 43-292(7) because the children had been in an out-of-home placement for 15 or more months of the most recent 22 months. Brett objected to the State's request to amend the motion "at th[at] late stage in the process."

The court and the parties discussed the issue of the amendment of the motion to terminate Brett's parental rights off the record and in the court's chambers. When the parties returned to the courtroom, the court indicated on the record that it was going to permit the State to amend the motion to terminate. The court also indicated that it was going to give Brett additional time to prepare for the hearing. The court continued the termination hearing for approximately 5 days until April 3, 2012. The court explained its decision:

> [A]s I discussed in chambers, while certainly [Brett] has been aware of the fact that the children have been in out-of-home care for [at least 15 of the most recent 22 months pursuant to § 43-292(7)], regardless of whether there was an allegation, the other required elements regarding unfitness and best interests would likely have been — would likely have been discussed and there would be evidence presented on the — because of the remain — the remaining or the existing allegations.
>
> So I — it's my belief and determination that there's no prejudice that arises to [Brett] as a — as a result, particularly since we're going to give additional time for preparation.

After the close of the March 29, 2012, hearing, Brett filed a written objection to the amendment to the motion to terminate his parental rights. At the start of the termination hearing on April 3, the court again found that the amendment to the

motion to terminate was proper and that Brett had been given sufficient time for preparation.

[4,5] On appeal, Brett alleges that the county court erred in permitting the State to amend the motion to terminate his parental rights by adding an allegation that termination was warranted pursuant to § 43-292(7) so close in time to the start of the termination hearing. When a party seeks leave to amend a pleading in a civil proceeding, the general rule is that leave shall be freely given when justice so requires. See *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012). In fact, a court's denial of a request to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated. See *id.*

Brett does not allege that he was prejudiced in any way by the amendment to the motion to terminate his parental rights. And, as the record reflects, the court provided Brett additional time to prepare for the termination hearing due to the amendment, although it is clear that the length of time the children had been in an out-of-home placement was extremely relevant to the termination hearing and Brett should have been prepared to defend against such an assertion even without the specific allegation pursuant to § 43-292(7). In addition, we note, as we discuss more thoroughly below, that the amendment to the motion was appropriate because there was uncontradicted evidence presented at the termination hearing that the children had been in an out-of-home placement for at least 15 of the most recent 22 months as is required by § 43-292(7).

Because Brett does not allege, nor does the evidence reveal, that he was prejudiced in any way by the State's amendment to the motion to terminate his parental rights, we find that the county court did not abuse its discretion in permitting the State to amend the motion. Brett's assertion to the contrary has no merit.

3. Recusal

Brett also alleges that the county court judge erred in failing to recuse himself from the termination proceedings after he

acted impartially by "directing the attention of the [S]tate [to] the failure on the pleadings to make a specific allegation" pursuant to § 43-292(7). Brief for appellant at 32. Because we find that no reasonable person would have questioned the judge's impartiality when he asked the State about the allegations in the motion to terminate, we conclude that Brett's assertion has no merit.

[6,7] Under the Nebraska Revised Code of Judicial Conduct, a judge must recuse himself or herself from a case if the judge's impartiality might reasonably be questioned. *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012). In order to demonstrate that a trial judge should have recused himself or herself, the moving party must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown. *Id.* In addition, a party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *Id.*

We first note that Brett never asked the county court judge to recuse himself from the termination proceedings. In fact, at the start of the hearing on April 3, 2012, the judge asked Brett's counsel, "Do you wish me to recuse myself?" Counsel indicated to the judge that she "did not ask for that in the motion."

Moreover, contrary to Brett's assertions, the record reveals that the county court judge did not encourage the State to amend the motion to terminate or explicitly question the State about the absence of an allegation pursuant to § 43-292(7). Instead, the court asked a clarification question of the State after the State included in its opening statement language about the length of time the children had been in an out-of-home placement. The court's question apparently prompted the State to review its motion to terminate, and at that point, the State realized it had mistakenly omitted the allegation concerning § 43-292(7).

Based on our reading of the record, we cannot say that a reasonable person would have questioned the court's impartiality

in the termination proceedings. As such, we find that the court did not err in failing to recuse itself from the juvenile court case.

4. Termination of Parental Rights

We now turn to Brett's assignments of error which concern the county court's decision to terminate his parental rights to his four minor children. On appeal, Brett challenges the county court's finding that there is a sufficient statutory basis for termination of his parental rights and its finding that termination is in the children's best interests. Upon our de novo review, we conclude that there is clear and convincing evidence to support the statutory basis for termination of Brett's parental rights. However, we find that the court erred in finding sufficient evidence that termination is in the children's best interests. As such, we reverse, and remand for further proceedings.

[8] For a juvenile court to terminate parental rights under § 43-292, it must find that one or more of the statutory grounds listed in that section have been satisfied and that termination is in the child's best interests. See *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006). 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.*

(a) Statutory Basis for Termination

In this case, the State alleged and the county court found that termination of Brett's parental rights to Jacob, Madison, Megan, and Morgan was warranted pursuant to § 43-292(2), (4), (6), and (7). Upon our de novo review of the record, we find that the evidence presented at the termination hearing clearly and convincingly demonstrated that all four of the 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 there was sufficient evidence to support termination pursuant to § 43-292(2), (4), or (6).

The evidence presented at the termination hearing revealed that Jacob, Madison, Megan, and Morgan were removed from Brett's home in October 2009. The children remained in an out-of-home placement until September 2010, when they were transitioned back into Brett's home. In December 2010, however, the children were again removed from Brett's home. After December 2010, they remained in an out-of-home placement through April 2011, when the State filed its motion to terminate Brett's parental rights, and through March 2012, when the termination proceedings began. As such, at the time of the termination hearing, the children had been in an out-of-home placement for 18 of the most recent 22 months. And, notwithstanding the 4 months the children lived with Brett from September to December 2010, the children had been in an out-of-home placement for more than 2 years by the time of the termination hearing.

Based on these facts, we conclude that there is clear and convincing evidence that termination of Brett's parental rights is 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), (4), or (6).

(b) Best Interests

Brett also asserts that the county court erred in determining that termination of his parental rights is in the best interests of the children. Specifically, Brett argues that he has made progress toward reunification with his children; that he has a strong bond with his children; that his only setback toward the goal of reunification occurred in December 2010, when he began to consume alcohol again for a brief period of time; that after December 2010, the Department stopped providing him assistance and eventually stopped providing him visitation with the children; and that but for the Department's termination of efforts, he would have been able to achieve reunification.

Upon our review of the record, we find insufficient evidence to demonstrate that terminating Brett's parental rights to Jacob, Madison, Megan, and Morgan is in the children's best interests.

As such, we reverse the juvenile court's order terminating Brett's parental rights to these four children.

[9,10] 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, given such severe and final consequences, parental rights should be terminated only in the absence of any reasonable alternative and as the last resort. See, *In re Interest of Justin H. et al.*, 18 Neb. App. 718, 791 N.W.2d 765 (2010); *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004). 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. *Id.*

The evidence presented by the State at the termination hearing revealed that the children were removed from Brett's care in October 2009 after he was arrested and charged with assaulting Lisa. These charges were eventually dropped.

Shortly after the children were removed from Brett's care, he entered inpatient treatment to address his substance abuse issues. Brett's treatment revealed that he had a severe back problem that caused him a great deal of pain. Brett had a history of abusing alcohol and controlled substances as a way of dealing with his pain. Brett successfully completed the inpatient treatment program and went on to maintain his sobriety after his release from the program. Brett began seeing a new doctor who adjusted Brett's pain medication in order to help him manage his condition without abusing alcohol or controlled substances.

Brett's visitation with his children went well, and he was quickly given the opportunity to have unsupervised, overnight visitation with all four of the children. In September 2010, less than 1 year after the initial removal, the children were returned to Brett's home. With the help of Brett's family, he was able to appropriately care for the children until approximately November or December 2010, when Brett began to again consume alcohol in order to help manage his pain. During this time, Brett was transitioning to a new pain medication, and as a result, he was apparently undermedicated. Instead of asking his doctor for help, Brett turned to alcohol to self-medicate. He

admitted to his mistake, and the children were removed from his home.

After the children were removed from Brett's home in December 2010, the Department permitted him to have weekly visitation with the children. This visitation was scheduled such that Brett visited with Jacob one week and with the triplets the next week. This schedule was a result of Brett's and the Department's concerns that Jacob often did not receive much attention during the short group visitations because of the attention demanded by the triplets.

Visitation with the children was terminated in the fall of 2011, when Brett expressed an interest in relinquishing his parental rights to the children. Brett was under the impression that if he relinquished his parental rights, the children's foster parents would permit him to maintain contact and a relationship with the children. Brett changed his mind about the relinquishment after learning that he would not be entitled to any contact with the children. The Department never reinstated his visitation.

Additionally, after the children were removed from Brett's home in December 2010, the Department terminated the services it had previously provided to Brett to help him achieve reunification. As a result, at the termination hearing, the Department caseworkers provided very little, if any, testimony about Brett's circumstances from January 2011 through the time of the hearing in April 2012. The caseworkers did not know whether Brett maintained his sobriety, where he was residing, whether he was employed, or anything else about his current circumstances.

Brett did provide some evidence about his circumstances in the 16 months prior to the termination hearing. Such evidence revealed that he did not complete further substance abuse treatment, but that he had maintained his sobriety with no further "relapses" with the help of his doctor. He had maintained a stable residence and continued to have a desire to be reunited with his children. In addition, he attended almost every visit with the children that was offered to him and he attempted to maintain contact with the Department even though the caseworkers did not seek out any contact with him.

Upon our de novo review of the record, we find that a large portion of the evidence offered both by the State and by Brett revealed that Brett made strong efforts toward reunification with his children during the early stages of this case. He submitted to inpatient substance abuse treatment and appeared to maintain a safe and stable lifestyle. The positive changes Brett made to his life facilitated the return of the children to his home. Unfortunately, Brett experienced some setbacks with his sobriety once his children were returned to his care and the children were returned to an out-of-home placement. Of course, Brett's actions while his children were in his care are concerning. The children were not in Brett's home for a terribly long period of time before he began to consume alcohol again. And, such a rapid setback could indicate that he is simply unable to appropriately parent his children while maintaining his sobriety.

However, it is not entirely clear exactly what this setback meant in terms of Brett's ability to parent, because after his relapse, the Department's efforts to reunify Brett with his children dramatically decreased and eventually ended altogether. As a result, we do not have much information about what Brett did after the relapse or whether this relapse was an isolated event or a pattern of behavior. As we mentioned above, we do not expect perfection in a parent, but, rather, a continued effort to become a better and more appropriate parent. And, because termination of parental rights is such a severe consequence, we must be sure that it is used as a last resort.

Based on the evidence presented at the termination hearing, we cannot say that there is sufficient evidence to demonstrate that termination of Brett's parental rights is in the children's best interests. Evidence that Brett had one setback on his road toward reunification with the children is simply insufficient to demonstrate that termination is the last resort available for this family. There was insufficient evidence to demonstrate that Brett's relapse in December 2010 was a pattern of behavior rather than an isolated event and that Brett is currently incapable of appropriately parenting the children. The Department's unilateral decision to terminate services to Brett and to terminate his visitation with the children produced a

lack of evidence about Brett's circumstances for the 16 months prior to the termination hearing.

Due to this insufficiency in the evidence, we reverse the county court's order terminating Brett's parental rights to Jacob, Madison, Megan, and Morgan, and remand the matter to the county court for further proceedings consistent with this opinion.

V. CONCLUSION

Upon our review of the record, we conclude that the county court did not err in permitting the State to amend its motion to terminate Brett's parental rights or in failing to recuse itself from the termination proceedings. In addition, we conclude that there is clear and convincing evidence to demonstrate that the children have been in an out-of-home placement for 15 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 Brett's parental rights is in the best interests of Jacob, Madison, Megan, and Morgan. Accordingly, we reverse the order terminating Brett's parental rights and remand the matter to the county court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

RAFAEL CERVANTES, APPELLANT, V. OMAHA STEEL CASTINGS CO., APPELLEE.

831 N.W.2d 709

Filed April 16, 2013. No. A-12-210.

1. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, a higher appellate court reviews the trial judge's findings of fact, which will not be disturbed unless clearly wrong.
2. **Stipulations: Parties: Trial: Courts.** Stipulations voluntarily entered into between the parties to a cause or their attorneys, for the government of their conduct and the control of their rights during the trial or progress of the cause, will be respected and enforced by the courts, where such stipulations are not contrary to good morals or sound public policy.

3. **Stipulations: Parties.** Parties are bound by stipulations voluntarily made, and relief from such stipulations after judgment is warranted only under exceptional circumstances.
4. **Stipulations: Parties: Courts: Good Cause.** Courts will enforce valid stipulations unless some good cause is shown for declining to do so, especially where the stipulation has been acted upon so that the parties could not be placed in status quo.
5. **Stipulations.** Stipulations cannot be contradicted by evidence tending to show the facts to be other than as stipulated.
6. **Pleadings: Waiver.** An admission made in a pleading on which the trial is had is more than an ordinary admission; it is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and therefore is a limitation of the issues.
7. **Pleadings: Evidence.** Judicial admissions must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence.
8. **Pleadings.** An admission in an answer does not extend beyond the intendment of the admission as clearly disclosed by its context.

Appeal from the Workers' Compensation Court: THOMAS E. STINE, Judge. Reversed and remanded for further proceedings.

Timothy S. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellant.

Harry A. Hoch III, of Sodoro, Daly & Sodoro, P.C., for appellee.

IRWIN, MOORE, and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

Rafael Cervantes appeals from the award of the Nebraska Workers' Compensation Court filed February 22, 2012. The court rejected certain stipulations of the parties and found Cervantes was not permanently and totally disabled as a result of multiple scheduled member injuries. The court also found that Cervantes was entitled to vocational rehabilitation services from June 8, 2008, to July 21, 2011, but that he would not be entitled to services beyond that period of time.

BACKGROUND

Cervantes was born in April 1958, and he does not read, write, or speak English. He attended school through the sixth

grade in Mexico, and his previous work experience included work as a field hand in Mexico.

In the United States, Cervantes worked for Omaha Steel Castings Co. (Omaha Steel). This job included picking up containers of food weighing greater than 10 pounds and required overhead lifting and reaching. The qualifications for Cervantes' position included the ability to work at a fast pace and lift up to 100 pounds.

On August 14, 2006, Cervantes was standing on a steel beam, suspended approximately 5 feet in the air. He slipped off the beam, and as he fell, his right arm was pulled, causing significant pain. On August 18, Cervantes was diagnosed with a "SLAP II tear of the superior labrum" in the right shoulder, and he was treated conservatively for his injury. On August 24, Cervantes was advised that in order to adequately treat the labrum tear, it would be appropriate for him to undergo surgery, which he elected not to undergo. Cervantes returned to work for Omaha Steel shortly after the accident, primarily using his left arm to perform his work duties.

Cervantes sought a second opinion from Dr. Kirk Hutton, who also recommended surgery on Cervantes' right shoulder, and Cervantes refused the treatment. On February 14, 2007, Dr. Hutton issued a report with his diagnosis of Cervantes' injuries, noting that if he did not have surgery, he had reached maximum medical improvement and sustained an 18-percent permanent partial impairment rating of his upper right extremity. Dr. Hutton set permanent work restrictions of "light work with lifting 20 pounds maximum and frequent lifting and/or carrying of objects weighing up to 10 pounds." He recommended that Cervantes "keep work below shoulder level and close to the body." Dr. Hutton stated Cervantes would need future medical care and treatment, including possible surgery, as well as "physical therapy and/or anti-inflammatory and pain medicines on occasion." On July 25, Dr. Hutton modified the permanent restrictions to include only "sedentary work, 10 pounds lifting maximum."

On November 8, 2007, Cervantes saw Dr. D.M. Gammel for pain in his left shoulder. Dr. Gammel noted that there was "no known specific injury," but that Cervantes did not have the use

of his right shoulder, as he needed surgery. Dr. Gammel also noted that Cervantes had been using his left shoulder exclusively, with increased pain and difficulty. He later diagnosed the injury as a "labral tear." On December 5, Cervantes saw another doctor for a left shoulder MRI, which showed a "[t]ear of superior labrum extending anterior to posterior consistent with Type 2 SLAP tear of the glenoid labrum."

Cervantes' final day of employment at Omaha Steel was January 16, 2008. He has not been able to perform any of the types of work he completed previously because of the restrictions caused by his injuries.

After an MRI on December 5, 2007, Dr. Hutton's February 27, 2008, "Progress Note" diagnosed Cervantes with "[b]ilateral shoulder SLAP lesions." Dr. Hutton prescribed "a sedentary work restriction keeping work below shoulder level and close to the body," with respect to the shoulder injuries.

Dr. Hutton's letter report on April 4, 2008, noted the current diagnosis for the left shoulder was a "SLAP II tear." Dr. Hutton could not say with a reasonable degree of medical certainty that the tear was caused by Cervantes' work activities, but the types of duties that Cervantes described certainly may have aggravated his condition causing it to become painful. He said Cervantes reported dealing with his right shoulder pain by overcompensating and using his left shoulder, subsequently developing pain. Dr. Hutton recommended surgery, which Cervantes refused, opting to treat his left shoulder more conservatively. Dr. Hutton noted Cervantes would need physical therapy and "continued anti-inflammatory usage" to treat both shoulders, and he recommended vocational training to help Cervantes get a job which did not require lifting, pushing, or pulling, because these activities would aggravate his shoulder conditions. He stated that if Cervantes elected not to have surgery on his left shoulder, he had reached maximum medical improvement and had sustained a 12-percent permanent partial impairment to each upper extremity.

On December 26, 2008, Dr. Hutton completed a medical questionnaire, diagnosing Cervantes with a left shoulder "SLAP II lesion." He stated the lesion was aggravated by Cervantes' work activities with Omaha Steel. He assigned

a 12-percent permanent impairment to Cervantes' left upper extremity "as a result of the work-related aggravation he sustained to a pre-existing left shoulder condition as a result of performing his work activities" for Omaha Steel.

Cervantes underwent vocational rehabilitation training from June 8, 2008, through July 21, 2011. During this period, and throughout the trial, Cervantes was not a legal resident of the United States, but he represented that he was in order to obtain vocational rehabilitation services.

Ted Stricklett, a vocational rehabilitation consultant, worked with Cervantes to assist with classes in English as a second language. In September 2010, Stricklett sent an e-mail to counsel stating, "If consideration is given to [Cervantes'] work restrictions per Dr. Hutton (Sedentary work while keeping work below shoulder level and close to his body) and if I were to assume vocational rehabilitation is unsuccessful, then it would be my opinion that . . . Cervantes would be competitively unemployable." On December 15, 2011, Cervantes underwent a psychological evaluation. The evaluation determined Cervantes' intellectual functioning is "borderline to low average." He is also functionally illiterate and not able to communicate effectively without the aid of an interpreter.

On July 21, 2011, Stricklett wrote a report stating that Cervantes was unsuccessful in his vocational rehabilitation and that it was still his opinion Cervantes was competitively unemployable. On the same day, Cervantes filed his petition alleging he sustained bilateral upper extremity injuries in an accident on August 14, 2006, arising out of and in the course of his employment with Omaha Steel. He also alleged he was entitled to compensation from the company.

Omaha Steel's answer stated:

> [Omaha Steel] admits that on August 14, 2006, [Cervantes] was an employee of . . . Omaha Steel . . . , and while employed on said date and while engaged in his duties of employment, he suffered an injury to both of his shoulders as a result of an accident arising out of and in the course of his employment . . . .

The answer also stated that the injury sustained to Cervantes' right shoulder and upper extremity was the result of being

struck by a piece of equipment and that he sustained an injury to his left shoulder and upper extremity "as a result of overcompensating for his related right shoulder/upper extremity injury." Further, the answer admitted Cervantes "sustained a 12% impairment to his left upper extremity and an 18% impairment to his right upper extremity as a result of the aforementioned accident and injuries."

A pretrial conference was held on January 5, 2012, and a pretrial order was issued on January 9. At the time of the pretrial conference, the parties stipulated to various facts which were reproduced in the court's award. These stipulations included Cervantes' employment with Omaha Steel, the dates of his employment, the amount of his wages, the payments he received for his injuries, his participation in vocational rehabilitation, his immigration status, and the venue for this case. The pretrial order, filed January 9, specifically stated that "on August 14, 2006, [Cervantes] suffered injury by accident to his left arm and right arm, arising out of and in the scope of his employment."

A hearing before the Nebraska Workers' Compensation Court took place on January 17, 2012, and the issues were limited to whether Cervantes was permanently and totally disabled as a result of multiple scheduled member injuries; whether Cervantes was entitled to vocational rehabilitation services between June 8, 2008, and July 21, 2011; and, if he was not entitled to vocational rehabilitation, whether Omaha Steel was entitled to a credit for temporary total disability payments made during that period of time.

In the award, filed February 22, 2012, the court rejected the parties' stipulation that Cervantes had sustained bilateral shoulder injuries as a result of the August 14, 2006, work accident and determined Cervantes was not permanently and totally disabled under Neb. Rev. Stat. § 48-121(3) (Reissue 2010). The court also found Cervantes was entitled to vocational rehabilitation services between June 8, 2008, and July 21, 2011, but was not eligible for further vocational rehabilitation from the time of the order. Cervantes filed his notice of appeal on March 8, 2012.

ASSIGNMENTS OF ERROR

Cervantes assigns the Workers' Compensation Court erred in rejecting the parties' stipulation that Cervantes sustained multiple scheduled member injuries as a result of the August 14, 2006, work accident. Cervantes also assigns error to the finding that he was not rendered permanently totally disabled as a result of the injuries, pursuant to § 48-121(3).

STANDARD OF REVIEW

[1] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, a higher appellate court reviews the trial judge's findings of fact, which will not be disturbed unless clearly wrong. See *Spitz v. T.O. Haas Tire Co.*, 283 Neb. 811, 815 N.W.2d 524 (2012).

ANALYSIS

Rejection of Parties' Stipulations.

In this case, the parties stipulated to various facts at the pretrial hearing on January 5, 2012, and these stipulations were reproduced in the court's pretrial order filed on January 9. On January 17, the parties presented evidence specifically targeted to address the issues of whether the injuries, stipulated to at the pretrial hearing, rendered Cervantes permanently and totally disabled and whether Cervantes should be entitled to vocational rehabilitation as a result of these injuries. At trial, the parties did not address whether Cervantes' injuries arose out of a single work-related incident, because this fact had been stipulated to prior to trial.

The court's award rejected the stipulation, finding the medical evidence contradicted the stipulation that the injury to Cervantes' left shoulder arose out of and in the scope of his employment with Omaha Steel. As a result, the court found that Cervantes was not permanently and totally disabled as a result of multiple scheduled member injuries.

[2,3] The Nebraska Supreme Court has stated that stipulations voluntarily entered into between the parties to a cause or their attorneys, for the government of their conduct and the control of their rights during the trial or progress of the

cause, will be respected and enforced by the courts, where such stipulations are not contrary to good morals or sound public policy. *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006); *In re Estate of Mithofer*, 243 Neb. 722, 502 N.W.2d 454 (1993). The Supreme Court has also stated that parties are bound by stipulations voluntarily made and that relief from such stipulations after judgment is warranted only under exceptional circumstances. *Id.*

In this case, the stipulations, voluntarily made by the parties, who were represented by counsel, were not respected and enforced by the court, and there is no evidence that the court's decision was motivated by a finding that the stipulations were contrary to good morals or public policy. Instead, the court chose to invalidate the stipulations after independently evaluating the evidence and determining the evidence contradicted the stipulations.

Omaha Steel argues that "'there is no law in Nebraska which requires a court to accept a stipulation,'" brief for appellee at 12-13, quoting *Fordham v. West Lumber Co.*, 2 Neb. App. 716, 513 N.W.2d 52 (1994). However, this specific reference was related to the calculation of the injured party's weekly wage, and the court noted it may decline to enforce a stipulation where good cause is shown for doing so. In *Fordham*, the court declined to enforce the stipulation where it found the stipulation either was meant to be inapplicable to the calculation of permanent disability or was improvidently made and the interests of justice and fairness required it to be ignored.

[4] The Nebraska Supreme Court has stated courts will enforce valid stipulations unless some good cause is shown for declining to do so, especially where the stipulations have been acted upon so that the parties could not be placed in status quo. *Shipler, supra*. See, also, *Kuhlmann v. Platte Valley Irr. Dist.*, 166 Neb. 493, 89 N.W.2d 768 (1958).

Throughout the case, neither party disputed that Cervantes' injuries to both shoulders arose out of the same incident. Cervantes' petition stated that he sustained "bilateral upper extremity injuries," and Omaha Steel's answer admitted that "he suffered an injury to both of his shoulders as a result of

an accident arising out of and in the course of his employment by . . . Omaha Steel." The parties' pretrial stipulation is in line with these statements, and the parties' presentation of evidence at trial is as well. The court's decision to reject the stipulation after trial prejudices the parties, especially Cervantes, as he would have had the opportunity to present evidence of the injury to both shoulders at trial, had it been a disputed issue.

[5] Stipulations cannot be contradicted by evidence tending to show the facts to be other than as stipulated. See *Kuhlmann, supra*. Even if the court's interpretation of the evidence was correct, we find it was clearly wrong to reject the stipulation agreed to and relied upon by the parties in this case.

[6-8] In addition, the Supreme Court has stated:

> "[A]n admission made in a pleading on which the trial is had is more than an ordinary admission; it is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and therefore is a limitation of the issues."

City of Ashland v. Ashland Salvage, 271 Neb. 362, 369, 711 N.W.2d 861, 868 (2006). Judicial admissions must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence. *City of Ashland, supra*; *U S West Communications v. Taborski*, 253 Neb. 770, 572 N.W.2d 81 (1998). This court has further recognized that an admission in an answer "does not extend beyond the intendment of the admission as clearly disclosed by its context." *Robison v. Madsen*, 246 Neb. 22, 29, 516 N.W.2d 594, 599 (1994) (emphasis omitted).

Omaha Steel's answer admitted Cervantes suffered injuries to both shoulders as part of a single, work-related accident. The answer is unequivocal, deliberate, and clear regarding how the injuries occurred, and there is no evidence that the admission was made inadvertently or by mistake. The evidence shows the parties were in agreement on the limited issue of the causation of Cervantes' injuries when they created the stipulation. We find Omaha Steel's statement of how the injuries occurred is a judicial admission and is further evidence that the court incorrectly rejected the parties' stipulation.

Permanent and Total Disability.

Having determined that the Workers' Compensation Court was clearly wrong in rejecting the stipulation of the parties, we must address the remaining issue of whether Cervantes was permanently and totally disabled as a result of the work accident.

After trial, the court was not persuaded that the work accident caused the injuries to both the right and left shoulders and upper extremities. Therefore, the court could not find Cervantes was totally and permanently disabled under § 48-121(3), which requires the loss of use to be caused by one accident. However, if the court had accepted the parties' stipulation that the accident was the cause of the injuries to Cervantes' right and left shoulders, the court could come to a different conclusion regarding the extent of Cervantes' disability.

Whether Cervantes is permanently and totally disabled is a question of fact which must be resolved by the Workers' Compensation Court. Therefore, we remand this cause for a resolution of the issue and direct the court to make a decision regarding Cervantes' disability in light of the parties' stipulation and on the existing record.

CONCLUSION

We find the decision of the Nebraska Workers' Compensation Court was clearly wrong in rejecting the stipulation of the parties regarding the nature of Cervantes' injuries, and we reverse, and remand for further proceedings. The Workers' Compensation Court is directed to determine whether, in light of the parties' stipulation, and on the existing record, Cervantes is permanently and totally disabled as a result of the accident which occurred during the scope of his employment with Omaha Steel.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

OLD HOME ENTERPRISE, APPELLEE, V. IAN FLEMING ET AL., APPELLEES, AND SUBWAY, GARNISHEE-APPELLANT.

831 N.W.2d 46

Filed April 16, 2013. No. A-12-484.

1. **Appeal and Error.** 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.
2. **Courts: Appeal and Error.** The district court and higher appellate courts generally review appeals from the county court for error appearing on the record.
3. **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.
4. **Dismissal and Nonsuit.** The only way to ensure that an unserved action stands dismissed, as required by statute, is to hold that such dismissal occurs by operation of law, without predicate action by the trial court.
5. **Dismissal and Nonsuit: Service of Process.** Service of process effected more than 6 months after the petition was filed at a time when the action stood dismissed does not negate the dismissal pursuant to Neb. Rev. Stat. § 25-217 (Reissue 2008).
6. ____: ____. A voluntary appearance, which is the equivalent of service of process, is a nullity in a dismissed action.
7. **Dismissal and Nonsuit: Service of Process: Jurisdiction.** When a lawsuit is dismissed by operation of law for lack of service of process within 6 months of filing, the trial court has no jurisdiction to make orders thereafter, except to formalize the dismissal, and if made, they are a nullity, as are subsequent pleadings.
8. **Actions: Jurisdiction: Dismissal and Nonsuit.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte, and because Neb. Rev. Stat. § 25-217 (Reissue 2008) is self-executing, the action is dismissed 6 months after the complaint was filed.
9. **Dismissal and Nonsuit: Words and Phrases.** The words "any defendant" in the statutory language of Neb. Rev. Stat. § 25-217 (Reissue 2008) mean the dismissal is indicated only as to the defendant who is not served, not all of the defendants in the action.
10. **Judgments: Debtors and Creditors: Garnishment.** Garnishment is a legal aid in the execution of a judgment; it is a method by which a judgment creditor can recover against a third party for the debt owed by a judgment debtor.

Appeal from the District Court for Douglas County, JAMES T. GLEASON, Judge, on appeal thereto from the County Court for Douglas County, SHERYL L. LOHAUS, Judge. Judgment of District Court reversed, and cause remanded with directions to vacate and dismiss.

Angela M. Minahan, of Reinsch, Slattery, Bear & Minahan, P.C., L.L.O., for garnishee-appellant.

Lawrence G. Whelan and Dennis G. Whelan, of Whelan Law Office, for appellee Old Home Enterprise.

IRWIN, MOORE, and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

Subway, as garnishee, appeals from the order of the district court for Douglas County which affirmed the judgment of the county court for Douglas County overruling a "Motion to Set Aside Judgment" and a "Motion to Quash Execution." Subway became involved in this case when Old Home Enterprise (Old Home) sought garnishee liability for the debt purportedly owed by Subway's employee, Travis Becker, a defendant in the underlying action. For the reasons that follow, we reverse, and remand the cause with directions to vacate and dismiss.

BACKGROUND

On December 29, 2009, Old Home filed a complaint against Ian Fleming, Becker, Jason Vleck, Justin Valentine, and David Moore for breach of a rental contract. For purposes of this appeal, we focus on the case only as it relates to Becker.

On January 21, 2010, Old Home was notified that Becker was not served as required by Nebraska law because the sheriff was "unable to locate" Becker. On July 21, Old Home requested an alias summons for Becker, which was served at Becker's mother's home on July 30. When Becker failed to appear or plead, Old Home filed a motion for default judgment. On September 7, the county court entered default judgment against Becker in the amount of $9,279.97 plus court costs and attorney fees.

On December 3, 2010, Old Home made its first attempt to serve a summons and order of garnishment on Becker's employer, Subway. The summons, order of garnishment, and attached interrogatories were sent by certified mail to the specific Subway store where Becker worked, in Blair, Nebraska.

An employee signed for the documents, and Subway did not return the interrogatories. On June 22, 2011, Old Home attempted service on Subway in the same manner, and Subway did not respond in any manner.

Old Home then filed an application for a continuing lien against Subway and an application to determine garnishee liability. The county court for Douglas County issued an order for hearing to be served on Subway, and it was sent by certified mail. Becker signed for the document at the Subway store in Blair.

The hearing to determine garnishee liability took place on August 8, 2011. The county court entered judgment against Subway, imposing garnishee liability for the debt of its employee, Becker, and issued an order in aid of execution for the judgment. Subway was found liable to the judgment creditor, Old Home, in the amount of $9,200.78 plus interest and court costs.

Subsequently, Subway filed a "Motion to Set Aside Judgment" and a "Motion to Quash Execution," and the county court denied both motions. Subway timely filed a notice of appeal from the denial of those motions on October 19, 2011, and the parties appeared before the district court for Douglas County on January 6, 2012. The district court took the matter under advisement and affirmed on May 22 the decision of the county court.

ASSIGNMENTS OF ERROR

Subway failed to specifically assign errors in accordance with the Supreme Court's rules of appellate practice. See Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2012).

STANDARD OF REVIEW

[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. *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012).

ANALYSIS

[2,3] The district court and higher appellate courts generally review appeals from the county court for error appearing on

the record. *Centurion Stone of Nebraska v. Trombino*, 19 Neb. App. 643, 812 N.W.2d 303 (2012). As stated above, although an appellate court considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Connelly v. City of Omaha, supra*. 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. *Id*. In this case, a review of the record reveals plain error.

[4] According to the Nebraska statutes, an "action shall stand dismissed without prejudice as to any defendant not served within six months from the date the complaint was filed." Neb. Rev. Stat. § 25-217 (Reissue 2008). The only way to ensure that an unserved action stands dismissed, as required by statute, is to hold that such dismissal occurs by operation of law, without predicate action by the trial court. See *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000).

[5,6] Service of process effected more than 6 months after the petition was filed at a time when the action stood dismissed does not negate the dismissal pursuant to § 25-217. See *Vopalka v. Abraham, supra*. A voluntary appearance, which is the equivalent of service of process, is a nullity in a dismissed action. See *id*. Old Home's complaint against Becker for breach of a rental contract was filed December 29, 2009, and was not served until July 30, 2010. During that period, Becker did nothing that would constitute a voluntary appearance or waiver of process. More than 6 months had elapsed, and therefore, the action was dismissed by operation of law, without prejudice.

[7] When a lawsuit is dismissed by operation of law for lack of service of process within 6 months of filing, the trial court has no jurisdiction to make orders thereafter, except to formalize the dismissal, and if made, they are a nullity, as are subsequent pleadings. See *id*.

This rule is illustrated in *Davis v. Choctaw Constr.*, 280 Neb. 714, 789 N.W.2d 698 (2010), where a complaint was filed in August 2005 and the defendant was not served until August 2006. The defendant then made an appearance, followed by a full trial, which resulted in a substantial judgment against it.

The defendant then filed a motion for new trial in which it asserted the district court lacked jurisdiction to enter the judgment under § 25-217 because the service did not occur within 6 months. The trial court overruled the motion for new trial, and the defendant's appeal was heard by the Nebraska Supreme Court, which reversed the trial court's decision.

[8] The Supreme Court stated that lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte, and because § 25-217 is self-executing, the action was dismissed 6 months after the complaint was filed. *Davis v. Choctaw Constr., supra*. The court held that the trial proceedings were nullities and that the district court erred in not vacating the judgment and dismissing the action when the issue of subject matter jurisdiction was raised in the postjudgment motions.

Similarly, in this case, Becker was not timely served. The action against Becker was automatically dismissed under § 25-217 when 6 months had passed from the filing of the action on December 29, 2009. Therefore, the county court lacked jurisdiction to make any order against Becker after that time, and the default judgment entered against Becker on September 7, 2010, is a nullity.

[9] The Nebraska Supreme Court determined the words "any defendant" in the statutory language of § 25-217 mean the dismissal is indicated only as to the defendant who is not served, not all of the defendants in the action. See *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 268 Neb. 439, 684 N.W.2d 14 (2004).

Therefore, we find the default judgment in the underlying breach of contract action is set aside as to Becker only. The other defendants in Old Home's original complaint are not affected by this decision.

Becker is the only defendant in the underlying action who is employed by Subway, and Subway is only involved as a garnishee in the instant case because of its employer-employee relationship with Becker.

[10] Garnishment is a legal aid in the execution of a judgment; it is a method by which a judgment creditor can recover against a third party for the debt owed by a judgment debtor.

Myers v. Christensen, 278 Neb. 989, 776 N.W.2d 201 (2009). Having determined the default judgment against Becker is a nullity, we find the subsequent garnishee liability action against Subway arising out of such default judgment is also a nullity, because there is no longer any debt owed by Becker. See *id.* at 993, 776 N.W.2d at 205 ("[t]he claim of a judgment creditor garnishor against a garnishee can rise no higher than the claim of the garnishor's judgment debtor against the garnishee"). For this reason, the decisions of the county and district courts must be reversed. The breach of contract case must be dismissed as to Becker, and Subway cannot be held liable for a garnishment claim arising from the case against Becker.

CONCLUSION

Having determined the county court issued orders after the lawsuit against Becker was dismissed by operation of law, we find there is plain error on the record. The cases against Becker and Subway must be dismissed.

We reverse, and remand with directions to the district court for Douglas County to remand to the county court for Douglas County, with directions to vacate the county court's default judgment of September 7, 2010, as to Becker and to dismiss the underlying complaint filed December 29, 2009, against Becker only. The district court for Douglas County is further directed to remand the cause to the county court for Douglas County with directions to vacate its order dated August 8, 2011, determining garnishee liability against Subway and to refund the cash supersedeas bond to Subway.

REVERSED AND REMANDED WITH DIRECTIONS TO VACATE AND DISMISS.

CITY OF OMAHA, NEBRASKA, ET AL., APPELLANTS, V. C.A. HOWELL, INC., DOING BUSINESS AS HOWELL'S BP, AND THE NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEES.

832 N.W.2d 30

Filed April 23, 2013. No. A-11-1116.

1. **Administrative Law: Liquor Licenses: Appeal and Error.** Appeals from orders or decisions of the Nebraska Liquor Control Commission are taken in accordance with the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008 & Cum. Supp. 2012).
2. **Administrative Law: Final Orders: Appeal and Error.** Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency.
3. ____: ____: ____. Under the Administrative Procedure Act, an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record.
4. **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.
5. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
6. **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.
7. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is a court's power to hear a case.
8. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
9. **Jurisdiction: Appeal and Error.** If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.
10. **Administrative Law: Jurisdiction: Appeal and Error.** Where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute.
11. **Administrative Law: Words and Phrases.** An administrative agency is a neutral factfinding body when it is neither an adversary nor an advocate of a party.
12. **Administrative Law: Parties.** When an administrative agency acts as the primary civil enforcement agency, it is more than a neutral fact finder and is a required party.

13. **Administrative Law: Parties: Appeal and Error.** An agency which is charged with the responsibility of protecting the public interest, as distinguished from determining the rights of two or more individuals in a dispute before such agency, is a necessary or indispensable party in a judicial review of an order of an administrative agency.
14. **Administrative Law: Liquor Licenses.** Within the Nebraska Liquor Control Commission's power is the authority to issue licenses subject to certain restrictions or conditions as reasonably necessary to protect the health, safety, and welfare of the people of the State of Nebraska and to promote and foster temperance in the consumption of alcohol.
15. **Administrative Law: Jurisdiction: Appeal and Error.** The filing of the petition and the service of summons are the two actions that are necessary to establish jurisdiction pursuant to the Administrative Procedure Act.
16. **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.
17. **Jurisdiction: Dismissal and Nonsuit: Motions to Vacate: 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 Lancaster County: KAREN B. FLOWERS, Judge. Vacated and dismissed.

Thomas O. Mumgaard, Deputy Omaha City Attorney, for appellants.

Michael L. Lazer and Kevin J. McCoy, of Smith, Gardner, Slusky, Lazer, Pohren & Rogers, L.L.P., for appellee C.A. Howell, Inc.

Jon Bruning, Attorney General, and Milissa Johnson-Wiles for appellee Nebraska Liquor Control Commission.

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

INBODY, Chief Judge.

INTRODUCTION

The City of Omaha, Nebraska, and three citizen protestors, Sharon Olson, James Rawlings, and Tracy King (collectively the City), appeal the order of the Lancaster County District Court affirming the decision of the Nebraska Liquor Control Commission (the Commission) granting a retail

class D liquor license to C.A. Howell, Inc. (Howell), doing business as Howell's BP.

STATEMENT OF FACTS

On June 1, 2010, Howell submitted an application with the Commission for a liquor license for Howell's BP, a gas station, located on North 30th Street in Omaha. The application indicated that Howell sought the issuance of a retail class D license for the sale of beer, wine, and distilled spirits, off sale only. A petition was filed with the Commission indicating that several residents protested the issuance of a liquor license to Howell's BP. On June 22, the Omaha City Council reviewed and considered Howell's application for a license and recommended that the application be denied. The city council concluded that Howell was not able to properly provide for the safe sale of liquor as proposed, and in consideration of the petitioning citizens' protests, the existence of other licenses in the area, the impact on law enforcement, and the public interest, the council recommended that the application be denied.

On August 27, 2010, a hearing was held before the Commission on Howell's application for a retail class D liquor license. At the hearing, Olson, a citizen protestor and member of the "Miller Park-Minne Lusa Neighborhood citizen's patrol," testified that there were other liquor stores in the vicinity of Howell's BP. Olson testified that the area was not in need of another liquor store and that she was concerned because "young people" frequently "hang[] out" at Howell's BP. Olson requested that the Commission deny Howell's application because of the increase in crime and violence, in addition to police calls, that would follow.

Craig Howell, the owner of Howell's BP, testified that he had operated the Howell's BP station on North 30th Street for 7 or 8 years. He testified that in that time, he had never sold alcohol at the store. During those years, customers requested almost daily that Howell engage in the sale of alcohol at that location. He testified that if the license is granted, he plans on remodeling the location to add more store area by taking away two of the three automobile repair bays. He testified that at previous locations, the businesses held liquor licenses and

did not have any violations during the time he operated them. Howell submitted a large document which contained numerous pages of signatures by customers of the store in support of the issuance of a liquor license.

In response to an exhibit submitted by the City, which indicated that in December 2009, a store clerk had been shot and killed by an individual with whom the clerk had "exchange[d] . . . words," Craig Howell testified that an employee of his was the victim of a homicide. He explained that prior to the shooting, the employee had been working for Howell for only 1 week; that there was no indication that the shooting was connected with an attempted robbery; and that the shooter had never been apprehended. Craig Howell testified that nothing was taken from the store and that that was the only incidence of violence which had occurred inside of the store.

Craig Howell also testified in response to two Omaha Police Department crime analysis unit reports for the intersection where Howell's BP is located, for June through December 2009 and January through August 2010. The reports are generated from the police department's computers via the 911 emergency dispatch service's communication center. For each emergency call, the report gives the type of call and the date, time, and disposition. Many of the calls took place between midnight and 3 a.m. Craig Howell testified that while he currently operates Howell's BP on a 24-hour basis, he anticipates that he would close the business in the early morning hours if the license were granted. He testified that he has the store open for 24 hours a day only because the income he generates now requires those business hours and that he hopes alcohol sales will increase the income so that he is not required to stay open 24 hours a day.

Craig Howell explained that in accordance with the police department, he was instructed to contact the police if there were any incidents at or near his property during the early morning hours, and that he instructed his employees to do the same. He testified that he and his employees work as night watchmen, since the business is open on a 24-hour basis. He testified that he would also be hiring a security guard if the

license were granted. He also testified that all of the emergency calls indicated on the crime analysis unit reports had nothing to do with the sale of alcohol because the store did not have a liquor license.

Craig Howell testified that a convenience store much like Howell's BP had previously applied for a liquor license, was denied the license, and thereafter closed its doors to all business. He recognized that there were two large grocery stores in the area which held class C liquor licenses, but explained that he was trying to obtain a different market than those stores.

On September 1, 2010, the Commission entered an order finding that Howell was fit, willing, and able to properly provide the service described in the application; that Howell was able to conform to the rules and regulations of the Nebraska Liquor Control Act; that Howell demonstrated the proper management and control of the premises to ensure conformation to the Nebraska Liquor Control Act; and that the issuance of the license was or would be required by present or future public convenience and necessity. The Commission approved the application by a vote of 2 to 1 and issued Howell a retail class D liquor license.

On September 27, 2010, the City filed a petition for judicial review of the Commission's decision granting Howell a liquor license. The petition indicated that the Commission was not made a party of record because it was a neutral factfinding body and alleged that the Commission did not comply with the Nebraska Liquor Control Act in its decision to grant Howell a liquor license.

On October 18, 2010, the City filed an amended petition which included the Commission as a named party and the same allegations as the original petition, without the language regarding the Commission's being a neutral party. On October 20, the Commission acknowledged receipt of a copy of the amended petition naming it as a party and filed a waiver of service by summons.

On November 4, 2010, Howell filed a motion to dismiss with prejudice, alleging that the Commission was a necessary party and was not timely made a party until after 30 days

from its order, contrary to the requirements of Neb. Rev. Stat. § 84-917 (Cum. Supp. 2012). On that same day, the Commission filed an answer generally denying all of the allegations in the amended petition. Judges' notes indicate that the district court denied Howell's motion to dismiss in March 2011. On June 28, 2011, Howell filed an answer and renewed his motion to dismiss which had been previously denied.

On November 30, 2011, the district court filed an order affirming the Commission's issuance of the liquor license. The district court found that the City did not dispute Howell was fit, willing, and able to provide for the sale of alcohol and would conform to the rules and regulations of the Nebraska Liquor Control Act, but that the City sought a reversal of the license because the Commission reached its decision on an improper basis and because the evidence failed to support that the issuance of the license was required by present or future public convenience and necessity.

The district court found that a remark made during the hearing by an individual commissioner, which the City argued constituted findings of fact and the basis for the improper basis argument, did not modify the actual written findings of fact and that the City's argument was without merit. The district court further found there was no issue regarding zoning restrictions, sanitary conditions, traffic, or the existing populations or projected growth thereof. The court found that the City's allegations of police calls to the Howell's BP location in 2009 or 2010 provided the court with no evidence to support that existing law enforcement is inadequate or would become so, or that the liquor license would attract "people who want to cause trouble." The district court also found that although there were two class C licenses in the area, there was no corroborative documentation that Howell's license resulted in an undue concentration of licenses in one area. The district court concluded that Howell met its burden to show that the issuance of a license is required by present or future public convenience, in accord with the daily requests by customers for the sale of alcohol. The district court affirmed the issuance of the license to Howell, and it is from this order that the City has appealed.

ASSIGNMENTS OF ERROR

The City assigns that the district court erred by affirming the Commission's grant of a liquor license, because the license was granted under an unlawful and unauthorized purpose. The City also assigns that the district court erred in concluding that Howell met its burden of showing the statutory standards necessary to obtain a liquor license.

STANDARD OF REVIEW

[1,2] Appeals from orders or decisions of the Commission are taken in accordance with the Administrative Procedure Act (APA), Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008 & Cum. Supp. 2012). See *Lariat Club v. Nebraska Liquor Control Comm.*, 267 Neb. 179, 673 N.W.2d 29 (2004). Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *DLH, Inc. v. Nebraska Liquor Control Comm.*, 266 Neb. 361, 665 N.W.2d 629 (2003).

[3,4] Under the APA, an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record. See *id.* 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.*

[5] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Lariat Club v. Nebraska Liquor Control Comm., supra.*

[6] 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

During the pendency of this appeal, this court ordered the parties to address the issue of jurisdiction pursuant to the

provisions of the APA found at § 84-917. Appeals from orders or decisions of the Commission must be taken in accordance with the APA. Neb. Rev. Stat. § 53-1,116 (Reissue 2010) (appeal from any "order or decision of the [C]ommission granting, denying, suspending, [or] canceling" license or permit for sale of alcoholic liquor in accordance with APA). See *DLH, Inc. v. Nebraska Liquor Control Comm., supra* (appeals from orders or decisions of Commission are taken in accordance with APA).

Section 84-917, which provides for the right to appeal the final decision in a contested case pursuant to the APA, has been amended several times, including in 2009. However, the substance of the particular subsection at issue in this case, § 84-917(2)(a)(i), remains unchanged, and it provides, in pertinent part:

> Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. If an agency's only role in a contested case is to act as a neutral factfinding body, the agency shall not be a party of record. In all other cases, the agency shall be a party of record.

The City contends that the Commission was properly included as a party in the amended petition and that the district court and this court properly have jurisdiction over this case. Conversely, Howell alleges that the City failed to name the Commission as a necessary party in the original petition and that the amended petition was not filed within the allotted time pursuant to § 84-917. The Commission, in its brief, adopts Howell's arguments, but also contends that it was a necessary party and that the City's failure to include it in the original petition deprived the district court of subject matter jurisdiction to hear the appeal. The determination regarding the Commission's role as a party of record has not been addressed prior to this appeal.

[7-9] Subject matter jurisdiction is a court's power to hear a case. *State ex rel. Lamm v. Nebraska Bd. of Pardons*, 260

Neb. 1000, 620 N.W.2d 763 (2001). Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007). If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction. *Anderson v. Houston*, 274 Neb. 916, 744 N.W.2d 410 (2008).

[10] Where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute. *Nebraska Dept. of Health & Human Servs. v. Weekley*, 274 Neb. 516, 741 N.W.2d 658 (2007); *Essman v. Nebraska Law Enforcement Training Ctr.*, 252 Neb. 347, 562 N.W.2d 355 (1997). In the case before us, we must first determine whether the district court lacked subject matter jurisdiction by determining whether the Commission was a neutral factfinding agency or a party of record pursuant to § 84-917(2)(a)(i).

What Is Commission's Role?

The Commission argues that Neb. Rev. Stat. § 53-1,115 (Reissue 2010) answers the question of whether it is a party of record in the instant case. Section 53-1,115 provides, in pertinent part: "(4) For purposes of this section, party of record means: (a) In the case of an administrative proceeding before the [C]ommission on the application for a retail, craft brewery, or microdistillery license: . . . (iv) The [C]ommission."

Section 84-917(2)(a)(i) provides that the Commission, as a party of record, shall be made a party to the proceedings for review, but that if the agency's only role in the contested case was to act as a neutral factfinding body, the agency "shall not be a party of record." Thus, we must determine whether the Commission was a "neutral factfinding body." See *id.*

[11-13] An administrative agency is a neutral factfinding body when it is neither an adversary nor an advocate of a party. *Metropolitan Util. Dist. v. Aquila, Inc.*, 271 Neb. 454, 712 N.W.2d 280 (2006); *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005). However, when an administrative agency acts as the primary civil

enforcement agency, it is more than a neutral fact finder and is a required party. *Metropolitan Util. Dist. v. Aquila, Inc., supra*; *In re Application of Metropolitan Util. Dist., supra*. Further, an agency which is charged with the responsibility of protecting the public interest, as distinguished from determining the rights of two or more individuals in a dispute before such agency, is a necessary or indispensable party in a judicial review of an order of an administrative agency. *Tlamka v. Parry*, 16 Neb. App. 793, 751 N.W.2d 664 (2008). See, also, *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985); *Leach v. Dept. of Motor Vehicles*, 213 Neb. 103, 327 N.W.2d 615 (1982).

Both the Nebraska Supreme Court and this court have previously analyzed the roles of various agencies as either neutral fact finders or required parties. See, *Becker v. Nebraska Acct. & Disclosure Comm.*, 249 Neb. 28, 541 N.W.2d 36 (1995) (Nebraska Accountability and Disclosure Commission was required to be party to proceedings for judicial review of settlement agreement between itself and University of Nebraska Board of Regents); *Tlamka v. Parry, supra* (inmate's failure to timely include Nebraska Department of Correctional Services as party in initial petition deprived trial court of jurisdiction over his petition for review). The line between an agency's roles is by no means clear, as evidenced in two separate cases through which the Nebraska Public Service Commission was found in one instance not to be a neutral factfinding body and in a second instance to be acting as a neutral factfinding body. See, *Metropolitan Util. Dist. v. Aquila, Inc., supra* (Nebraska Public Service Commission was acting as factfinding body and not as certifying agency, primary civil enforcement agency, or adversarial party or enforcing previous order); *In re Application of Metropolitan Util. Dist., supra* (under authority given to Nebraska Public Service Commission, it was not acting as neutral factfinding body and was proper party to action).

In the case of *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005), the Metropolitan Utilities District of Omaha (MUD) appealed to the district court from a decision of the Nebraska Public Service

Commission (PSC) dismissing its application for certification as a competitive natural gas provider. The district court "'affirmed,'" finding that the PSC lacked jurisdiction. *Id.* at 495, 704 N.W.2d at 240. The PSC appealed to the Nebraska Supreme Court, contending that it had jurisdiction over MUD. MUD argued that the PSC did not have standing to appeal and was not a proper party to the action. *Id.* The statute in issue at that time, Neb. Rev. Stat. § 66-1804(1) (Reissue 2003), provided:

> The [PSC] shall have full power, authority, and jurisdiction to regulate natural gas public utilities and may do all things necessary and convenient for the exercise of such power, authority, and jurisdiction. . . . [S]uch power, authority, and jurisdiction shall extend to, but not be limited to, all matters encompassed within the State Natural Gas Regulation Act and sections 57-1301 to 57-1307.

The Nebraska Supreme Court found that the statutes setting forth the PSC's powers and authority concerning natural gas utilities gave it powers to act as more than a neutral factfinding body and concluded that the PSC was a required party. *In re Application of Metropolitan Util. Dist., supra.*

In the case of *Metropolitan Util. Dist. v. Aquila, Inc.*, 271 Neb. 454, 712 N.W.2d 280 (2006), MUD appealed the decision of the PSC ordering MUD to cease and desist the construction of a natural gas main extension as a result of a formal complaint filed by another utility company asserting that the extension was not in the public interest. The PSC was made a party to the appeal. *Id.* The Nebraska Supreme Court held that the PSC had acted as a neutral factfinding body and, as such, was not a necessary party to the appeal. In making that determination, the court found that pursuant to § 66-1804(1), the PSC's jurisdiction extended to Neb. Rev. Stat. §§ 57-1301 to 57-1307 (Reissue 2004), but that those statutes limited the PSC's role by specifically including a provision in § 57-1306 stating that the PSC "shall have no jurisdiction over a metropolitan utilities district or natural gas utility beyond the determination of disputes brought before it under sections 57-1301 to 57-1307." In concluding that the PSC was not a necessary party to the action, the court found that the PSC was not acting

as a certifying agency, as a primary civil enforcement agency, or in the role of an adversarial party or enforcing a previous order, but was acting as a factfinding body to determine the validity of the cease-and-desist order. *Metropolitan Util. Dist. v. Aquila, Inc., supra.*

[14] In this case, the Commission is empowered to promulgate rules and regulations to carry out the provisions of the Nebraska Liquor Control Act, Neb. Rev. Stat. §§ 53-101 to 53-1,122 (Reissue 2010). See, *JCB Enters. v. Nebraska Liq. Cont. Comm.*, 275 Neb. 797, 749 N.W.2d 873 (2008); *Lariat Club v. Nebraska Liquor Control Comm.*, 267 Neb. 179, 673 N.W.2d 29 (2004). Section 53-116 sets forth that the Commission has exclusive vested "power to regulate all phases of the control of the manufacture, distribution, sale, and traffic of alcoholic liquor." Section 53-117 also provides, in part, that the Commission has the power to receive, issue, suspend, cancel, and revoke liquor licenses; promulgate rules and regulations; govern the traffic of alcoholic liquor and "enforce strictly" the Nebraska Liquor Control Act; inspect premises where liquor is located; hear and determine appeals; conduct audits; and investigate the administration of laws in relation to alcoholic liquor. This court has also concluded that within the Commission's power is the authority to issue licenses subject to certain restrictions or conditions as reasonably necessary to protect the health, safety, and welfare of the people of the State of Nebraska and to promote and foster temperance in the consumption of alcohol. See *F & T, Inc. v. Nebraska Liquor Control Comm.*, 7 Neb. App. 973, 587 N.W.2d 700 (1998). Clearly, under the statutory authority given to the Commission, it has a broad range of powers and plays a significant role in the administration of the Nebraska Liquor Control Act.

Howell's application for a liquor license was submitted to the Commission and forwarded to the city council for review. The city council requested a denial of the license. The Commission, under the broad authority given to it pursuant to § 53-117, decided against the recommendation and issued Howell a liquor license, which made the Commission an adversarial party. Furthermore, the Commission is also

charged with the responsibility of protecting the public interest through its regulation of all phases of alcoholic liquor and, as such, is not merely a neutral factfinding body. See, *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985); *Leach v. Dept. of Motor Vehicles*, 213 Neb. 103, 327 N.W.2d 615 (1982); *Tlamka v. Parry*, 16 Neb. App. 793, 751 N.W.2d 664 (2008). Therefore, in this case, pursuant to § 84-917(2)(a)(i), the Commission was required as a party of record and should have been included in the City's original petition.

Were Statutory Requirements for Jurisdiction Met?

Having determined that the Commission was required as a party of record and should have been included in the City's original petition, we must now determine whether the statutory requirements for jurisdiction were met.

[15] The filing of the petition and the service of summons are the two actions that are necessary to establish jurisdiction pursuant to the APA. *Essman v. Nebraska Law Enforcement Training Ctr.*, 252 Neb. 347, 562 N.W.2d 355 (1997); *Tlamka v. Parry, supra*. However, Howell claims that the Commission was not made a party to the proceedings within the allotted time set forth in § 84-917(2)(a)(i), which provides, in part:

> Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. If an agency's only role in a contested case is to act as a neutral factfinding body, the agency shall not be a party of record. In all other cases, the agency shall be a party of record. Summons shall be served within thirty days of the filing of the petition in the manner provided for service of summons in section 25-510.02.

Neb. Rev. Stat. § 25-510.02(1) (Reissue 2008) provides that summons be left at the office of the Attorney General "with the Attorney General, deputy attorney general, or someone designated in writing by the Attorney General, or by certified mail

service addressed to the office of the Attorney General." See, also, *Concordia Teachers College v. Neb. Dept. of Labor*, 252 Neb. 504, 563 N.W.2d 345 (1997) (when § 25-510.02 applies, summons must be served on Attorney General in order to institute judicial review under APA).

Since the City failed to include the Commission as a party of record, the requirements of § 84-917(2)(a)(i) were not met. However, the City argues that any jurisdictional defect was cured with the filing of the amended petition. We find that the City's reliance upon that argument is flawed. If we were to accept that argument, it would essentially alleviate the statutory requirement of timeliness in § 84-917(2)(a)(i), which requires that the necessary parties to an APA proceeding be included in a timely petition. See *Tlamka v. Parry, supra*. The statutory timeliness in § 84-917(2)(a)(i) is that the petition be filed with the district court "within thirty days after the service of the final decision by the agency."

Here, the Commission made its determination on August 27, 2010, and its order on September 1. The City filed its original petition on September 27, and did not include the Commission as a party of record. On October 18, the City filed an amended petition, including the Commission as a party of record and including the Attorney General's office on the certificate of service. On October 19, the Commission, via the Attorney General's office, filed a waiver of service by summons. The record contains only one summons, filed on October 10 with regard to the original complaint, which was to be served on Howell only.

The Commission was a necessary party and was not timely included as such in the original petition. Therefore, the City's petition did not meet the statutory requirements of § 84-917(2)(a)(i) and the district court lacked jurisdiction, and that in turn deprives this court of jurisdiction.

CONCLUSION

[16,17] The City failed to seek district court review in the mode and manner and within the time provided by the statute. By failing to include the Commission as a party in the initial petition, the City failed to timely petition the district court for

review as to a necessary party. The district court lacked subject matter jurisdiction of the APA proceeding. 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.* Therefore, the judgment of the district court is vacated and this appeal is dismissed.

VACATED AND DISMISSED.

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

831 N.W.2d 358

Filed April 30, 2013. No. A-12-490.

1. **Juvenile Courts: Minors.** The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests.
2. **Juvenile Courts.** A juvenile court has broad discretion as to the disposition of a child found to be within the jurisdiction of the juvenile court under Neb. Rev. Stat. § 43-247(1) (Reissue 2008).
3. **Public Health and Welfare: Parent and Child.** Neb. Rev. Stat. § 43-532 (Reissue 2008) dictates that state policy is to assist juveniles in the least restrictive method consistent with the needs of each child.
4. **Juvenile Courts: Minors: Proof.** If a treatment level group home is the least restrictive placement consistent with a child's needs, a juvenile court may place the child into a more restrictive level of care only after the State makes a showing that a treatment level group home is not a viable option for the child.

Appeal from the County Court for Adams County: MICHAEL OFFNER, Judge. Reversed and remanded with directions.

T. Charles James, of Langvardt, Valle & James, guardian ad litem for appellant.

Amy R. Skalka, of Seiler & Parker, P.C., L.L.O., for appellant.

No appearance for appellee.

MOORE, PIRTLE, and RIEDMANN, Judges.

RIEDMANN, Judge.

INTRODUCTION

This appeal raises the issue of whether the juvenile court erred in committing Skylar E. to the Youth Rehabilitation and Treatment Center (YRTC) for the pendency of his minority despite recommendations by two psychologists, working on behalf of the State, that a lower level of treatment be provided. Neb. Rev. Stat. § 43-532 et seq. (Reissue 2008 & Cum. Supp. 2012) requires a juvenile court to place a minor in the least restrictive setting consistent with Nebraska law and with the minor's best interests. We therefore find that the juvenile court abused its discretion in committing Skylar to YRTC without requiring the Nebraska Department of Health and Human Services (DHHS) to explore the option of a less restrictive placement, such as a treatment level group home, as recommended by the State's psychologists.

BACKGROUND

Skylar is a 15-year-old male. In November 2010, when Skylar was 13, the State removed both him and his sister Alyson D. from his mother's care. The juvenile court initially acquired jurisdiction of both Skylar and Alyson under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) because their mother was living in a halfway house and was unable to care for them. While proceedings were ongoing under § 43-247(3)(a), Skylar was transferred to a number of different placements as further set forth below. In January 2012, while placed at the Madison Detention Center, Skylar punched a wall. He was found guilty of criminal mischief, which triggered an Office of Juvenile Services (OJS) evaluation and caused the juvenile court to acquire jurisdiction of him under § 43-247(1). The case was transferred from Madison County to Adams County.

State Placement History.

When Skylar was first removed from his mother in November 2010, he was placed in foster care. While at this foster care placement, Skylar began therapy with Dr. Doyle Daiss. Dr. Daiss scheduled a weekly appointment for Skylar, but the foster parents were able to take Skylar to only 13 of 21 scheduled sessions. Both Skylar and Dr. Daiss worked together to craft a treatment plan focusing on the need to manage anger and impulses. They both considered their relationship positive and productive.

Skylar initially achieved success in his foster care placement. In January 2011, a social worker described Skylar as happier than she had ever seen him. In April 2011, however, Skylar was expelled from school for bringing a knife to school and allegedly threatening the principal. Dr. Daiss testified that Skylar possessed knives to protect himself because no adult had ever been able to meet that need for him. Skylar's behavior deteriorated after the expulsion, and in July 2011, the State removed Skylar from the foster placement because his foster parents reported "defiant behaviors" and Skylar's fleeing on various occasions.

The State then placed Skylar at a Boys Town shelter for a few months before placing him and Alyson in a second foster home. Skylar did well there for a while, but he also had episodes of concerning behavior. On one occasion, Skylar took a knife from his foster father, and on another occasion, the family smelled smoke in the middle of the night and discovered that "something had been snubbed out in the cat's dish." Skylar would also, on occasion, leave for hours at a time without permission and refuse his medication. The culmination of these incidents prompted the State to remove Skylar from the second foster home.

After his removal from the second foster home, Skylar went to Cedar Youth Services, a shelter in Lincoln, before a group home in Geneva accepted him. The State removed Skylar from the group home in Geneva after he ran away twice—once to see his girlfriend in Harvard and once to see Alyson in Aurora. Skylar stole a car in conjunction with his attempt to travel to Aurora.

The State next placed Skylar at a foster home in Henderson, followed by a group home at Epworth Village in Grand Island. The Epworth Village group home is separate from the Epworth Village treatment level group home. Skylar ran away from the Epworth Village group home three times in 5 days, causing the State to place him in a shelter at Madison. After he failed to follow the rules at the Madison shelter, he was moved to the Madison Detention Center. The State tried to place him at the foster home in Henderson again, but the State returned him to the Madison Detention Center after he "left school" and was found in his bedroom closet with another youth.

Upon Skylar's return to Madison, in January 2012, he punched a wall at the detention center. This action resulted in criminal charges that led to the adjudication under § 43-247(1) which is at issue in this case.

Throughout this time, Dr. Daiss attempted to schedule therapy for Skylar, but the logistics of transportation combined with Skylar's frequent movement prevented them from regularly meeting. Dr. Daiss testified at trial that he would "[m]ost definitely" be willing to work with Skylar again "down the road."

Throughout this time, Skylar's visits with his mother and Alyson decreased. Skylar last saw his mother in December 2011, and since then, he has had contact with her only through letters.

Testimony at Trial.

In April 2012, the Adams County Court held a hearing to determine Skylar's next placement in light of the criminal mischief conviction. The State, DHHS, Skylar, Skylar's mother, and Skylar's guardian ad litem all appeared at the hearing.

Several professionals testified that Skylar's mother and Alyson are critically important to Skylar. Therapists and social workers observing visitation described Skylar as parental toward Alyson and protective of his mother. A report from Dr. John Meidlinger reveals that Skylar described to him some of his mother's past boyfriends as being physically violent toward her and that Skylar recalled a time where he threatened to beat up one of them. Dr. Meidlinger's report indicates that Skylar

told him that he does not care what happens to him, but will protect his family at all costs.

According to Dr. Meidlinger, Alyson is the only sibling with whom Skylar has contact. He mentioned in his report that Skylar communicated that he does not care where he goes as long as he can see Alyson.

Dr. Meidlinger observed that Skylar is steadfastly loyal to his mother and continues to believe she will "get her life straightened out" and raise him and Alyson. He indicated in his report that Skylar continues to hope for this outcome despite his mother's failure to attend many of the visitations arranged with Skylar and Alyson after losing custody of them. DHHS' visitation logs indicate that Skylar told his mother all he wanted for Christmas was to go home. Skylar estimates that since entering the State system, he has been placed in about 15 different foster care, group home, and shelter situations without success.

Dr. Meidlinger testified that he diagnosed Skylar with dysthymia, oppositional defiant disorder, and attention deficit hyperactivity disorder. He stated that he did not have enough information to make a diagnosis of conduct disorder but that Skylar resembles children with conduct disorder in some ways. Dr. Meidlinger opined that Skylar's "experiences have led him to believe that life isn't fair and authorities are the people in charge and what they do is not fair either." Dr. Meidlinger thought that Skylar's "bold and defiant attitude is perhaps a way of hiding his inner feelings of weakness, vulnerability and history of victimization."

Dr. Meidlinger recommended that Skylar begin a counseling process focusing on issues of abandonment and, perhaps, trauma. He opined that those issues may be causing his "aggressive posturing" and acting out. He further recommended that Skylar be placed in a treatment level group home and then a less restrictive setting if appropriate. He stated that the treatment home at Epworth Village would meet Skylar's needs. He was decidedly less enthusiastic about placing Skylar at YRTC, where therapy would be more limited. Throughout his testimony, Dr. Meidlinger expressed his belief that Skylar's underlying issues have played an important role

in shaping his behavior and that addressing those issues, rather than just Skylar's behavior, would be the most effective way to treat Skylar.

Dr. Eric Snitchler testified that he conducted the psychological evaluation for Skylar's OJS evaluation in March 2012. He stated that he works with a therapy services company which has a contract with Magellan Health Services (Magellan). The contract with Magellan places Dr. Snitchler under restrictions with respect to what he can recommend in his written report. In his written report, Dr. Snitchler diagnosed Skylar with "conduct disorder, attention deficit, hyperactivity disorder, alcohol abuse, [and] nicotine dependence," although he stated that he would have liked to have had more information about Skylar's earlier background to give him some indications as to how those problems originated.

Dr. Snitchler explained that he made no recommendations for treatment in his report because Magellan does not allow him to recommend treatment unless he makes "a sub-acute treatment placement" recommendation. Dr. Snitchler said that he was not under Magellan requirements while testifying in court, however, and for the first time, at trial, he recommended placing Skylar into a treatment level group home. For this placement to be successful, a group home would need to accept Skylar and Skylar would need to cooperate and maintain the placement. Dr. Snitchler felt a treatment level group home would be the most appropriate placement for Skylar because Skylar could get outpatient therapy treatment in that setting.

Dr. Snitchler stated, however, that Magellan would not pay for treatment for Skylar because Skylar was diagnosed with conduct disorder and conduct disorder has not been something research has shown benefits from a treatment level placement. Dr. Snitchler also said he suspected many group homes would not take Skylar because of his past behavioral problems.

Ann Wood is the OJS evaluation coordinator for DHHS who performed Skylar's OJS evaluation. She explained that an OJS evaluation is ordered after a youth has been adjudicated. Her role is to put information together and send it to Magellan for assignment to a provider. She explained that she looks at the

recommendation provided by the Magellan provider together with an internal youth level of services inventory (YLS) and makes a recommendation for a youth's disposition based on those two documents. YLS is an assessment that measures a youth's level of risk to reoffend. It is "a matrix and scoring system that is somewhat standardized." Wood testified that Skylar's YLS score was 25, which is a high level of risk to reoffend on a scale with four levels ranging from low to very high.

Wood recommended Skylar be placed at YRTC because he has a high risk to reoffend and has been in multiple placements without success. She explained that in evaluating Skylar's risk to reoffend, she found Skylar's family circumstances to be his highest risk score, elevating his overall YLS rating. A section on attitude and orientation also mentions that Skylar is not participating in therapy and labels that as a risk factor.

Wood stated that DHHS recommends YRTC as the next level of care for juveniles if foster placements and group homes are not adequate. Wood explained that she is not allowed to recommend a treatment level group home unless it is "approved by the clinician who does the clinical portion of the evaluation" by Magellan. In this case, Wood could not have recommended a treatment level group home unless Dr. Snitchler recommended a treatment level group home in his written evaluation.

Dr. Daiss testified about his relationship with Skylar from February through October 2011. He testified that he thought the relationship was productive, but that he could not reach the issues causing Skylar's behavior because of Skylar's inconsistent presence. Dr. Daiss stated that Skylar needed to have contact with both his mother and Alyson to make progress.

Trial Court Ruling.

The trial court committed Skylar to YRTC for the pendency of his minority. In a ruling from the bench, the trial court explained one reason for sending Skylar to YRTC was its doubt that a treatment level group home would accept him. The trial court emphasized Dr. Snitchler's language, noting that he said

he would recommend a treatment level group home for Skylar *if* any of the group homes would take him into their program. The trial court stated:

> But he said if anybody would take him, okay he did. And I took the if, I'm saying here, if they would take him, that would be great. And if he would work through the system, that would be great. If he didn't, then it's not going to work. . . . But in the end we both . . . have the shrinks saying that this is the best, best practices. We know what best practices means. That's a fancy word where people come from New York and they give us a lecture and they are trying to tell us that this is what you ought to do if the world was pure and clean and we had every opportunity that we possibly have. And that's what we are striving for. But we also have to look at reality and that's what we're going to talk about at the end.

The trial court went on to state that the reality is that the trial court "[didn't] think someone might even take [him] because of [his] history, okay. That's going to be the reality."

The trial court also explained that Skylar's way of treating people caused the State to remove him from his placements, which disrupted his therapy and visitation. Finally, the trial court explained that Skylar needed stability for education and that YRTC would allow that. The court also stated that therapists at a treatment level group home would not have anything new to say in therapy and that therefore, there was no reason to believe Skylar would not run away again.

On appeal, the guardian ad litem and Skylar's attorney argue that the trial court erred in finding that placement of Skylar at YRTC was the least restrictive placement and in Skylar's best interests. DHHS did not file a brief in this appeal.

ASSIGNMENTS OF ERROR

The guardian ad litem and Skylar's attorney both argue that the trial court abused its discretion in committing Skylar to the care and custody of OJS for placement at YRTC because it is not the least restrictive placement consistent with Skylar's best interests. Neither the State nor DHHS filed a brief in this action.

STANDARD OF REVIEW

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 presents questions of law, an appellate court must reach a conclusion independently of the trial court. *In re Interest of Jones*, 230 Neb. 462, 432 N.W.2d 46 (1988). A trial court's findings of fact will not be set aside unless they are against the weight of the evidence or there is a clear abuse of discretion. *Id.*

ANALYSIS

[1] Section 43-247(1) grants the juvenile court jurisdiction of any minor under the age of 16 who has committed "an act other than a traffic offense which would constitute a misdemeanor or an infraction under the laws of this state, or violation of a city or village ordinance." See *In re Interest of Roy R.*, 3 Neb. App. 816, 533 N.W.2d 107 (1995). When a court takes jurisdiction over a juvenile, it obtains the "powers conferred on it by the Nebraska Juvenile Code . . . to provide for the treatment and rehabilitation of certain juveniles." *In re Interest of Breana M.*, 18 Neb. App. 910, 914, 795 N.W.2d 660, 664 (2011). The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests. *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996).

[2,3] A juvenile court has broad discretion as to the disposition of a child found to be within the jurisdiction of the juvenile court under § 43-247(1). See Neb. Rev. Stat. § 43-286 (Cum. Supp. 2012). In such a case, the juvenile court may commit such juvenile to OJS for placement at YRTC if the youth is over the age of 14. See § 43-286(b). At the same time, § 43-532 dictates that state policy is to assist juveniles in the "least restrictive method consistent with the needs of [each] child." See *In re Interest of J.R.W.*, 237 Neb. 691, 467 N.W.2d 413 (1991). The policy applies to "children . . . who, by their circumstances or actions, have violated the laws, rules, or regulations of the state and are found to be in need of treatment or rehabilitation" and must be interpreted "in

conjunction with all relevant laws, rules, and regulations of the state." § 43-532.

In this case, the juvenile court acquired jurisdiction of Skylar pursuant to § 43-247(1) because Skylar was adjudicated for violating Neb. Rev. Stat. § 28-519(1)(a) (Reissue 2008), property damage, after punching the wall at the Madison Detention Center. Because it acquired jurisdiction of Skylar under § 43-247(1) and Skylar is older than 14, the juvenile court had the power to send Skylar to YRTC. In making that decision, the juvenile court was required to find that a less restrictive placement was not consistent with Skylar's needs.

We find that the trial court abused its discretion in finding that YRTC was the least restrictive placement consistent with Skylar's needs. The trial court considered placing Skylar in either YRTC or a treatment level group home. The trial court rejected a treatment level group home based on two primary concerns: that Skylar would not be accepted into a treatment level group home and that Skylar would not achieve the stability he needs in a treatment level group home because he would run away.

[4] The trial court's concern that Skylar may not be accepted into a treatment level group home is speculative at this point because DHHS has not yet explored this placement possibility. If a treatment level group home is the least restrictive placement consistent with Skylar's needs, the court may place Skylar into a more restrictive level of care only after the State makes a showing that a treatment level group home is not a viable option for Skylar. See, § 43-532 et seq.; *In re Interest of J.R.W., supra*.

The trial court validly raises concern about Skylar's need for stability and history of leaving placements. This concern requires analysis in the context of the testimony presented at trial. Three psychologists testified at trial: Dr. Daiss, who completed a number of sessions with Skylar before he arrived at the Madison Detention Center; Dr. Meidlinger, who evaluated Skylar at the Madison Detention Center; and Dr. Snitchler, who conducted interviews and reviewed Skylar's file as part of the OJS evaluation. All three psychologists admitted that Skylar

has some behavioral issues. Skylar has difficulty with impulse and anger control and has not yet been able to discuss his past or analyze the impact of documented childhood difficulties on his decisionmaking.

The State removed Skylar from the care of his mother when he was an adolescent. He is steadfastly loyal to her and has responded to the State's decision to remove him from her care with anger, defiance, and, on occasion, running away from the State's placements. Despite his poor decisions, Skylar was able to maintain a positive therapeutic relationship with Dr. Daiss and identified weaknesses in his anger and impulse control. Dr. Daiss felt the relationship was productive and testified that he thought Skylar could benefit from therapy. Both Drs. Daiss and Meidlinger testified that Skylar's behaviors are a response to underlying issues that could be addressed with the appropriate therapy. Dr. Daiss could not make a treatment recommendation, but both State doctors testified that a treatment level group home, which is a level of care Skylar has never received, would be the appropriate level of care to meet Skylar's needs. Skylar's DHHS caseworker made no recommendation about his placement.

The only individual who recommended that Skylar be sent to YRTC was Wood. At trial, however, Wood testified that Magellan rules prevented her from recommending a treatment level group home because Dr. Snitchler had not recommended one in his evaluation. Dr. Snitchler did, however, make that recommendation in court. Wood's opinion must be somewhat discounted because she was prevented from recommending a treatment level group home.

Moreover, the record does not show that Wood ever met with Skylar. Instead, Wood relied on a report that did not express Dr. Snitchler's full opinion and the YLS score. The YLS score is an objective test that does not take into account the specifics of Skylar's situation; for example, his score is inflated because he is not participating in therapy, even though he wants to participate.

In this case, all of the experts who had the authority to recommend a treatment level group home did so. All three doctors thought Skylar would benefit from therapy, and the two who

were able to recommend placements opined that placement at a treatment level group home was the most effective way to address Skylar's poor judgment and behavior. The evidence in this case shows that a treatment level group home is in Skylar's best interests. Because a treatment level group home is a less restrictive level of care consistent with Nebraska law and Skylar's needs, the trial court abused its discretion in ordering Skylar's placement at YRTC. Accordingly, the order of the juvenile court committing Skylar to YRTC is reversed and the cause is remanded with directions for the court to order DHHS to explore whether less restrictive placement settings are available for Skylar's care, to include, but not be limited to, a treatment level group home.

CONCLUSION

The trial court abused its discretion in committing Skylar to YRTC when the evidence in the record proves that committing Skylar to a less restrictive level of care was consistent with Skylar's best interests. Accordingly, we reverse the decision of the trial court and remand the cause with directions for the court to order DHHS to explore whether less restrictive placement settings are available for Skylar's care, to include, but not be limited to, a treatment level group home.

REVERSED AND REMANDED WITH DIRECTIONS.

KENDALL B. CURRY AND ROBIN L. CURRY, APPELLEES, V. MARGARET FURBY AND DIANE M. SCHOCH, APPELLANTS.

832 N.W.2d 880

Filed May 7, 2013. No. A-12-091.

1. **Equity: Boundaries: Appeal and Error.** An action to ascertain and permanently establish corners and boundaries of land under Neb. Rev. Stat. § 34-301 (Cum. Supp. 2012) is an equity action.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

3. **Waters: Boundaries: Title.** Title to riparian lands runs to the thread of the contiguous stream.
4. **Waters: Boundaries: Words and Phrases.** The thread, or center, of a channel is the line which would give the landowners on either side access to the water, whatever its stage might be and particularly at its lowest flow.
5. **Waters: Words and Phrases.** The thread of a stream is that portion of a waterway which would be the last to dry up.
6. **Waters: Boundaries.** Where the thread of a stream is the boundary between estates and that stream has two channels, the thread of the main channel is the boundary between the estates.
7. ____: ____. Where the thread of the main channel of a river is the boundary line between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel.
8. **Waters: Words and Phrases.** Avulsion is a sudden and perceptible loss or addition to land by the action of water, or a sudden change in the bed or course of a stream.
9. ____: ____. Avulsion is a change in a stream that is violent and visible and arises from a known cause, such as a freshet or a cut through which a new channel has formed.
10. ____: ____. Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shoreline out by deposits made by contiguous water; reliction is the gradual withdrawal of the water from the land by the lowering of its surface level from any cause.
11. **Waters: Boundaries.** The changes wrought by accretion versus avulsion involve markedly different processes, and each process has a different consequence for the boundary between the landowners on opposite banks of the river.
12. **Waters: Quiet Title: Proof.** A party who seeks to have title in real estate quieted in him on the ground that it is accretion to land to which he has title has the burden of proving the accretion by a preponderance of the evidence.
13. **Waters: Proof.** The burden to show that the channel of a river changed by avulsion is the same as the burden to show that it changed by accretion.
14. **Waters: Boundaries.** When a river changes its main channel not by excavating, passing over, and then filling the intervening place between the old channel and the new channel, but by flowing around the intervening land where the change to the new channel results from an increase year to year in the amount of water flowing in the new channel, the law requires that the boundary line remain in the old channel rather than move to the new channel as long as the old channel remains a running stream.
15. ____: ____. The mean centerline of a river, determined by dividing the distance between meander lines of the river, is an arbitrary location of the center of the stream and is not a determination of the thread of the stream in this jurisdiction.

Appeal from the District Court for Nance County: MICHAEL J. OWENS, Judge. Affirmed as modified.

Stephen R.W. Twiss, of Sampson, Curry & Twiss, P.C., for appellants.

Patrick J. Nelson, of Law Office of Patrick J. Nelson, L.L.C., for appellees.

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

MOORE, Judge.

I. INTRODUCTION

Margaret Furby and Diane M. Schoch (collectively the Furbys) appeal from an order of the district court for Nance County, which found in favor of Kendall B. Curry and Robin L. Curry in this boundary dispute action filed by the Currys under Neb. Rev. Stat. § 34-301 (Cum. Supp. 2012). On appeal, the Furbys assign error to the court's determination of the location of the boundary along the thread of the stream of the south channel of the Loup River and its use of a metes and bounds description of the thread of the stream. The court did not err in finding that certain surveys are presumptive evidence of the location of the thread of the stream or in finding that the Furbys failed to present sufficient evidence to overcome the presumption. We have modified the description of the boundary between the parties' properties as set forth herein, and accordingly, we affirm as modified.

II. BACKGROUND

1. GENERAL BACKGROUND AND PLEADINGS

The Currys, husband and wife, are the record owners of certain portions of government Lots 6, 7, and 8 and any accretions thereto (the Curry property), located north of the Loup River in Section 3, Township 16 North, Range 5 West of the 6th P.M., in Nance County, Nebraska. The Currys purchased the property in 2002. The original government survey, dated February 21, 1876, of the portion of Section 3 north of the river shows that the north meander line of the river ran along the southeast side of the Curry property.

In 2002, Margaret conveyed a remainder interest in government Lots 1 and 2 (the Furby property) in Section 3, Township 16 North, Range 5 West of the 6th P.M. in Nance County to her son, Russel Furby. Margaret retained a life estate interest in the property. In 2008, Russel conveyed his remainder interest to his sister, Schoch. The original government survey of

the portion of Section 3 to the south of the Loup River shows that at the time of the survey, dated June 30, 1873, Lots 1 and 2 were both located south of the river, with Lot 1 being north of Lot 2. The south meander line of the river ran along the northwest side of the Furby property.

The original government surveys in the record depict the Loup River as flowing across Section 3 between the south meander line and the north meander line with no platted islands in between. The next available evidence in the record depicting the river as it flows through Section 3 is found in aerial photographs from 1937, which depict a north channel and a south channel with an island in between. In other words, over time, the river has moved southerly so that a significant portion of Lot 2 is now located north of the thread of the stream of the south channel of the river and a significant portion of Lot 1 is located on the island. The parties dispute the mechanism by which the river moved to the south and thus the boundary between their properties.

In their operative complaint, the Currys claim that the river moved southerly by the process of accretion and reliction. The Currys asked the district court to establish the southwest corner, the south boundary, and the southeast corner of their property at the thread of the stream of the south channel of the river, in other words, south of the island.

In their answers, the Furbys denied that the river moved by virtue of accretion and reliction, alleged that the boundaries and corners as set forth in the operative complaint were not the true boundaries and corners of the Curry property, and alleged that the north boundary of the Furby property remained north of the island at the thread of the Loup River as measured from the original meander lines established in the original government surveys.

2. Trial Evidence

Trial was held before the district court on July 12 and 13, 2011. A significant amount of evidence was adduced, and we summarize the relevant evidence below.

In 2002, prior to purchasing the Curry property, the Currys commissioned a registered land surveyor, Thomas Tremel, to

conduct a survey of the property. In his 2002 survey, Tremel depicted, among other things, two Loup River channels—a "Loup River Dry Channel" on the north side of the island and a "Loup River Main Channel" on the south side of the island. Tremel also depicted the "Thread of the Stream" of the "Loup River Main Channel." A note on the survey states that the banks of the Loup River and the thread of the stream were "scaled from the Nebraska Department of Resources 1993 digital orthophotos." Tremel's 2002 survey contains the following legal description of the southwest corner, south boundary, and southeast corner of the Curry property:

> [T]hence S 00°00′12″ W, parallel with the East line of said Section 3, approximately 1838 ft. to the thread of the stream of the Loup River; thence Northeasterly on the thread of the stream of said Loup River approximately 2042 ft. to the Southerly extension of the East line of said Section 3; thence N 00°00′12″ E, approximately 2494 ft. on the Southerly extension of the East line and the East line of said Section 3 to the point of beginning . . . .

After the Currys purchased the Curry property, Russel commissioned a surveyor, Leroy Gerrard, to survey the Furby property in order to ascertain the boundaries of the Furby property in relationship to the island. Gerrard's retracement survey, dated January 5, 2005, and revised on March 4, shows the meander lines of the Loup River and the boundaries of Lots 1 and 2 as originally platted in 1873 and their relationship to the north and south channels of the river and the island as they existed in 2005. It shows that the north channel was dry in 2005, that the retraced Lot 1 overlaps a portion of the island, and that the retraced Lot 2 overlaps both a portion of the south channel and a small portion of the island. On the survey, Gerrard stated:

> The exterior lines of government Lots One (1) and Two (2) in Section Three (3), Township Sixteen (16) North, Range Five (5) West of the 6th P.M., Nance County, Nebraska have been surveyed and monumented as said exterior lines are delineated on the original government survey dated June 30, 1873. All surveyed lines lying

> in the Loup River or on the island in the Loup River are for historical reference only and do not define nor imply ownership.

On February 23, 2007, Tremel prepared a composite drawing of his own 2002 survey and Gerrard's 2005 survey, overlaid onto a 2003 aerial photograph, which depicts the positions of the two tracts surveyed by Gerrard and Tremel relative to each other and to the physical geographic features depicted in the photograph.

Tremel testified at trial that he found no evidence of avulsion during his work relating to his 2002 survey. One of the things he did in reaching such a determination was walk down the dry north channel and examine "how the swales configured [both] the [north and south] banks of the river." Tremel testified that he did not observe any evidence of an avulsive event. He testified that in his experience, the best evidence of avulsion is where there is a direct channel cut through the land outside of the original riverbed, leaving behind a definable dry bed in the old channel, which he did not observe here. He did not believe an avulsive event occurred, based upon his observation of the terrain near the south channel, which revealed low-lying vegetation to the north of the south channel and no vegetation to the south. Tremel did not review any historic flood or flow records in connection with his surveys, but he did review aerial photographs of the area from 1937, 1938, and 1950.

Tremel was asked about Lot 1, which was on the south side of the river as originally platted and appears north of the thread of the stream of the south channel in Tremel's composite drawing. Tremel testified that in his opinion, Lot 1 had been washed away by the action of the Loup River and did not exist any more. Tremel based that opinion in part on his review of a 1938 photograph, which he testified "shows all that land gone." Tremel further opined that the land depicted in his survey from the north bank of the river down to the thread of the stream of the south channel was accretion to Lots 6, 7, and 8.

In the latter part of 2010, at the request of the Currys' attorney, Tremel did further surveying work and revised his

2002 survey to reflect additional points along the north and south banks of the south channel of the Loup River. Both the 2002 and 2010 surveys note that the banks of the river and the thread of the stream were scaled from 1993 aerial photographs. Tremel indicated that although he had walked in and physically observed the area, he did not physically measure the banks of the river; rather, he derived measurements from "orthophotos." In his 2002 survey, Tremel split the difference between the banks of the south channel to mathematically scale the thread of the stream. He testified that he labeled the "'thread of the stream'" on his 2002 survey for "descriptive purposes," but testified that this was not necessarily the true line of the thread of the stream at that time.

In connection with his additional survey work, on September 29 and November 22, 2010, Tremel again physically observed the Loup River to determine the approximate location of the thread of the stream. From an airboat, Tremel made observations of the amount of water flowing in the south channel, the depth of the water, and where the greatest volume of water was at the relevant location. Tremel then prepared a survey overlaid onto a 2006 aerial photograph, placing thereon the boundaries of the tract he surveyed as well as the approximate location of the thread of the stream, based on his observations. We note that the line on the overlay showing the approximate thread of the stream based on Tremel's observations falls generally to the south of the scaled-in thread-of-the-stream line depicted on his 2002 and revised 2010 surveys. As to both surveys, Tremel testified that he filed them per Neb. Rev. Stat. § 81-8,122.01 (Reissue 2008) and that they contained the minimum data required by the statute.

The record also contains photographs taken by Kendall of the Loup River at the relevant location in 2010. The photographs taken by Kendall depict the water in the south channel and the amount and type of vegetation on the island and in the north channel.

Russel first observed the Loup River at the relevant location in about 1973, when he was 7 or 8 years old. There was water flowing in both channels at that time, and the south

channel was too deep to cross on foot. Since 1973, Russel has observed the water in the Loup River to flow in one channel or the other or both channels, switching its flow and which channel appeared to be the main channel on numerous occasions. Russel did not recall the island's ever washing away. Russel last observed water flowing in the north channel in 1992 while hunting off the west end of the island. According to Russel, the south channel was dry at that time and the flow of water in the north channel was quite fast. Russel described an ice jam and flooding in the spring of 1993 that plugged the north channel with sand and left the south channel as the deepest channel. Every time Russel has observed the north channel since 1993, it has been dry. By 2008 or 2009, when he last observed the north channel, there was a lot of underbrush and other vegetation growing in it. Schoch's husband testified about his observations of the river's flow around the island since about 1988, which were consistent with Russel's observations.

M. Stanley Dart, an emeritus associate professor of geography for the University of Nebraska at Kearney, testified on behalf of the Currys. His principal areas of teaching were in physical geography and geology. Through his education, training, and work, Dart had become knowledgeable about rivers, and he had focused at times on "fluvial geomorphology," which he described as the "processes that rivers undergo as they flow, and the various types of rivers." Dart testified at length regarding the characteristics and history of the Loup River.

According to Dart, the Loup River, like the Platte River also in Nebraska, is a braided stream characterized by a large sediment load composed mostly of sand or small particles. The river tends to be rather shallow and oftentimes quite wide, with very low banks and broad expanses. In a braided stream such as the Loup River, where there is a bend in the river, the bank on the outside curve of the bend will tend to erode and the bank on the inside curve of the bend will tend to accumulate sediment deposits. In other words, there is more likelihood of accretions' being added to the land on the shore on the inside of a curve.

In his work as a college instructor, Dart made extensive use of aerial photographs to demonstrate a range of geographic phenomena. At the request of the Currys' attorney, Dart reviewed and analyzed numerous historical aerial photographs of the land in dispute in this case. After thoroughly reviewing and analyzing each of the aerial photographs contained in an exhibit comprising many such photographs from 1937 to 2010, Dart marked the island in dispute on each photograph and offered a number of opinions about the evolution of the Loup River based upon his review.

According to Dart, the Loup River changed as expected over the 73 years between the first aerial photographs in 1937 to the last aerial photograph in 2010. Dart testified that the river "is eroding, it is depositing, it is moving sediment, it does so regularly and consistently, and to a degree in a predictable pattern." Dart observed that the main channel of the Loup River as it passes the island in dispute was on the south side of the island until about 1980. Between 1980 and 1993, the main channel of the Loup River as it passed the island varied back and forth from the north side of the island to the south side of the island. In 1993, and consistently thereafter, the main channel of the Loup River had been in the south channel, on the south side of the island. Dart's review of the photographs showed that the island had existed in the river since at least 1937. Dart noted that in 1937, the island had significant mature vegetation, indicating that the island had "been there a sufficient period of time to become stabilized." On cross-examination, Dart admitted that he did not know what might have changed the course of the Loup River between the original government survey and 1937. He agreed that the island could have been formed by either erosion or avulsion, but he testified that the island might also have been the result of deposition of material in the channel of the stream.

3. Judgment and Posttrial Proceedings

The district court entered an order on October 14, 2011, finding in favor of the Currys and establishing the south boundary of their property along the thread of the stream of

the Loup River to the south of the island. The court found that both the 2002 and 2010 Tremel surveys met all of the foundational requirements of § 81-8,122.01 and were thus presumptive evidence of the facts stated therein, specifically the location of the thread of the stream. The court found that the evidence adduced by the Furbys was not sufficient to overcome the statutory presumption. While the court noted prior appellate decisions acknowledging the difficulty of an accurate determination of the location of the thread of a stream, it accepted Tremel's conclusion as to the location of the thread of the stream.

The district court discussed the Furbys' argument that the formation of the south channel of the river sometime between 1873 and 1937 and the changes to the flow of the river following the massive ice jam in the spring of 1993 support a finding that the boundary line remains north of the island at the thread of the stream between the originally surveyed meander lines. In rejecting this argument, the court relied on Dart's testimony. Specifically, the court noted Dart's opinion that the island in question was in existence prior to 1937. The court noted Dart's testimony that the south channel existed prior to 1937 and was clearly the main channel of the river at that time, and it found this testimony to be compelling. Accordingly, the court found that the Furbys' contention that the thread of the stream was in the north channel was not supported by the evidence.

The district court discussed the Furbys' contention that the 1993 ice jam was an avulsive event which changed the main channel of the Loup River from the north channel to the south channel. In rejecting this contention, the court relied on photographic evidence presented by the Currys regarding the flow of the river prior to 1993 and found that the thread of the stream was on the south side of the island prior to 1937. The court also found that the Furbys failed to present sufficient evidence in support of what it termed the "'flowing around intervening land mass' rule" set forth in *State v. Ecklund*, 147 Neb. 508, 23 N.W.2d 782 (1946), which we discuss in greater detail in the analysis section below.

The district court found in favor of the Currys and set the south boundary of their property at "the thread of the stream of the Loup River as depicted and described in [Tremel's 2002 survey] and [the certified copy of Tremel's 2010 survey]." The court then set forth a legal description of the thread of the stream as "set forth in [the Currys'] operative complaint."

The Currys filed a timely motion to alter or amend the judgment, alleging that the legal description of the thread of the stream contained in the district court's order was taken from their original complaint, filed in October 2009, and not from their amended complaint, filed in January 2011, as the court intended. The Currys asked the court to revise the legal description in its order to correspond to the description contained in the actual operative complaint. Following a hearing, the court entered an amended order, finding that the south boundary of the Curry property was the thread of the stream of the Loup River "as depicted and described in Exhibit 76." Exhibit 76 is an overlay of Tremel's 2010 survey on a 2006 aerial photograph. The legal description of the south boundary set forth in the amended order corresponds to that found in the Currys' actual operative complaint, as follows:

> Commencing at the Northeast corner of Section 3, Township 16 North, Range 5 West of the 6th Principal Meridian, Nance County, Nebraska, and assuming the East line of said Section 3 as bearing S 00°00′12″ W, and all bearings contained herein are relative thereto; thence S 00°00′12″ W, on the East line of said Section 3, a distance of 1,530.55 feet; thence S 84°24′26″ W, a distance of 48.19 feet; thence S 31°25′56″ W, a distance of 280.42 feet; thence S 56°33′59″ W, a distance of 105.07 feet; thence S 77°25′57″ W, a distance of 61.98 feet; thence S 42°44′21″ W, a distance of 455.66 feet; thence S 71°17′58″ W, a distance of 474.63 feet; thence S 60°49′25″ W, a distance of 127.80 feet; thence S 81°51′29″ W, a distance of 466.72 feet; thence S 72°02′22″ W, a distance of 589.03 feet; thence S 39°22′42″ E, a distance of 506.61 feet; thence S 52°40′51″ E, a distance of

> 111.75 feet; thence S 00°00′12″ W, parallel with the East line of said Section 3, if extended southerly, a distance of 2,331 feet, more or less, to a point on the thread of the stream of a channel of the Loup River, which point is **the actual point of beginning**; thence Northeasterly, on the thread of the stream of such channel of the Loup River, a distance of 2,322 feet (direct measure), more or less, to a point on the East line of said Section 3, if extended southerly, such point being located 4,024.55 feet, more or less, South of the Northeast corner of said Section 3, which point is the point of termination (said boundary line being hereinafter referred to as "Plaintiffs' South Boundary Line")[.]

The Furbys subsequently perfected their appeal to this court.

III. ASSIGNMENTS OF ERROR

The Furbys assert, as combined and summarized, that the district court erred (1) in determining that the boundary between the parties' properties is at the thread of the stream in the south channel of the Loup River rather than at the thread as measured from the original meander lines established in the original government surveys and (2) in establishing a precise legal description of the thread of the stream using a metes and bounds description.

IV. STANDARD OF REVIEW

[1,2] An action to ascertain and permanently establish corners and boundaries of land under § 34-301 is an equity action. *Anderson v. Cumpston*, 258 Neb. 891, 606 N.W.2d 817 (2000); *Oppliger v. Vineyard*, 19 Neb. App. 172, 803 N.W.2d 786 (2011). In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Prime Home Care v. Pathways to Compassion*, 283 Neb. 77, 809 N.W.2d 751 (2012).

V. ANALYSIS

1. Water Law Principles

Before addressing the Furbys' assignments of error, we first set forth some basic principles of water law.

[3-7] Title to riparian lands runs to the thread of the contiguous stream. *Obermiller v. Baasch*, 284 Neb. 542, 823 N.W.2d 162 (2012). The thread, or center, of a channel is the line which would give the landowners on either side access to the water, whatever its stage might be and particularly at its lowest flow. *Id*. The thread of a stream is that portion of a waterway which would be the last to dry up. *Id*. Where the thread of a stream is the boundary between estates and that stream has two channels, the thread of the main channel is the boundary between the estates. *Oppliger v. Vineyard, supra*. Where the thread of the main channel of a river is the boundary line between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel. *Anderson v. Cumpston, supra*.

[8-11] Avulsion is a sudden and perceptible loss or addition to land by the action of water, or a sudden change in the bed or course of a stream. *Id*. Avulsion is a change in a stream that is violent and visible and arises from a known cause, such as a freshet or a cut through which a new channel has formed. See *Conkey v. Knudsen*, 141 Neb. 517, 4 N.W.2d 290 (1942), *vacated on other grounds* 143 Neb. 5, 8 N.W.2d 538 (1943). On the other hand, accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shoreline out by deposits made by contiguous water; reliction is the gradual withdrawal of the water from the land by the lowering of its surface level from any cause. *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994). The changes wrought by accretion versus avulsion involve markedly different processes, and each process has a different consequence for the boundary between the landowners on opposite banks of the river. *Oppliger v. Vineyard, supra*.

[12,13] A party who seeks to have title in real estate quieted in him on the ground that it is accretion to land to which he

has title has the burden of proving the accretion by a preponderance of the evidence. *State v. Matzen*, 197 Neb. 592, 250 N.W.2d 232 (1977). In *Oppliger v. Vineyard*, 19 Neb. App. 172, 803 N.W.2d 786 (2011), this court stated that the burden to show that the channel of the river changed by avulsion obviously would be the same.

2. Application of Statutory Presumption

The Furbys first argue that the Currys did not sustain their burden of proving that the thread of the stream changed by the process of accretion, such that the thread of the stream is now located in the south channel of the river. However, the district court did not find that the Currys proved the change in the thread of the river by accretion; rather, the court found that the 2002 and 2010 Tremel surveys are presumptive evidence of the location of the thread of the stream. The court relied on § 81-8,122.01 in accepting Tremel's conclusion as to the location of the thread of the stream.

Section 81-8,122.01 provides:

> Whenever a survey has been executed by a land surveyor, registered under the provisions of sections 81-8,108 to 81-8,127, a record of such survey bearing the signature and seal of the land surveyor shall be filed in the survey record repository established pursuant to section 84-412 if such survey meets applicable regulations. . . . The record of survey shall be filed within ninety days after the completion of the survey . . . and shall consist of the following minimum data: (1) Plat of the tract surveyed; (2) legal description of the tract surveyed; (3) description of all corners found; (4) description of all corners set; (5) ties to any section corners, quarter corners, or quarter-quarter corners found or set; (6) plat or record distances as well as field measurements; and (7) date of completion of survey. The record of survey so filed shall become an official record of survey, and shall be presumptive evidence of the facts stated therein, unless the land surveyor filing the survey shall be interested in the same.

Because Tremel's 2002 and 2010 surveys met all of the foundational requirements of § 81-8,122.01, the district court found them to be presumptive evidence of the facts stated therein, specifically as to the location of the thread of the stream.

We agree based on our de novo review of the record that Tremel's surveys meet the foundational requirements of § 81-8,122.01. Tremel testified that he executed the surveys when he was a registered land surveyor, that a record of each survey bearing his signature and seal was filed in the survey record repository within 90 days after the survey's completion, and that both surveys contained the minimum data required by statute. Specifically, he testified that both surveys contained a plat and legal description of the tract surveyed; a description of all corners found and all corners set; ties to any section, quarter, or quarter-quarter corners found or set; a plat or record of distances as well as field measurements; and the date of the survey's completion. He also testified that he had no personal interest in the land shown in the surveys. Thus, the surveys are presumptive evidence of the facts stated therein, including the fact that the thread was located in the south channel at the time of the surveys, and the district court did not err in applying the statutory presumption. As such, it was unnecessary for the Currys to establish that the thread of the stream changed through the process of accretion.

3. Did Furbys Overcome Statutory Presumption?

We next turn to the question of whether the Furbys overcame the statutory presumption.

The Furbys argue that the boundary line remains as established in the original government surveys; in other words, in the north channel. In support of establishing the boundary in the north channel, the Furbys assert that there was either sufficient evidence to show that the thread of the stream changed through avulsion or evidence of other processes recognized in the exception found in *State v. Ecklund*, 147 Neb. 508, 23 N.W.2d 782 (1946).

The district court concluded that the evidence adduced by the Furbys was not sufficient to overcome the presumption

established by the statute, specifically finding that they failed to establish avulsion or their arguments with respect to the exception found in *State v. Ecklund*, *supra*.

4. Did Furbys Present Sufficient Evidence of Avulsion or Other Exception?

The Furbys contend that there have been two substantial changes in the flow of the Loup River in the pertinent area. They allege that the first change occurred between 1873 and 1937 and formed what is now the south channel and that the second change occurred as a result of the ice jam in the spring of 1993.

(a) Change Between 1873 and 1937

The original government surveys depict the Loup River as flowing across Section 3 between the south and north meander lines with no platted islands in between. The next available evidence in the record is found in aerial photographs from 1937 which depict a north channel and a south channel with an island in between. Testimony from Dart established that the south channel was the main channel of the river in 1937. The Furbys contend that the vegetation shown on the original government surveys suggests that the south channel could have been formed between 1873 and 1937 by water rushing through a high water channel in an avulsive event; however, there is nothing in the record to affirmatively show that this in fact occurred. Although Dart agreed this theory was a possibility, he testified that he did not know what caused the south channel to form during this period of time and that it was also possible it could have formed slowly over time by erosion or from the deposition of material in the channel.

Tremel testified that he did not see any evidence of avulsion during his examination of the property in connection with his 2002 survey. Specifically, Tremel based this conclusion on his examination of the banks of the dry north channel and of the south channel.

The Furbys did not adduce affirmative evidence to show that an avulsive event occurred between the time of the

government survey in 1873 and 1937. There is no evidence that during this timeframe, there was a sudden and perceptible change to the land by the action of water or in the bed or course of the river, or a violent and visible change from a known cause. See *Babel v. Schmidt*, 17 Neb. App. 400, 765 N.W.2d 227 (2009).

(b) *State v. Ecklund* Exception

[14] Alternatively, the Furbys argue that the exception found in *State v. Ecklund*, 147 Neb. 508, 23 N.W.2d 782 (1946), is applicable. In that case, the north channel of the river had originally carried most of the water, but after dams had been built upstream, the south channel began to have more flow and was considered the thread of the stream. The Nebraska Supreme Court found that the exception to the law of accretion and avulsion detailed in *Frank v. Smith*, 138 Neb. 382, 293 N.W. 329 (1940), applied to the boundary dispute. As recognized in *Frank*, this exception applies when a river changes its main channel not by excavating, passing over, and then filling the intervening place between the old channel and the new channel, but by flowing around the intervening land where the change to the new channel results from an increase year to year in the amount of water flowing in the new channel. In that situation, the law requires that the boundary line remain in the old channel rather than move to the new channel as long as the old channel remains a running stream. See *id*. In *Ecklund*, the court concluded that while the change of the main channel from the north side of the river to its present location on the south side may have been a gradual change throughout a space of at least 40 years, the thread of the stream did not gradually move over the subsequently formed intervening lands. As such, the boundary remained the line of the thread of the stream where it formerly ran in the north channel. *State v. Ecklund, supra*.

This court has recognized that in cases where this exception has been applied, there was ample evidence that the river did in fact change course in a sudden and violent manner, as well as evidence as to how that change took place. See *Babel v. Schmidt, supra*.

In the present case, there was insufficient evidence to establish that the river changed in such a manner as described in *Frank v. Smith, supra*, or in *State v. Ecklund, supra*. As mentioned above, Dart testified that he did not know what caused the south channel to form between 1873 and 1937, but that it was possible that it could have formed slowly over time by erosion, by the river's rushing through it in a single avulsive event, or from the deposition of material in the channel. As such, the evidence in this case does not support application of this exception.

Based on our de novo review, we agree with the district court that the Furbys failed to adduce sufficient evidence both to support their contention that the south channel was formed by avulsion or any other process and to overcome the statutory presumption.

(c) 1993 Ice Jam

The Furbys assert that the 1993 ice jam was an avulsive event that permanently changed the location of the main channel from the north side to the south side of the island, requiring us to find that the north channel remained the legal boundary. In discussing this contention, the district court noted the evidence presented by the Currys regarding boundary locations prior to 1993, specifically the exhibit comprising many aerial photographs from 1937 to 2010, which were reviewed and discussed by Dart. Upon reviewing that evidence, the court found that the thread of the stream was on the south side of the island prior to 1937 and otherwise rejected the Furbys' arguments about avulsion.

In our de novo review, we conclude that the occurrence of the ice jam in 1993 does not support a finding that the thread of the stream should remain in the north channel as depicted in the original government surveys. As discussed above, the island and south channel were formed prior to 1937, and the south channel was the main channel from sometime before 1937 until about 1980. During this time, the north channel carried less water than the south channel and was occasionally dry. After 1980, the evidence suggests that the main channel alternated between the north and south channels, but that after

the ice jam in 1993, the north channel has become dry and the south channel is the main, and only, channel to carry water. In other words, the thread of the stream remains in the south channel, as was true prior to 1980. Again, the evidence regarding the changes in the river between 1980 and 1993 does not overcome the statutory presumption regarding the thread of the stream.

5. Legal Description of Thread of Stream

Finally, the Furbys assert that the district court erred in granting the Currys' motion to alter or amend the judgment, finding that a precise legal description of the thread of the stream was established by the evidence, and precisely describing the southern boundary of the Currys' property using a metes and bounds description of the location of the thread of the stream. In its amended order, the court found that the south boundary of the Curry property was the thread of the stream of the Loup River "as depicted and described in Exhibit 76," and it set forth a legal description corresponding to that found in the operative complaint.

[15] In support of their argument, the Furbys cite *Oppliger v. Vineyard*, 19 Neb. App. 172, 803 N.W.2d 786 (2011). In *Oppliger*, this court determined that the boundary between the parties' properties was the thread of the stream of the north channel of the North Platte River. We then addressed whether the precise location of the thread could or should be addressed by a metes and bounds description. We stated:

> As to precisely and exactly where [the thread of the stream] is in a metes and bounds description, such is not before us and is inherently impractical, and in reality, such would rarely be subject to precise measurement and legal description beyond the conceptual definition we have employed for the thread of the stream throughout our opinion. Therefore, the thread of the stream of the North Platte River is found in the north channel, and it fits the definition of "thread of the stream" [found in Nebraska case law].

Oppliger v. Vineyard, 19 Neb. App. at 208, 803 N.W.2d at 812. The land surveyor in *Oppliger* prepared a composite survey map that platted the geographic centerline of the north channel superimposed on an aerial photograph with a metes and bounds description. This court observed that the surveyor had clearly platted the middle of the north channel measured bank to bank. We found that the mean centerline of a river, determined by dividing the distance between meander lines of the river, is an arbitrary location of the center of the stream and is not a determination of the thread of the stream in this jurisdiction. *Id*. We further observed that

> as a practical matter, the precise and exact location of the thread would become important only in times of drought and extremely low flow. Of the numerous Nebraska cases involving the thread of a stream, none contains a precise metes and bounds legal description of its location. [Citations omitted.] We conclude that such a description is neither required nor practical given that the thread of the stream is a legal concept and that pinpointing its exact location is inherently difficult, if not impossible, until a river actually dries up, which event would then reveal the thread's precise location, i.e., where the last little bit of flowing water could be found.

Id. at 209, 803 N.W.2d at 813.

The Furbys also observe that in its amended order, the court found that the boundary was the thread of the stream of the Loup River as depicted and described in exhibit 76. Exhibit 76 does not contain any legal descriptions and shows both the scaled-in thread-of-the-stream line shown on Tremel's surveys (i.e., the line he derived by dividing the distance between the banks of the south channel) and the line showing the approximate thread of the stream as observed by Tremel from an airboat in September and November 2010.

The Currys observe that the legal description found in their operative complaint and the district court's original and amended orders employs a "more or less" distance description to arrive at the location of the thread of the stream. They agree that the court's statement that the boundary is the

thread of the stream "as depicted and described in Exhibit 76" is not entirely correct, as there is no legal description contained in exhibit 76. They assert that such error is insignificant, however, given this court's determination in *Oppliger v. Vineyard*, 19 Neb. App. 172, 803 N.W.2d 786 (2011), that no precise or exact legal description of the thread of the stream is required. The Currys argue that there is a practical reason why exhibit 76 is significant and why Tremel's depiction of the approximate thread of the stream as observed in 2010 and the approximate distances shown thereon are important. They assert that without a description which comes relatively close, using descriptive phrases such as "more or less" and "approximately," future disputes might well arise over whether the thread of the stream is located on the north or south side of what appears to be a new island forming south of the island in dispute in this case.

We agree that a metes and bounds description is unnecessary and inherently impractical for the reasons we previously stated in *Oppliger*. Thus, we modify the district court's order to establish that the boundary between the Curry property and the Furby property is the thread of the stream of the Loup River, which thread is located in the river's south channel south of the island as generally depicted in exhibit 76.

VI. CONCLUSION

The district court did not err in applying the statutory presumption found in § 81-8,122.01 or in finding that the Furbys failed to present sufficient evidence to overcome the presumption. We modify the description of the boundary as set forth above.

AFFIRMED AS MODIFIED.

Brian David Steffy, appellant, v. Randi Jo Steffy, now known as Randi Jo Stenson, appellee.

832 N.W.2d 895

Filed May 14, 2013. No. A-12-082.

1. **Appeal and Error.** An appellate court may, at its option, notice plain error.
2. **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.
3. **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.
4. **Rules of the Supreme Court: Appeal and Error.** Parties who wish to secure appellate review of their claims for relief must be aware of, and abide by, the rules of the Nebraska Supreme Court and the Nebraska Court of Appeals in presenting such claims.
5. ____: ____. Any party who fails to properly identify and present its claim in accordance with the Supreme Court rules does so at its peril and risks the appellate court's declining to address the claim.
6. **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 asserting the error.
7. **Rules of the Supreme Court: Appeal and Error.** Assignments of error consisting of headings or subparts of argument do not comply with the mandate of Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2008).
8. ____: ____. In situations where assignments of error do not comply with the mandate of Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2008), the court may consider the case as one in which no brief was filed, or, alternatively, the court may examine the proceedings for plain error.
9. **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.
10. **Child Custody.** In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.
11. ____. The threshold question in removal cases is whether the parent wishing to remove the child from the state has a legitimate reason for leaving.
12. ____. Legitimate employment opportunities for a custodial parent may constitute a legitimate reason for leaving the state.
13. ____. Legitimate employment opportunities for a custodial parent 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.

14. ____. After clearing the threshold of showing a legitimate reason for leaving the state, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.
15. ____. In considering a motion to remove a minor child to another jurisdiction, whether the proposed move is in the best interests of the child is the paramount consideration.
16. **Child Custody: Visitation.** In determining whether removal to another jurisdiction is in a child's best interests, the 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 move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation.
17. **Child Custody.** The ultimate question in evaluating the parties' motives in seeking removal of a child to another jurisdiction is whether either party has elected or resisted a removal in an effort to frustrate or manipulate the other party.
18. ____. The second factor that must be considered regarding a motion to remove a child to another jurisdiction is the potential that the move holds for enhancing the quality of life for the child and the custodial parent. This factor requires an analysis of other considerations which bear upon the potential enhancement of the child's quality of life.
19. ____. In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the child and the custodial parent, a court evaluates the following considerations: the emotional, physical, and developmental needs of the child; the child's opinion or preference as to where to live; the extent to which the relocating parent's income or employment will be enhanced; the degree to which housing or living conditions would be improved; the existence of educational advantages; the quality of the relationship between the child and each parent; the strength of the child's ties to the present community and extended family there; and the likelihood that allowing or denying the removal would antagonize hostilities between the two parties. This list should not be misconstrued as setting out a hierarchy of considerations, and depending on the circumstances of a particular case, any one consideration or combination of considerations may be variously weighted.
20. **Courts: Appeal and Error.** An appellate court will not consider an issue that was not passed upon by the trial court.
21. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed in part, and in part reversed.

Karen S. Nelson and Liam K. Meehan, of Schirber & Wagner, L.L.P., for appellant.

Steven M. Delaney and Darin L. Whitmer, of Reagan, Melton & Delaney, L.L.P., for appellee.

IRWIN, PIRTLE, and RIEDMANN, Judges.

PIRTLE, Judge.

I. INTRODUCTION

Brian David Steffy appeals a decision reached by the district court for Cass County following Brian's attempt to modify the parties' previous divorce decree. In Brian's complaint, he alleged that a material change of circumstances had occurred and sought an increase in child support, and he also sought the court's permission to move with the parties' minor child from Nebraska to Texas. The district court found a material change of circumstances had occurred due to a change in the income of Randi Jo Steffy, now known as Randi Jo Stenson, and the court increased the child support order accordingly. In addition, the court concluded that Brian had failed to prove a legitimate reason for leaving the state, and it thus denied his request for permission to move to Texas. For the reasons that follow, we affirm in part and in part reverse.

II. BACKGROUND

Brian and Randi moved to Plattsmouth, Nebraska, with their son, Jakob Steffy, in 2003. Jakob, born in August 2001, had been diagnosed with autism spectrum disorder. From 2003 to 2007, Randi was stationed near Omaha, Nebraska, in her capacity as a lieutenant colonel in the U.S. Army. In July 2007, the Army transferred Randi to Fort Leavenworth, Kansas.

On April 15, 2008, a decree of dissolution of marriage had been entered in this matter. At the time of the divorce, Brian and Jakob resided in Plattsmouth and Randi resided in Fort Leavenworth. The parties agreed to joint legal custody with Brian being the primary custodial parent. Randi had parenting time with Jakob every other weekend and for extended periods of time over the summer.

In August 2010, Randi was promoted to colonel and was transferred to Fort Knox, Kentucky. After being restationed, Randi continued to exercise parenting time with Jakob once a month and for extended periods over the summer. The parties exchanged Jakob in Rock Port, Missouri, and Randi took Jakob to her sister's home in Platte City, Missouri, during her

parenting time. Randi made sure that Jakob was involved in educational activities and "applied behavioral analysis" (ABA) therapy during the summer visitation periods.

In December 2010, Brian filed a complaint for modification seeking permanent removal of Jakob from Nebraska and seeking sole legal and physical custody subject to Randi's parenting time. Brian also alleged a material change of circumstances because Randi earned a promotion and a change of income, which necessitated a change in the child support order.

Brian met his current wife, Sheri Steffy, during December 2010, and they married in April 2011. Brian and Sheri reside in Plattsmouth with Jakob and Sheri's children from a previous marriage. Brian graduated with a degree in elementary education in May 2011. At the time of trial, he was a substitute teacher in Bellevue, Nebraska, where he was paid between $125 and $140 per day. Brian also received $1,800 per month from a military pension and, at the time of trial, received approximately $1,146 per month in child support from Randi. Sheri was under an employment contract with the Bellevue school system, where she earned approximately $54,000 per year as a teacher.

At trial, Brian testified that a teacher with his experience in the greater Omaha area would earn an annual salary between $30,000 and $31,000. Brian obtained salary information for a number of school districts near Dallas-Fort Worth, Texas. A teacher with the same credentials in the Dallas-Fort Worth metropolitan area could earn a salary ranging from $47,000 to $50,000. Brian stated that he would like to move to a school district offering higher pay and was attracted to Texas because it does not have a state income tax.

Brian testified he would also like to live in Texas because it would be closer to some of his extended family, including his mother, his brothers, his sister-in-law, a nephew, and some stepsiblings, all of whom live within the state. Brian said he considered how the move would affect Randi, and he determined the trip from Dallas-Fort Worth to Louisville, Kentucky, is equal to the distance from Louisville to Omaha. Brian stated he would be willing to accommodate monthly visitation by meeting Randi halfway between Dallas-Fort Worth

and Louisville, or Dallas-Fort Worth and either Kansas City, Missouri, or Kansas City, Kansas. This distance is approximately the same as their arrangement to meet between Louisville and Plattsmouth.

Keery Wolf, of Wolf Behavioral Consulting, testified that Jakob has restricted interests, stereotypic or repetitive behaviors (such as putting things in a specific place or hitting his leg over and over), lack of verbal communication, and social skills deficits. Wolf is one of Jakob's therapists and is a certified behavior analyst in ABA. ABA is the science of behavior change; either increasing appropriate behaviors, decreasing inappropriate behaviors, or both.

Wolf said that ABA therapists are at Jakob's school to work one-on-one with Jakob and that paraprofessionals from the school also learned what the ABA therapists do so the techniques could be used with Jakob during the rest of the day. Wolf spent at least 1 hour per week or 2 hours every other week with Jakob to verify that he was progressing, and she said that between October 2010 and the end of the 2011 school year, Jakob "progressed wonderfully." Wolf stressed that Jakob will need to continue ABA services because he has autistic characteristics and because he responded well to ABA therapy.

Brian testified that Jakob's ABA services are at risk. Brian offered evidence that Wolf's business is one of very few providing ABA services in Nebraska, but indicated that there are opportunities for the same type of therapy in Texas. Brian stated concern that Jakob's treatment would become unavailable in Nebraska if Wolf's business did not continue providing the same services. Wolf testified that although she could not provide the names of any ABA services in Dallas-Fort Worth, she knew there were a "good number" available, noting there were more providers in Texas than in Nebraska.

Brian also testified that his primary concern was making sure the ABA services, speech therapy, and occupational services for Jakob in Texas would be as good as or better than the services provided in Nebraska. He stated he believed moving would be in Jakob's best interests because of the plethora of ABA-related businesses in Texas. He personally visited one

business and took Jakob there to visit and be observed. He also stated that Texas would be more favorable because insurance mandates require coverage of Jakob's treatment in the state and that the same type of mandates are not in place in Nebraska. He also testified that he believed he would be able to earn more money to support Jakob's care.

The district court sent a letter to the parties on October 19, 2011, following the modification proceedings on August 25. The court increased the child support owed from Randi to Brian from $1,046 to $1,365.71 per month. The court also found Brian did not meet the tests for showing a legitimate reason to leave the state, and it denied Brian's request to remove Jakob from the state. The court's order was filed in the district court for Cass County on January 26, 2012. Brian appealed the order of the district court on February 1.

III. ASSIGNMENTS OF ERROR

[1] Brian does not specifically assign errors in accordance with Nebraska's rules of appellate procedure. However, an appellate court may, at its option, notice plain error. *United States Cold Storage v. City of La Vista*, 285 Neb. 579, 831 N.W.2d 23 (2013). We elect to do so in this case.

IV. STANDARD OF REVIEW

[2,3] 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 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. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004).

V. ANALYSIS

[4,5] The Supreme Court has cautioned that parties who wish to secure appellate review of their claims for relief must be aware of, and abide by, the rules of the Nebraska Supreme Court and the Nebraska Court of Appeals in presenting such

claims. *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006). Any party who fails to properly identify and present its claim in accordance with the Supreme Court rules does so at its peril and risks the appellate court's declining to address the claim. See *id*.

We note at the outset that Brian's brief does not comply with Neb. Ct. R. App. P. § 2-109(D)(1) (rev. 2008), which sets forth with specificity the nine sections required in an appellant's brief and the order in which they must appear. In relevant part, § 2-109(D)(1)(e) required:

> [a] separate, concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error. Each assignment of error shall be separately numbered and paragraphed, bearing in mind that consideration of the case will be limited to errors assigned and discussed. The court may, at its option, notice a plain error not assigned.

In this case, Brian does not set forth a separate section containing his assignments of error between the statement of the case and the propositions of law. Rather, a secondary table of contents refers to the page numbers on which his assignments of error are argued.

[6,7] The Nebraska Supreme Court has addressed briefing inconsistencies similar to the circumstances of this case and stated that it has long been the policy that to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *City of Gordon v. Montana Feeders, Corp.*, 273 Neb. 402, 730 N.W.2d 387 (2007). Recently, the Supreme Court considered a case in which the appellant's brief did not contain a separate "assignments of error" section stating the assigned errors apart from the arguments in the brief. The court held that "[a]ssignments of error consisting of headings or subparts of argument do not comply with the mandate of § 2-109(D)(1)(e)." *In re Interest of Jamyia M.*, 281 Neb. 964, 977, 800 N.W.2d 259, 269 (2011).

[8,9] In such situations, the court may consider the case as one in which no brief was filed, or, alternatively, the court may

examine the proceedings for plain error. *Id*. "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. *Id*.

We review the record for plain error, and, upon review, we find plain error is present for the reasons set forth below.

1. Application of Threshold Test Requiring Legitimate Reason to Remove Child From Nebraska

[10] In Nebraska, the standards set forth in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), and *Wild v. Wild*, 13 Neb. App. 495, 696 N.W.2d 886 (2005), are commonly used to test whether a parent has met the burden to remove a minor child from the state. In *Wild*, this court stated:

> The relevant test to be applied in cases where a custodial parent seeks court permission to remove a minor child from the state has been set forth by the Nebraska Supreme Court on numerous occasions. See, *Tremain v. Tremain*[, 264 Neb. 328, 646 N.W.2d 661 (2002)]; *McLaughlin v. McLaughlin*[, 264 Neb. 232, 647 N.W.2d 577 (2002)]; *Vogel v. Vogel*[, 262 Neb. 1030, 637 N.W.2d 611 (2002)]; *Brown v. Brown*[, 260 Neb. 954, 621 N.W.2d 70 (2000)]; *Jack v. Clinton*[, 259 Neb. 198, 609 N.W.2d 328 (2000)]; . . . *Farnsworth, supra*. In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. *Id*. Under Nebraska law, the burden has been placed on the custodial parent to satisfy this test. See . . . *Brown, supra*.

13 Neb. App. at 503, 696 N.W.2d at 895.

Brian argues the district court abused its discretion in applying the tests to this case because the noncustodial parent, Randi, no longer lives in Nebraska and she should not be allowed to

tether him to the state. He argues that Randi has not resided in Nebraska since the inception of the divorce action and that she does not exercise her visitation within the state. He argues that she no longer has sufficient contacts within the state and that she should not be given the same remedies as parents within the state, because her "career choices have isolated her from" the state. Brief for appellant at 17.

This court has consistently applied the above test to situations where parents request removal of a child, whether or not the noncustodial parent lives in Nebraska. See *Colling v. Colling, ante* p. 98, 818 N.W.2d 637 (2012), where both parties resided in Nebraska. See, also, *Maranville v. Dworak*, 17 Neb. App. 245, 758 N.W.2d 70 (2008) (custodial parent, who relocated after being granted permission to remove children, sought subsequent move to yet another state); *Tirado v. Tirado*, No. A-11-517, 2012 WL 882509 (Neb. App. Mar. 13, 2012) (selected for posting to court Web site) (noncustodial parent lived outside of Nebraska and sought to prevent custodial parent in Nebraska from moving to another state).

The lower court recognized that the facts of this case presented a somewhat unusual issue due to Randi's living outside of Nebraska, but the court ultimately determined it should not "deviate from the Nebraska jurisprudence as set forth in" *Farnsworth, supra*, "and the cases following *Farnsworth*." We recognize that in *Farnsworth*, the court's primary concern was to avoid disturbing the relationship between the child and the noncustodial parent, who has a consistent physical presence in the child's life. When the noncustodial parent is geographically removed from the child, however, it is uncertain whether the custodial parent must prove a legitimate reason for leaving the state as *Farnsworth* requires. Nonetheless, in the present case, Brian established a legitimate reason for his proposed move.

2. Legitimate Reason for Removal From Nebraska

[11] 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). In this appeal, Brian argues that this standard does not apply to his situation. We determine that even if this standard applies, the trial court erred in finding that Brian had not met his burden of proving he had a legitimate reason for leaving the state.

[12,13] 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.*

Brian provided evidence of his current income as a substitute teacher in Bellevue and evidence that a full-time teacher with his experience in the greater Omaha area would receive an annual salary between $30,000 and $31,000. He also testified he has had difficulty finding full-time employment in school districts in Nebraska.

Brian obtained salary information for a number of school districts near Dallas-Fort Worth. He provided evidence that a teacher with the same credentials in the Dallas-Fort Worth metropolitan area could earn a salary ranging from $47,000 to $50,000. Brian's employment-related reasons for moving to Texas included finding full-time employment in a school district offering higher pay and the lack of a state income tax in Texas. Brian testified that although there were many teaching positions available in Texas, he did not apply for any positions, because he had not yet received permission to leave Nebraska and thus would not have been able to accept a contract if one were offered. He also stated he waited to apply because he did not want to pay the certification costs for Texas until he was given permission to move. Sheri also researched teaching certification and jobs available in Texas, but decided not to apply until she and Brian were granted permission to move. She said, "[I]t would be premature to apply for something if we don't have permission to leave."

Brian wishes to pursue employment in Texas, where he could possibly earn nearly $20,000 more per year than with a full-time salary for a comparable job in Nebraska. The

Farnsworth court stated that "job-related changes are legitimate reasons for moving where there is a 'reasonable expectation of improvement in the career or occupation of the custodial parent,'" and that "where the custodial parent's new job included a small increase in salary and increased potential for salary advancement." 257 Neb. at 252, 597 N.W.2d at 600. The information Brian provided shows he has considered his choices carefully, and he set forth a reasoned discussion of why he should be allowed to move to Texas to pursue greater employment opportunities.

In previous Nebraska cases, courts have granted permission to remove a child in situations where parents showed they were actively pursuing employment; that they have applied for jobs, have interviews scheduled, or have received offers of employment. See *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). See, also, *Jafari v. Jafari*, 204 Neb. 622, 284 N.W.2d 554 (1979). However, this case offers a unique set of facts and is distinguishable from other Nebraska cases in that the custodial parent, Brian, is tethered to Nebraska, while the noncustodial parent, Randi, is not. Currently, Brian is required to remain a resident of Nebraska, even though Randi does not live, work, or exercise her parenting time within the state.

Jakob's education and treatment for autism spectrum disorder are further reasons Brian sought permission to move to Texas. Brian testified his primary concern when considering relocation was the continuation of ABA services, speech therapy, and occupational services for Jakob. Brian noted there are a plethora of service providers in Texas while, in contrast, Nebraska has very few.

Wolf testified that though there are other ABA service providers in eastern Nebraska, she is the only ABA-board-certified behavior analyst that provides services in schools and homes. Wolf stated that her company, Wolf Behavioral Consulting, is currently Jakob's service provider and that he receives approximately 12 to 15 hours of ABA services in school per week. She said it is important for children with autism spectrum disorder to have the same quality of services throughout the year. She also testified that Jakob qualifies for extended school year

services, which are provided during the summer with the goal of helping children maintain the progress made throughout the year.

Wolf testified that her company is going to start "going in a different direction" and that unless another board-certified behavior analyst is found to pick up her services, there could be a gap in services for Jakob. Wolf said that there are more board-certified providers in Texas than in Nebraska and that she was personally familiar with one provider in Texas. Brian also testified that he was familiar with one provider in Texas. Brian said Jakob had already visited and been observed by that provider. Brian noted there is an insurance mandate in Texas which would ensure that Jakob would receive the treatment necessary for his diagnosis. Also, a larger pool of service providers would make it more likely that Jakob would receive the continuity of services he requires. Brian stated his belief that Texas would be a better place for Jakob academically, behaviorally, and therapeutically.

We find that Brian has provided enough information, under these specific circumstances, to show that the pursuit of full-time employment in Texas and the increased educational and therapeutic opportunities for Jakob are legitimate reasons to remove Jakob from Nebraska.

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. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004).

While operating under the assumption that *Farnsworth* applies, the trial court found that Brian failed to meet his burden of showing a legitimate reason for removal. Without determining whether *Farnsworth* applies in this case, we find that the trial court abused its discretion, as Brian showed that the employment opportunities for him and for his current wife, Sheri, as well as the educational advantages for Jakob in Texas, are legitimate reasons for leaving Nebraska.

3. Best Interests of Minor Child

[14,15] After clearing the threshold of showing a legitimate reason for leaving the state, the custodial parent must next

demonstrate that it is in the child's best interests to continue living with him or her. *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). Whether the proposed move is in the best interests of the child is the paramount consideration. *Id.* See, also, *Evenson v. Evenson*, 248 Neb. 719, 538 N.W.2d 746 (1995).

[16] In determining whether removal to another jurisdiction is in the child's best interests, the 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 move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation. *Farnsworth, supra.*

(a) Each Parent's Motives

[17] The first factor that must be considered is each parent's motives for seeking or opposing the removal of the minor child from the jurisdiction. The ultimate question in evaluating the parties' motives in seeking removal of a child to another jurisdiction is whether either party has elected or resisted a removal in an effort to frustrate or manipulate the other party. *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007).

The evidence shows that Brian sought removal for a variety of reasons, including greater access to ABA services for Jakob, the potential for a better job, and to be closer to his extended family. We do not find any evidence that Brian sought removal in an effort to manipulate Randi or interfere with the established parenting time schedule.

We find that Randi opposed removal because it could potentially affect her parenting time. However, there is no evidence she would not be able to maintain the same schedule of monthly visits and extended time with Jakob during the summer. Randi also expressed concern that the move would make it difficult to continue exercising her parenting time at her sister's home and could require hotel rental. However, Brian has demonstrated his willingness to continue a similar transportation arrangement for Randi's parenting time, and

he has chosen a location that would require roughly the same travel distance and time, so Randi could continue her time with Jakob in her sister's home. This factor does not weigh against removal.

(b) Quality of Life

[18] The second factor that must be considered is the potential that the move holds for enhancing the quality of life for the child and the custodial parent. This factor requires an analysis of other considerations which bear upon the potential enhancement of the child's quality of life. *Wild, supra*.

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

(c) Emotional, Physical, and Developmental Needs

Jakob is a child with special needs, and currently those needs are being met in Plattsmouth. He receives occupational therapy, speech therapy, and ABA services at his school. Jakob has been in the same school system since he began school, and he is surrounded by familiar faculty, staff, and students. The evidence shows this stability is beneficial for Jakob, and we do not diminish its importance in his education.

However, there is evidence that the same services may not be available in the future. Wolf, a provider of Jakob's ABA services, testified that her business is changing, and there is the potential that she will stop providing such services or that another service provider will take the place of her business. There is also evidence that similar businesses are more prevalent in Texas, and Jakob has had contact with at least one such business in the past. Whether Jakob moves to Texas or remains in Nebraska, there is a potential for change in the ABA services he receives. The likelihood of a change in Wolf's business, resulting in a loss of ABA services for Jakob, weighs in favor of removal.

(d) Jakob's Opinion or Preference

Jakob did not testify at trial, and there is no evidence to reflect his preference. This factor does not weigh for or against removal.

(e) Enhancement of Income or Employment

As addressed more fully above, Brian requested to move to Texas to pursue full-time employment as a teacher. He currently is a substitute teacher and has had difficulty obtaining full-time employment in Nebraska. If he were to obtain a full-time job in Texas, he could potentially earn more, as the base salary for teachers in Texas is higher than that in Omaha. He would also be able to retain more of his income, as there is no state income tax in Texas.

He also testified that in Texas, there is an insurance mandate requiring insurance companies to cover treatment for services to people with special needs. This mandate would include coverage for Jakob's ABA services and could potentially take some of the financial burden off of Brian. This same mandate is not in effect in Nebraska, and if Brian's insurance decided to stop paying for Jakob's services, Brian would be responsible for paying for the services. This factor weighs in favor of removal, as the move could enhance Brian's income and employment, as well as ensure insurance coverage so Jakob

would continue to receive the treatment he needs without an additional financial burden on Brian.

(f) Housing or Living Conditions

The evidence does not reflect housing or living conditions either in Nebraska or in Texas, so these factors do not weigh for or against removal.

(g) Quality of Relationship Between Child and Parents

The record in the present case indicates that Jakob has a good relationship with both parties, and there is no evidence that removal will adversely affect those relationships. Jakob would continue to live with Brian, and Randi would continue to have parenting time according to the established schedule. This factor weighs in favor of removal.

(h) Ties to Community and Extended Family

The evidence shows that Jakob has lived in the same community since the age of two and that he is familiar with its people and surroundings. The trial court accurately stated, "Jakob's ties to the present community . . . are clear." However, he has no extended family in that community or anywhere in Nebraska. Randi's parents live in South Dakota, and Randi's sister, as previously stated, lives in Missouri. Jakob has a relationship with these family members, but he would still be able to see them and spend time with them during Randi's parenting time if she continued to exercise it in Missouri.

A move to Texas would provide Jakob with greater access to Brian's extended family. Brian testified that several of his family members live in Texas. This includes Brian's older brother and his wife in Grand Prairie, Brian's nephew in Farmer's Branch, Brian's sister in Richardson, Brian's younger brother in Rio Grande Valley, and Brian's mother and several stepsiblings in other parts of the state. Additionally, Sheri has extended family in Oklahoma.

There are benefits both to living in Nebraska and to living in Texas with regard to this factor, but, overall, the benefits weigh in favor of removal.

(i) Hostilities Between Parties

Another element to consider when determining whether removal will enhance the quality of life for a child is the likelihood that allowing or denying the removal would antagonize hostilities between the two parties. *Wild v. Wild*, 13 Neb. App. 495, 696 N.W.2d 886 (2005).

The trial court's letter indicates a finding that though Brian and Randi have worked together in the past, this removal will create hostilities between the parties.

However, a review of the record indicates removal would not necessarily antagonize hostilities between the parties. Brian testified at trial that he and Randi have a history of working together for Jakob's benefit. The record indicates Brian and Randi have adjusted Randi's parenting time to accommodate her schedule, and Brian and Randi routinely met between Plattsmouth and Platte City to minimize the amount of parenting time Randi spent driving. There is no evidence that this arrangement could not continue, as Brian has demonstrated his willingness to meet her halfway from Texas.

We find this factor does not weigh in favor of or against removal.

(j) Conclusion on Quality of Life

Our de novo review of the record leads us to a conclusion that the quality of life considerations weigh in favor of allowing Brian to permanently remove Jakob from Nebraska. In the present case, the various considerations either weighed in favor of removal or were roughly equal. Overall, the evidence in the record demonstrates that the proposed removal from Nebraska will enhance Jakob's quality of life without jeopardizing his treatment, his education, or the time spent with Randi.

(k) Impact on Relationship With Noncustodial Parent

Currently, Randi exercises her parenting time with Jakob on weekends and for extended periods over the summer months. Randi testified that the nature of her position with the Army makes it difficult for her to take time off and that she has

to request a "pass" or be on ordinary vacation leave anytime she needs to leave Louisville to see Jakob. Typically, she travels from Louisville to Missouri and meets Brian halfway between her sister's home and Brian's home. Then Randi and Jakob return to her sister's home for the remaining period of her parenting time. Brian testified that the distances between Louisville and Plattsmouth and between Louisville and Irving, Texas, are roughly the same and that he would be willing to continue with the same type of arrangement for meeting and transferring Jakob to Randi's care for parenting time. Regardless of whether Jakob lives in Nebraska or Texas, Randi will still have to travel for parenting time, and she will still be able to exercise her parenting time in Missouri. Additionally, removal will not affect Randi's ability to exercise parenting time with Jakob during the summer in Louisville.

Randi and Brian do not live or work in the same community, so Brian's move with Jakob to a place that is roughly equidistant from Randi's home will not jeopardize Randi's time with Jakob. Under the circumstances, there is no evidence the move from Plattsmouth to Texas will greatly affect the relationship between Randi and Jakob, and this factor weighs in favor of removal.

(l) Conclusion on Best Interests

A de novo review of the evidence shows that the parents were not motivated by an effort to frustrate or manipulate each other, that the move would enhance Jakob's quality of life, and that the move would not greatly impact the relationship between Randi and Jakob. The record demonstrates sufficient evidence that it is in Jakob's best interests to allow Jakob to be removed from Nebraska to Texas.

(m) Conclusion on Removal

We conclude that Brian has adduced sufficient evidence to show a legitimate reason to leave Nebraska and that the move would be in Jakob's best interests. We find it was an abuse of discretion for the trial court to require Brian to remain in Nebraska with Jakob, because under the unique circumstances

of this case, the trial court's decision deprives Brian of a just result.

(n) Unconstitutional Burden on Travel

[20,21] Brian argues that the federal Constitution provides a fundamental right to interstate travel, which should permit him to relocate from Nebraska to Texas. An appellate court will not consider an issue that was not passed upon by the trial court. See *Capital City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 650 N.W.2d 467 (2002). Further, the Nebraska Supreme Court has held that a constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. *Id.* See *In re Adoption of Luke*, 263 Neb. 365, 640 N.W.2d 374 (2002). This issue was not presented or passed upon during trial before the lower court and, thus, cannot be raised for the first time on appeal. Therefore, we decline to consider this issue.

VI. CONCLUSION

Assuming without deciding whether a custodial parent must meet the requirements of *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), when the noncustodial parent resides outside of the state, the evidence supports the conclusion that Brian proved both a legitimate reason for removal and that removal from Nebraska to Texas is in Jakob's best interests. We find plain error and reverse the decision of the district court, which denied Brian's request for removal.

The portions of the district court's order unrelated to removal are affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

CITY OF BEATRICE, STATE OF NEBRASKA, APPELLEE, V. DANIEL A. MEINTS, APPELLANT.

830 N.W.2d 524

Filed May 14, 2013. No. A-12-626.

1. **Ordinances: Judicial Notice: Appeal and Error.** An appellate court will not take judicial notice of an ordinance not in the record but assumes that a valid ordinance creating the offense charged exists, that the evidence sustains the findings of the trial court, and that the sentence is within the limits set by the ordinance.
2. **Rules of the Supreme Court: Records: Appeal and Error.** Neb. Ct. R. App. P. § 2-104(C) allows any party to file a supplemental transcript prior to the day the case is submitted to the court.
3. **Ordinances: Records: Appeal and Error.** An appellant satisfies his responsibility of including an ordinance in the record by requesting that a copy of the ordinance be included in the transcript prepared by the clerk of the county court.
4. **Constitutional Law: Ordinances: Appeal and Error.** The constitutionality of an ordinance presents a question of law, in which an appellate court is obligated to reach a conclusion independent of the decision reached by the court below.
5. **Criminal Law: Convictions: Evidence: Appeal and Error.** A conviction is supported by sufficient evidence if a rational trier of fact could have found the essential elements of the crime based on the evidence, viewed in the light most favorable to the prosecution.
6. **Judgments: Appeal and Error.** An appellate court will not disturb the factual findings of the trial court unless they are clearly wrong.
7. ____: ____. When reviewing a question of law, an appellate court must reach a conclusion independently of the trial court.
8. **Municipal Corporations: Statutes: Appeal and Error.** Because a municipal code is a legislative enactment, an appellate court analyzes it using the rules of statutory analysis.
9. **Statutes: Appeal and Error.** The rules of statutory analysis require an appellate court to interpret statutory language according to its plain and ordinary meaning.
10. **Statutes.** So far as practicable, a court must give effect to the entire language of a statute, reconciling different provisions so that they are consistent, harmonious, and sensible.
11. **Statutes: Appeal and Error.** An appellate court attempts to give effect to all parts of a statute and avoid rejecting as superfluous or meaningless any word, clause, or sentence.
12. **Constitutional Law: Equal Protection: Statutes: Presumptions: Proof.** An appellate court presumes that a statute challenged under the Equal Protection Clause is valid, and the burden of establishing the unconstitutionality of the statute is on the one attacking its validity.

13. **Equal Protection.** The Equal Protection Clause does not forbid states from classifying people, but it keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.
14. ____. In equal protection challenges, the court applies different levels of judicial scrutiny to different classifications.
15. ____. The court applies a rational basis level of scrutiny to a classification when no fundamental right or suspect classification is involved.
16. ____. A state has broad discretion to classify if the classification has a reasonable basis, for example in the areas of economics and social welfare.
17. ____. If a rational basis level of scrutiny is appropriate, because a classification does not affect fundamental rights or involve a suspect class, a court will find that a government act is a valid exercise of police power if the act rationally relates to a legitimate governmental purpose.
18. **Equal Protection: Motor Vehicles.** A classification based on the location of motor vehicle registration is not the type of suspect classification that warrants strict judicial scrutiny.
19. **Constitutional Law: Statutes.** As a general rule, in a challenge to the overbreadth and vagueness of a law, a court's first task is to analyze overbreadth.
20. **Constitutional Law: Criminal Law: Statutes.** A statute is void for vagueness if it does not define a criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited.
21. **Constitutional Law: Statutes: Standing.** To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others.

Appeal from the District Court for Gage County, DANIEL E. BRYAN, JR., Judge, on appeal thereto from the County Court for Gage County, STEVEN B. TIMM, Judge. Judgment of District Court affirmed.

Terry K. Barber, of Barber & Barber, P.C., L.L.O., for appellant.

Gregory A. Butcher, Beatrice City Attorney, for appellee.

SIEVERS, PIRTLE, and RIEDMANN, Judges.

RIEDMANN, Judge.

I. INTRODUCTION

Daniel A. Meints appeals his conviction of violating Beatrice City Code § 16-21 (1994), which requires the operator of a motor vehicle registered in Nebraska to provide proof of financial responsibility to a requesting law enforcement officer. He

claims that the ordinance is a violation of the Equal Protection Clause and is unconstitutionally vague; therefore, according to Meints, the evidence was insufficient to support a conviction. We disagree and affirm his conviction.

II. BACKGROUND

In November 2011, Meints was involved in an accident while riding his motorcycle in Beatrice, Nebraska. As a result of the accident, Meints was transported to a hospital. Officer Anthony Chisano went to the hospital and asked Meints for proof of insurance, but Meints was unable to provide it at that time. A few days later, Officer Chisano again asked Meints for proof of insurance or financial responsibility. Officer Chisano advised Meints that he needed to obtain proof of his insurance or financial responsibility and present it to the Beatrice City Attorney within 10 days. Meints allegedly informed Officer Chisano that he was financially responsible and that his statement was his proof.

Meints was subsequently issued a citation for violating § 16-21, which prohibits a person from operating a motor vehicle registered in Nebraska "without having a current and effective automobile liability policy, evidence of insurance, or proof of financial responsibility." Meints did not present proof of an automobile liability policy or financial responsibility to the Beatrice City Attorney after being issued the citation. The next month, the Beatrice City Attorney filed the citation and charged Meints with one count of "No Proof of Insurance." At trial, Meints offered two invoices from an insurance company in support of his contention that he was insured on the date of the accident. One is a supplemental bill for a policy change on a policy with an expiration date of October 14, 2011. The other is a contingent renewal offer for the same policy and carries the notation "renewal offer contingent upon payment of amount shown as total due." Meints testified that he was not sure whether he paid either invoice.

In February 2012, the Gage County Court convicted Meints of violating § 16-21. The court sentenced him to a $100 fine, plus court costs. Meints appealed to the Gage County District

Court, alleging insufficiency of the evidence and unconstitutionality of the ordinance. Due to Meints' failure to provide a copy of the ordinance to the district court, the district court presumed the ordinance was constitutional under the "ordinance rule" and affirmed the conviction of the trial court. On further appeal to this court, Meints provided a copy of the ordinance in a supplemental transcript.

III. ASSIGNMENTS OF ERROR

Meints argues, condensed and restated, that the trial court erred in (1) finding the evidence supported the conviction, (2) failing to find § 16-21 violates the Equal Protection Clauses of the U.S. and Nebraska Constitutions, and (3) failing to find § 16-21 violates the Due Process Clauses of the U.S. and Nebraska Constitutions.

IV. ANALYSIS

1. Sufficiency of Record

[1] Before addressing Meints' assigned errors, we first address whether a copy of § 16-21 is properly before us. An appellate court will not take judicial notice of an ordinance not in the record but assumes that a valid ordinance creating the offense charged exists, that the evidence sustains the findings of the trial court, and that the sentence is within the limits set by the ordinance. *State v. Buescher*, 240 Neb. 908, 485 N.W.2d 192 (1992); *State v. Salisbury*, 7 Neb. App. 86, 579 N.W.2d 570 (1998). Therefore, if the ordinance is not properly before us, our analysis of this case is based upon the above-cited assumptions.

[2] Meints did not provide a copy of the ordinance in either the transcript or the bill of exceptions when he appealed from the county court to the district court. He did not initially request that a copy of the ordinance be included in the transcript to this court. After Meints filed his brief, the City of Beatrice filed a motion for summary affirmance, based upon Meints' failure to include the ordinance in the record. Meints then filed a supplemental transcript that included the ordinance. Neb. Ct. R. App. P. § 2-104(C) allows any party to file a supplemental

transcript prior to the day the case is submitted to the court; therefore, this court denied the City of Beatrice's subsequent motion to strike the supplemental transcript and its motion for summary affirmance.

[3,4] In *State v. Bush*, 254 Neb. 260, 576 N.W.2d 177 (1998), the Nebraska Supreme Court held that an appellant satisfies his responsibility of including an ordinance in the record by requesting that a copy of the ordinance be included in the transcript prepared by the clerk of the county court. Furthermore, the constitutionality of an ordinance presents a question of law, in which an appellate court is obligated to reach a conclusion independent of the decision reached by the court below. *Anthony, Inc. v. City of Omaha*, 283 Neb. 868, 813 N.W.2d 467 (2012). Therefore, neither Meints' failure to include the ordinance in the record to the district court nor his failure to include it in the initial transcript to this court precludes us from fully addressing his assigned errors.

2. Finding Evidence Supported Conviction

Meints argues that the evidence in this case does not support a finding that he violated § 16-21. Specifically, Meints argues that the ordinance does not require him to produce documentation that his motorcycle was covered by an automobile liability insurance policy; rather, he claims the ordinance only requires that he actually be covered by an automobile insurance policy. He argues that there is no proof he did not have an effective automobile insurance liability policy at the time of the accident. In the alternative, Meints argues that his verbal affirmation of financial responsibility satisfied the ordinance. We disagree.

[5-7] A conviction is supported by sufficient evidence if a rational trier of fact could have found the essential elements of the crime based on the evidence, viewed in the light most favorable to the prosecution. See *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009). An appellate court will not disturb the factual findings of the trial court unless they are clearly wrong. See *State v. Wood*, 220 Neb. 388, 370 N.W.2d 133 (1985). When reviewing a question of law, however, an

appellate court must reach a conclusion independently of the trial court. See *Nelson v. City of Omaha*, 256 Neb. 303, 589 N.W.2d 522 (1999).

(a) Requirement to Prove Insurance Coverage

[8-10] Because a municipal code is a legislative enactment, an appellate court analyzes it using the rules of statutory analysis. See *id*. The rules of statutory analysis require an appellate court to interpret statutory language according to its plain and ordinary meaning. See *id*. So far as practicable, a court must give effect to the entire language of a statute, reconciling different provisions so that they are consistent, harmonious, and sensible. See *Van Patten v. City of Omaha*, 167 Neb. 741, 94 N.W.2d 664 (1959).

Section 16-21 states in pertinent part:

> (a) It shall be unlawful for any owner of a motor vehicle . . . which is required to be registered in this state and which is operated on a street or alley to allow the operation of a motor vehicle on a street or alley without having a current and effective automobile liability policy, evidence of insurance, or proof of financial responsibility. . . . This subsection shall not apply to motor vehicles registered in another state.
>
> (b) An owner who is unable to produce a current and effective automobile liability policy, evidence of insurance, or proof of financial responsibility upon the request of a law enforcement officer shall be allowed ten (10) days after the date of the request to produce proof to the city attorney that a current and effective automobile liability policy or proof of financial responsibility was in existence for the motor vehicle at the time of such request.
>
> (c) Every person who violates this section shall be guilty of a misdemeanor upon conviction and shall be fined not more than five hundred dollars ($500.00) and shall be advised by the court that his or her motor vehicle operator's license, motor vehicle certificate of registration, and license plates will be suspended by

> the State of Nebraska, Department of Motor Vehicles, until he or she complies with R.R.S. sections 60-505.02 and 60-528.

Meints argues that § 16-21 does not require him to show proof of automobile liability insurance, but requires only that he have a policy in effect. While one might derive that impression from reading only subsection (a) of § 16-21, subsection (b) requires motor vehicle owners to produce the policy, evidence of insurance, or proof of financial responsibility to requesting law enforcement officers. Subsection (b) states that an owner who is unable to produce such proof to a requesting law enforcement officer must present the proof to the city attorney within 10 days.

Subsection (b) does not distinguish between individuals who are unable to present proof of insurance to an officer because they do not have an insurance policy and individuals who are simply unwilling to present proof of insurance to an officer for other reasons, such as stubbornness. All individuals unable to present proof to a law enforcement officer have 10 days to present proof to the city attorney. Subsection (c) indicates that individuals who are unable to present proof of an insurance policy or of financial responsibility to an officer or the city attorney may be fined up to $500.

In this case, Meints did not present an insurance policy, evidence of an insurance policy, or proof of financial responsibility to Officer Chisano or to the city attorney. He argues one of the exhibits shows he had an automobile liability policy in effect, but the exhibit shows evidence only of a policy that expired the month before the accident, in October 2011. Meints did not produce any evidence that he was insured on the date of the accident; therefore, sufficient evidence existed to support the conviction.

(b) Verbal Affirmation of Financial Responsibility

[11] Meints asserts that he stated he was financially responsible to Officer Chisano and that his statement proved he was financially responsible. We do not agree that Meints' verbal statement of financial responsibility met the requirements of

§ 16-21(b). As stated above, we analyze an ordinance in the same manner in which we analyze a statute. Statutory language is to be given its plain and ordinary meaning. *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004). The rules of statutory interpretation require an appellate court to give effect to the entire language of a statute. *Amen v. Astrue*, 284 Neb. 691, 822 N.W.2d 419 (2012). The court attempts to give effect to all parts of a statute and avoid rejecting as superfluous or meaningless any word, clause, or sentence. *Id.*

Subsection (b) requires that a party "produce" either a policy, evidence of a policy, or proof of financial responsibility. To "produce" is defined as to "offer to view or notice." Webster's Third New International Dictionary of the English Language, Unabridged 1810 (1993). We read the plain language of § 16-21 to require physical documentation, not merely a self-serving oral statement.

Accordingly, we agree with the trial court that Meints' verbal statement did not meet the legal requirements for proving financial responsibility under § 16-21.

3. Failing to Find § 16-21 Violates Equal Protection

Meints argues that he cannot be convicted of violating § 16-21, because the ordinance violates the Equal Protection Clauses of the U.S. and Nebraska Constitutions. Specifically, Meints argues that the ordinance is unconstitutional because its limited application to vehicles registered in Nebraska irrationally singles out residents for violations. We disagree.

[12] Whether an ordinance is constitutional is a question of law, and an appellate court has an obligation to reach a conclusion independent of the decision reached by the court below. See *Anthony, Inc. v. City of Omaha*, 283 Neb. 868, 813 N.W.2d 467 (2012). An appellate court presumes that a statute challenged under the Equal Protection Clause is valid, and the burden of establishing the unconstitutionality of the statute is on the one attacking its validity. See *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

[13] The Equal Protection Clause of the 14th Amendment, § 1, mandates that no state shall "deny to any person within

its jurisdiction the equal protection of the laws." The Equal Protection Clause does not forbid states from classifying people, but it keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike. See *Rung, supra*.

[14-17] In equal protection challenges, the court applies different levels of judicial scrutiny to different classifications. See *id*. The court applies a rational basis level of scrutiny to a classification when no fundamental right or suspect classification is involved. *Citizens for Ed. Eq. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742 (2007). Fundamental rights have been defined as those that are "'"implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."'" *Id*. at 296, 739 N.W.2d at 758 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997)). A state has broad discretion to classify if the classification has a reasonable basis, for example in the areas of economics and social welfare. See *Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971). If a rational basis level of scrutiny is appropriate, because a classification does not affect fundamental rights or involve a suspect class, a court will find that a government act is a valid exercise of police power if the act rationally relates to a legitimate governmental purpose. See *Citizens for Ed. Eq., supra*.

In this case, the Beatrice ordinance, § 16-21, requires operators of motor vehicles registered in this state to carry, and be able to provide, proof of insurance or financial responsibility. The ordinance distinguishes between vehicles registered in Nebraska and vehicles registered in another state.

[18] We evaluate § 16-21 under a rational basis standard because the ordinance does not affect any fundamental rights or involve an inherently suspect classification. See *Porter v. Jensen*, 223 Neb. 438, 390 N.W.2d 511 (1986) (noting that driving is not fundamental right). A classification based on the location of motor vehicle registration is not the type of suspect classification that warrants strict judicial scrutiny.

Under a rational basis review, § 16-21 must rationally relate only to a legitimate governmental purpose. In this case,

§ 16-21 rationally relates to the government interest of protecting persons using the public highways from financially irresponsible, negligent motorists. We note that § 16-21 is virtually identical to Neb. Rev. Stat. § 60-3,167 (Reissue 2010), and although that statute is not part of Nebraska's Motor Vehicle Safety Responsibility Act, it serves a common purpose. The Nebraska Supreme Court has upheld the constitutionality of the Motor Vehicle Safety Responsibility Act, stating that its purpose is to "'protect the public on the highways against the operation of motor vehicles by financially irresponsible persons'" and that

> "in the interests of the public the state may make and enforce regulations reasonably calculated to promote care on the part of all who use its highways." *Hadden v. Aitken*, 156 Neb. 215, 221, 55 N.W.2d 620, 623 (1952), *overruled on other grounds, Stauffer v. Weedlun*, 188 Neb. 105, 195 N.W.2d 218 (1972).

Russell v. State, 247 Neb. 885, 890, 531 N.W.2d 212, 215 (1995).

We believe that § 16-21 serves the same interest as does the Motor Vehicle Safety Responsibility Act in protecting the public on the highways against the operation of motor vehicles by financially irresponsible persons. While § 16-21 imposes a requirement only upon those vehicles registered in this state, we do not find such a restriction violates the Equal Protection Clause. As articulated by the Massachusetts Supreme Court regarding a similar law:

> The use of . . . motor vehicles [not registered in this state] may be found by the Legislature to be small in comparison with that of such vehicles registered in accordance with our laws. The expense of enforcing the law with respect to them may be found to be excessive. It may be that there are other difficulties in the way. Moreover, a classification including only motor vehicles registered under our statutes cannot be pronounced unreasonable. Nonresident owners of motor vehicles or motor vehicles not registered under our laws doubtless might be included within the law.

Opinion of the Justices, 251 Mass. 569, 602, 147 N.E. 681, 696 (1925).

Because § 16-21 rationally relates to the legitimate governmental purpose of protecting the public on the highways against financially irresponsible persons, it does not violate the Equal Protection Clauses of the U.S. and Nebraska Constitutions. Therefore, this assignment of error is without merit.

4. Failing to Find § 16-21 Violates Due Process

Meints argues that § 16-21 violates the Due Process Clauses of the U.S. and Nebraska Constitutions because it is overly broad and vague. We disagree.

(a) Overbreadth

[19] As a general rule, in a challenge to the overbreadth and vagueness of a law, a court's first task is to analyze overbreadth. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002). An attack on the overbreadth of a statute asserts that language in the statute impermissibly infringes on a constitutionally protected right. *Id*. Meints does not identify upon what constitutionally protected right § 16-21 infringes. He cites only *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009), a case involving a conviction of use of a computer to entice a child for sexual purposes. In *Rung*, the defendant claimed Neb. Rev. Stat. § 28-320.02 (Reissue 2008) was overbroad because it prohibited not only the use of nonconstitutionally protected speech, but also the use of constitutionally protected speech.

Since Meints does not identify any constitutionally protected right, this assignment is without merit.

(b) Vagueness

[20] Meints argues that § 16-21 should be void for vagueness because it does not sufficiently define the prohibited conduct. A statute is void for vagueness if it does not define a criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited." *State v. Rung*, 278 Neb. at 866, 774 N.W.2d at 632.

[21] To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that

the statute is vague when applied to the conduct of others. *Rung, supra*. As stated above, we find that § 16-21 requires the operator of a motor vehicle registered in this state to produce an insurance policy, proof of a policy, or proof of financial responsibility to requesting law enforcement officers. Meints failed to produce the required proof, and therefore, he lacks standing to assert that § 16-21 is void for vagueness.

V. CONCLUSION

Finding that the evidence supports Meints' conviction and that § 16-21 of the Beatrice City Code is not unconstitutional, we affirm the decision of the district court affirming the decision of the trial court.

AFFIRMED.

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

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

835 N.W.2d 758

Filed May 21, 2013. Nos. A-12-921, A-12-922.

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. **Parental Rights: Proof.** In Nebraska statutes, the bases for termination of parental rights are codified in Neb. Rev. Stat. § 43-292 (Cum. Supp. 2012). Section 43-292 provides 11 separate conditions, any one of which can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child.
3. **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 (Cum. Supp. 2012), the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground.

4. **Parental Rights.** Neb. Rev. Stat. § 43-292 (Cum. Supp. 2012) requires that parental rights can be terminated only when the court finds that termination is in the child's best interests.
5. **Parental Rights: Evidence.** In determining whether it is in the best interests of the child for the court to terminate parental rights, the lower court can consider relevant evidence of facts occurring within the time period before the filing of the termination action, as well as those that have transpired since the date of the filing of the motion or petition seeking the termination of parental rights, such as those relating to parental efforts and behavior, and the needs or circumstances of the child.
6. **Parental Rights.** Children cannot, and should not, be allowed to linger in foster care while waiting to see if the parent will mature.
7. ____. Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of parental rights.
8. **Parental Rights: Parent and Child.** In considering the issue of whether it is in the best interests of the child for the court to terminate parental rights, it is important to remember that the law does not require perfection of a parent. Instead, the court should assess whether the parent has made continued improvement in parenting skills and whether a beneficial relationship has been established between the parent and the child.

Appeals from the County Court for Saunders County: GERALD E. ROUSE, Judge. Reversed and remanded with directions to dismiss.

Jennifer D. Joakim for appellant.

Jonathan M. Frazer, Deputy Saunders County Attorney, for appellee.

SIEVERS, PIRTLE, and RIEDMANN, Judges.

RIEDMANN, Judge.

INTRODUCTION

Staci C. appeals from the orders of the county court for Saunders County, sitting as a juvenile court, which terminated her parental rights to her daughters, Chloe C. and Carly C. Although there is a separate record for each case, the appellant and the issues raised on appeal are the same, and therefore, we consolidate these cases for resolution. Because we find the State failed to prove by clear and convincing evidence that terminating Staci's parental rights was in the best interests of Chloe and Carly, we reverse the judgments of the juvenile

court and remand the causes with directions to dismiss the motions for termination.

BACKGROUND

Staci is the biological mother of Chloe, born in June 2003, and Carly, born in September 2007. On January 22, 2010, authorities were called to Chloe's school after bruises were seen on Chloe's buttocks. Chloe reported at that time that she had been living for approximately 2 weeks with a woman who was a family friend of Staci's boyfriend, Tim Peterson, and that Staci was living with Peterson. That same day, the children were placed in foster care. They were later adjudicated as children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008).

Criminal charges were filed both against Peterson, for causing the bruising on Chloe, and against Staci, for failing to protect Chloe. Staci was convicted and placed on probation. One of the conditions of her probation was to refrain from any contact with Peterson, but because she continued to contact him, her probation was revoked and she served 30 days in jail. Staci was also later convicted of felony theft after stealing money from Peterson's family friend, with whom Chloe and Carly had lived, and was sentenced to 20 months to 5 years' incarceration. She was granted work release after serving 4 months and was paroled in February 2012.

After Chloe and Carly were removed from Staci's care, a case plan was developed which included several goals. Staci was to "'put her children's needs ahead of her own needs 100 percent of the time.'" Staci was also to provide a safe and stable living environment and enhance her parenting skills to meet the children's basic needs and keep them safe. In September 2010, Staci underwent a psychological evaluation. After this evaluation, an additional outcome was added whereby Staci was to follow all mental health treatment recommendations and to maintain a stable lifestyle environment for her children.

The State moved to terminate Staci's parental rights on November 15, 2011. At the same time, the State moved to terminate the parental rights of Chloe's father and Carly's

father. The court terminated the fathers' rights, and that decision is not being appealed; therefore, we do not address those terminations.

The termination hearing was held on May 1 and July 10, 2012. At the termination hearing, Staci conceded that her children had been in an out-of-home placement for 15 or more months of the most recent 22 months.

The evidence adduced at the termination hearing revealed that before becoming involved with Peterson, Staci was living with her children in an apartment in Iowa and working as a certified nurse aide. In July 2009, Staci moved herself and her children to Nebraska to be with Peterson. Staci had met Peterson on the Internet, and he promised they would get married and indicated that if things went well, he might even adopt her children. After moving to Nebraska, Staci obtained employment as a cook at a nursing home. Her relationship with Peterson was "good at first," but he became verbally and mentally abusive. Eventually, the abuse turned physical. When asked about why the girls were living with Peterson's family friend prior to the State's involvement, Staci said that she had asked the family friend if Staci could bring the girls over to stay with her, because Staci knew she would still be able to see them but that they would be out of "harm's way." At that time, Staci did not have any other friends or family in Nebraska.

Staci admitted that during the first year of her case plan, she did not do what was asked of her. She testified that the reason for her noncompliance was due to Peterson's control over her: She was not able to leave the house when she wanted to, she was not allowed to get money from her own paycheck, and she could not get where she needed to go because he kept the keys to her car. Staci testified that Peterson controlled her financially and that out of the $400 or $500 per month she earned, he would give her only $50 and would spend the rest of her money on himself. According to Staci, Peterson "was the control, the power, and you do as I say or there's going to be severe consequences." Sabine Grover, Staci's direct program support worker, testified that Staci was fearful of Peterson and that there was "a control factor" present.

Staci ended her relationship with Peterson by the end of 2010. In January 2011, she entered a domestic violence shelter called Safe Haven. Safe Haven is a 6-week program where victims of domestic violence can get therapy, have a safe and confidential place to live, and get support and help with whatever is needed. While at Safe Haven, Staci completed a parenting class and participated in a domestic violence support group. Jennifer Roth, a family permanency specialist who worked with Staci, testified that Staci made progress once she entered the Safe Haven program. Grover also noticed positive changes in Staci during the time she was at Safe Haven. Grover testified that Staci was learning new skills and implementing them with her children and that they were working. Grover stated, "I was really impressed."

In November 2011, while out on work release, Staci contacted Voices of Hope, a program that provides services for sexual assault and domestic violence victims. Staci requested one-on-one advocacy and met with a counselor once a week for 8 weeks. Besides working with a counselor, she also attended a domestic violence support group and completed a "DV101 psycho-educational group." Kacey Barrow, Staci's counselor at Voices of Hope, testified at the termination hearing that the main goal during that time was to find housing and that Staci would do a lot of self-advocacy by using the telephone, writing letters, and making contacts. Barrow described Staci as "very motivated" to make changes in her life. Barrow and Staci would also discuss having a support system and how Staci should prepare for parole and getting her children back. During sessions at Voices of Hope, Staci was always early, was always prepared, did the work requested of her, was always the first to engage, and was very open.

The testimony from caseworkers and support workers at the termination hearing indicated that Staci attended visits with her children a majority of the time and that the visits generally went very well. The girls were always excited to see Staci and would run to her, jump into her arms, and hug her. Staci would interact appropriately with the children, and although she had some difficulties with parenting skills along the way, Staci was usually willing to learn and correct those problems.

Grover testified that during the time she spent with Staci, she noticed improvements in Staci's parenting skills in that she had more patience, took more time with the girls, would get down on their level to communicate with them, would redirect their behavior appropriately, and just started "doing all the right things."

When Grover took over as Staci's support worker in July 2010, the visits were held at a city park. Grover testified that it was very hot outside and that the girls were irritable because of the heat, but Staci engaged them and did the best she could under the circumstances. Eventually, Staci took the initiative to get permission to have visits at a community center which was air-conditioned and had a big room where they were able to do crafts and activities and play with toys. When Staci was at Safe Haven, the visits were held in a church where they were able to watch videos and eat snacks. After the church building closed, Staci gained permission to have visits at the building where she was taking domestic violence and parenting classes.

After Staci was paroled, she entered a transitional shelter for women. While at the shelter, she completed a life skills class and was involved in vocational rehabilitation. At the time of the termination hearing, Staci had been working at a new job for 3 weeks. She had also been approved for housing assistance and was on the waiting list for a voucher. Staci testified at the termination hearing that through all of the programs and classes she completed, she has gained insight into her own situation and realized the extent to which her relationship with Peterson has interfered with her relationship with her children.

After the termination hearing, the court entered orders terminating Staci's parental rights to Chloe and Carly. The court found that Staci continued to see Peterson even after the State took custody of the girls and ordered her not to have contact with him. The court also found that Staci had not followed the case plans, had been in and out of placements, and had served prison time. The court noted that Staci conceded that the girls had been in an out-of-home placement for 15 or more months of the most recent 22 months. Finally, the court determined

that the best interests of the children required they find permanent placement and that Staci's parental rights be terminated. Staci timely appeals.

ASSIGNMENTS OF ERROR

Staci assigns that the juvenile court erred in finding that the State proved by clear and convincing evidence that (1) Staci failed to correct the conditions leading to the adjudication and that reasonable efforts were provided pursuant to Neb. Rev. Stat. § 43-292(6) (Cum. Supp. 2012), (2) Staci substantially and continuously or repeatedly neglected and refused to give the children necessary parental care pursuant to § 43-292(2), (3) Staci is unable to discharge parental responsibilities due to mental illness or mental deficiency pursuant to § 43-292(5), and (4) terminating Staci's parental rights was in the best interests of her children.

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).

ANALYSIS

Grounds for Termination.

[2] In Nebraska statutes, the bases for termination of parental rights are codified in § 43-292. Section 43-292 provides 11 separate conditions, any one of which can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child. *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010).

In its order terminating Staci's parental rights to Chloe and Carly, the juvenile court did not specifically identify the subsections it was addressing. However, the court found that Staci had not followed the case plans ordered by the court (§ 43-292(6)) and that Chloe and Carly had been in an out-of-home placement for 15 or more months of the most recent 22 months (§ 43-292(7)).

Staci concedes that Chloe and Carly have been in an out-of-home placement for 15 or more months of the most recent 22 months. The girls were removed from Staci's home on January 22, 2010. At the time the motions to terminate parental rights were filed on November 15, 2011, Chloe and Carly had been in an out-of-home placement for almost 22 months. At the time the termination hearing began on May 1, 2012, the girls had been in an out-of-home placement for over 27 months. Our de novo review of the record clearly and convincingly shows that grounds for termination of Staci's parental rights under § 43-292(7) were proved by sufficient evidence.

[3] 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 Justin H. et al.*, 18 Neb. App. 718, 791 N.W.2d 765 (2010). Therefore, this court need not review termination under § 43-292(2), (5), or (6). Once a statutory basis for termination has been proved, the next inquiry is whether termination is in the child's best interests.

Chloe's and Carly's Best Interests.

[4,5] Staci argues that the juvenile court erred in finding that terminating her parental rights was in Chloe's and Carly's best interests. Section 43-292 requires that parental rights can be terminated only when the court finds that termination is in the child's best interests. In determining whether it is in the best interests of the child for the court to terminate parental rights, the lower court can consider relevant evidence of facts occurring within the time period before the filing of the termination action, as well as those that have transpired since the date of the filing of the motion or petition seeking the termination of parental rights, such as those relating to parental efforts and behavior, and the needs or circumstances of the child. See *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005).

[6,7] The appellate courts of Nebraska have repeatedly cautioned that children cannot, and should not, be allowed

to linger in foster care while waiting to see if the parent will mature. See, *In re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007); *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002); *In re Interest of Kenna S.*, 17 Neb. App. 544, 766 N.W.2d 424 (2009); *In re Interest of Eden K. & Allison L.*, 14 Neb. App. 867, 717 N.W.2d 507 (2006); *In re Interest of Stacey D. & Shannon D.*, 12 Neb. App. 707, 684 N.W.2d 594 (2004). Similarly, where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of parental rights. *In re Interest of Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012).

[8] However, in considering the issue of whether it is in the best interests of the child for the court to terminate parental rights, it is important to remember that the law does not require perfection of a parent. See *In re Interest of Aaron D., supra*. Instead, the court should assess whether the parent has made continued improvement in parenting skills and whether a beneficial relationship has been established between the parent and the child. See *In re Interest of Justin H. et al., supra*.

In the present case, several witnesses at the termination hearing rendered the opinion that terminating Staci's parental rights was in Chloe's and Carly's best interests. One witness was the caseworker from January through October 2010, who then became involved again in December 2011. She testified that she believed terminating Staci's parental rights was in the children's best interests because Staci had "made very poor choices" in the previous 2 years in regard to "her criminal aspect of things" and she could not maintain housing and stable employment in order to get the girls back in her home and parent them 100 percent of the time.

Roth was the family permanency specialist from July 2010 through November 2011. She opined that terminating Staci's parental rights was in the children's best interests, because they need to have a stable environment and they had not had that, nor had Roth seen that Staci had been able to provide that. The children and family services specialist for the case beginning in January 2012 opined that terminating Staci's parental rights was in the children's best interests because of the lack

of progress on the case plan goals and the length of time the children had been out of Staci's home without permanency. However, that specialist admitted she had never observed Staci with her children.

Despite this testimony, based on all of the evidence presented at the termination hearing, we find that Staci has demonstrated a continued improvement in her parenting skills and has established a beneficial relationship with her children. We consider Staci's initial lack of progress in light of the surrounding circumstances. Barrow, Staci's counselor, testified about the "cycle of violence" that Staci had been caught in during her relationship with Peterson, whereby the victim stays with an abusive partner because the victim does not feel like he or she deserves any better. Breaking that cycle consists of empowering victims to see that they do not deserve the abuse and that they do not have to live like that. Barrow testified that she believes Staci had made strides to ensure that she would not return to her previous situation.

We note that it was Staci who took the initiative to contact Safe Haven and enter the program. And once Staci was able to break out of that cycle of violence, she made efforts toward meeting her case plan goals. While we acknowledge that there is evidence to the contrary, the general testimony was that after Staci ended her relationship with Peterson, she showed continual improvement. This is not to suggest that Staci is a perfect parent, and we find many of her choices to be questionable at best. However, we also find compelling the fact that before Staci's relationship with Peterson, she and her children were living independently and she maintained steady employment in order to support her family. At the time of the termination hearing, Staci had secured employment and had been approved for housing assistance. As a general proposition, it can be said that what harm has befallen the children, such occurred while Staci was involved with Peterson. Not only has Staci ended that relationship, she has been actively engaged in the process of learning about domestic violence and self-improvement so as to avoid such situations in the future—all of which is to the benefit of, and in the best interests of, her children.

The evidence presented at the termination hearing revealed that Staci consistently attended visitation with her children, she interacted appropriately with them most of the time, and she was willing to accept and implement suggestions from the caseworkers. Additionally, the evidence shows that there is a beneficial relationship between Staci and her children, because the girls were always very excited to see Staci and enjoyed their visits with her. We appreciate that Staci 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 Staci's parental rights to Chloe and Carly is in the children's best interests.

CONCLUSION

We find that the juvenile court erred when it found that the State had proved, by clear and convincing evidence, that terminating Staci's parental rights would be in Chloe's and Carly's best interests. Accordingly, we reverse the judgments of the juvenile court and remand the causes with directions to dismiss the motions for termination.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

IN RE INTEREST OF NERY V. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MARIO V., SR., APPELLANT, IDA V., APPELLEE, AND ROSEBUD SIOUX TRIBE, INTERVENOR-APPELLEE.

IN RE INTEREST OF ESPERANZA V. AND MARIO V., JR., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MARIO V., SR., APPELLEE, IDA V., APPELLANT, AND ROSEBUD SIOUX TRIBE, INTERVENOR-APPELLEE.

832 N.W.2d 909

Filed May 28, 2013. Nos. A-12-629, A-12-662.

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. **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. **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.
4. **Indian Child Welfare Act: Proof.** Under Nebraska law, a party to a proceeding who seeks to invoke a provision of the Nebraska Indian Child Welfare Act has the burden to show that the act applies in the proceeding.
5. **Indian Child Welfare Act: Time.** To determine whether the Nebraska Indian Child Welfare Act applies, the critical issue is not whether the child is an "Indian child," but, rather, when his or her status was established in the proceedings.
6. **Indian Child Welfare Act: Federal Acts: Time.** The provisions of the federal Indian Child Welfare Act and the Nebraska Indian Child Welfare Act apply prospectively from the date the Indian child's status as such is established on the record.
7. **Indian Child Welfare Act: Parental Rights.** The provisions relating to the withdrawal of a relinquishment provided for in Neb. Rev. Stat. § 43-1506 (Reissue 2008) of the Nebraska Indian Child Welfare Act do not apply to a relinquishment signed prior to the applicability of the act.
8. **Parental Rights: Adoption.** Pursuant to Neb. Rev. Stat. § 43-106.01 (Reissue 2008), the rights of the relinquishing parent are terminated when the Nebraska Department of Health and Human Services, or a licensed child placement agency, accepts responsibility for the child in writing.
9. **Parental Rights: Adoption: Time.** A duly executed revocation of a relinquishment and consent to adoption delivered to a licensed child placement agency within a reasonable time after execution of the relinquishment and before the

agency has, in writing, accepted full responsibility for the child, as required by statute, is effective to invalidate the original relinquishment and consent.

10. **Parental Rights.** There are four requirements for a valid and effective revocation of a relinquishment of parental rights: (1) There must be a duly executed revocation of a relinquishment, (2) the revocation must be delivered to a licensed child placement agency or the Nebraska Department of Health and Human Services, (3) delivery of the revocation must be within a reasonable time after execution of the relinquishment, and (4) delivery of the revocation must occur before the agency has, in writing, accepted full responsibility for the child.
11. **Parental Rights: Time.** When a parent's attempted revocation of his or her relinquishment of parental rights is not done in a reasonable time after the relinquishment, the relinquishment becomes irrevocable.
12. **Indian Child Welfare Act: Parental Rights: Interventions: Notice.** Pursuant to Neb. Rev. Stat. § 43-1505(1) (Reissue 2008), in any involuntary proceeding in a state court, when the court knows or has reason to know that an Indian child is involved, the party seeking termination of parental rights to an Indian child shall notify the Indian child's tribe, by certified or registered mail with return receipt requested, of the pending proceedings and of the tribe's right of intervention.
13. **Indian Child Welfare Act: Parental Rights: Notice: Time.** Pursuant to Neb. Rev. Stat. § 43-1505(1) (Reissue 2008), no termination of parental rights proceedings shall be held until at least 10 days after receipt of notice by the tribe or the Secretary of the Interior.
14. **Indian Child Welfare Act: Parental Rights: Notice.** If an Indian child's tribe was not given proper notice of proceedings resulting in termination of parental rights to the child, the termination proceedings conducted were invalid and the order of termination must be vacated.
15. **Indian Child Welfare Act: Parental Rights: Pleadings.** The Nebraska Indian Child Welfare Act requires the State, in proceedings to terminate parental rights, to plead (1) active efforts by the State to prevent the breakup of the family and (2) that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical harm.
16. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.

Appeal from the County Court for Hall County: PHILIP M. MARTIN, JR., Judge. Judgment in No. A-12-629 vacated, and cause remanded for further proceedings. Judgment in No. A-12-662 affirmed in part and in part vacated, and cause remanded for further proceedings.

Matthew C. Boyle, of Lauritsen, Brownell, Brostrom & Stehlik, for Mario V., Sr.

Janice I. Reeves, of Truell, Murray & Associates, for Ida V.

Sarah N. Johnson, Deputy Hall County Attorney, and Jay B. Judds, of Nebraska Department of Health and Human Services, for State of Nebraska.

Susan M. Koenig, guardian ad litem for children.

SIEVERS, PIRTLE, and RIEDMANN, Judges.

SIEVERS, Judge.

The county court for Hall County, sitting as a juvenile court, terminated the parental rights of Mario V., Sr. (Mario Sr.), and Ida V. to their minor children. Mario Sr. appeals in case No. A-12-629, and Ida appeals in case No. A-12-662. We initially determine that the relinquishments that Ida executed some 3 years before these proceedings are valid and that her attempted revocation of such is of no force and effect. But, because there is no evidence that the Rosebud Sioux Tribe was given proper notice of these termination of parental rights proceedings as required by the Nebraska Indian Child Welfare Act (NICWA), we find that the termination proceedings conducted were invalid and thus that the order of termination in both cases must be vacated. We therefore remand the causes to the juvenile court for further proceedings consistent with our opinion.

FACTUAL BACKGROUND

This appeal involves three children: Mario V., Jr. (Mario Jr.), born in November 2004; Esperanza V., born in August 2006; and Nery V., born in October 2008. All three children are the biological children of Mario Sr. and Ida. Mario Sr. and Ida were married on December 23, 2004, and divorced on July 22, 2009. However, Mario Sr. and Ida began living together again in July 2010.

Mario Sr. and Ida have been involved in a number of juvenile court proceedings over the years, and we briefly summarize their encounters with the juvenile system. In October 2004, Ida had rights to another child, her firstborn son, terminated by order of a juvenile court. Mario Sr. was not this child's biological father. Mario Jr. was born less

than 2 months after Ida's parental rights to her firstborn son were terminated.

In October 2005, Mario Jr. was removed from the parental home because Ida tested positive for methamphetamine, violating her probation. Mario Jr. was not placed with Mario Sr. because Mario Sr. then had a pending assault charge wherein Ida was the alleged victim. Mario Jr. was returned to the parental home 6 months later.

In December 2006, Mario Jr. and Esperanza were removed from the parental home because of reports of domestic violence between Mario Sr. and Ida and of drug use by Ida. Ida relinquished her parental rights to Mario Jr. and Esperanza in March 2008, and we note that she was pregnant with Nery at the time. Mario Sr. and Ida separated, and Mario Sr. planned to divorce Ida. Mario Jr. and Esperanza were returned to the custody of Mario Sr. The procedural background of the 2006 juvenile proceedings, case No. JV06-470, will be further discussed below.

Although Mario Sr. and Ida had divorced in July 2009, they began living together again in July 2010. Because Mario Sr. worked out of town and was only home on the weekends, Ida was the primary caregiver for Mario Jr., Esperanza, and Nery.

In November 2010, Mario Jr., Esperanza, and Nery were removed from the parental home after a 1-month investigation by the Nebraska Department of Health and Human Services (DHHS). DHHS was concerned about Ida's being the primary caregiver because of her previous relinquishments of Mario Jr. and Esperanza. DHHS was also concerned because Ida admitted feeling overwhelmed, Ida had made statements about wanting Mario Jr. and Esperanza back in foster care, and Ida admitted the urge to use drugs again. Additionally, Ida's brother, who had an extensive criminal history, had been living in the family home. Around the time of this removal, Esperanza and Nery tested positive for exposure to methamphetamine. The November 2010 removal gave rise to juvenile case No. JV10-505, wherein Mario Sr.'s and Ida's parental rights were terminated. The procedural background of cases Nos. JV06-470 and JV10-505 will be discussed below.

PROCEDURAL BACKGROUND

To put all of the procedural background together in "one place," before attempting a narrative account of the procedure, we set forth the following timeline of significant dates and events, with the hope that such allows the reader to follow the progression of the cases more easily, and we note the lower court case number for clarity:

- 03/13/2008 Ida signed her relinquishments of her parental rights to Mario Jr. and Esperanza (JV06-470).
- 11/01/2010 The State filed its petition alleging that Mario Jr., Esperanza, and Nery were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008); temporary custody was granted to DHHS (JV10-505).
- 12/03/2010 NICWA notice was sent to the Rosebud Sioux Tribe regarding the State's § 43-247(3)(a) petition and the order for immediate custody (JV10-505).
- 12/07/2010 The return receipt for the NICWA notice was signed (JV10-505).
- 12/08/2010 The State filed its petition for termination of Mario Sr.'s and Ida's parental rights to Mario Jr., Esperanza, and Nery pursuant to Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 2012) (JV10-505).
- 02/04/2011 The Rosebud Sioux Tribe filed its "Notice of Intervention" invoking its right to intervene in the child custody proceedings and noting that all three children were "enrollable" members of the tribe (JV10-505).
- 07/22/2011 Ida filed notice of her intent to withdraw her voluntary relinquishment of her parental rights (JV06-470).
- 08/16/2011 Ida filed her withdrawal of her voluntary relinquishment of her parental rights (JV06-470); she also filed motions to dismiss the State's motion for termination, alleging the State failed to provide proper notice to the tribe and failed to state a proper cause of action (JV10-505).
- 08/22/2011 The juvenile court took Ida's withdrawal of her relinquishments (JV06-470) and her pretrial motions to dismiss (JV10-505) under advisement and proceeded with the first day of the termination proceedings (JV10-505).
- 08/23/2011 Second day of the termination proceedings (JV10-505).

- 09/06/2011 Third day of the termination proceedings (JV10-505).
- 09/13/2011 Fourth day of the termination proceedings; the State filed an amended petition for termination of Mario Sr.'s and Ida's parental rights, adding an allegation of "active efforts" (JV10-505).
- 10/21/2011 The State filed another amended petition for termination of Mario Sr.'s and Ida's parental rights, adding an allegation of "serious emotional or physical damage" if such rights are not terminated (JV10-505).
- 11/22/2011 Fifth day of the termination proceedings (JV10-505).
- 01/31/2012 Sixth and final day of the termination proceedings (JV10-505).
- 06/25/2012 The juvenile court filed an order wherein it denied Ida's request to withdraw her relinquishments of Mario Jr. and Esperanza (JV06-470 and JV10-505), overruled Ida's motions to dismiss for improper notice to the tribe and failure to state a proper cause of action (JV10-505), terminated Ida's parental rights to Nery (JV10-505), and terminated Mario Sr.'s parental rights to all three children (JV10-505).

Case No. JV06-470.

The State filed a petition on December 18, 2006, alleging that Mario Jr. and Esperanza were within the meaning of § 43-247(3)(a) by reason of the faults or habits of their "parent, guardian, or custodian." At the bottom of the petition, under "Name & Address of Parent/Custodian," it listed Mario Sr. and Ida at different addresses in Grand Island, Nebraska. The State alleged that on December 11, the children (1) lacked "proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian" and (2) were "in a situation or engage[d] in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile[s]."

A disposition and permanency hearing as to Ida only was held on February 15, 2007 (the proceedings of which do not appear in our record). We do have an order titled "Disposition/Permanency Hearing," written in checklist form, that states that continued placement of the children in a parental residence

is not appropriate because "rehabilitation goals [are] not complete" and "father" is allegedly residing with "mother." Thus, the children were placed in the care and custody of DHHS. The case and visitation plan dated February 12, 2007, was approved. The disposition regarding Mario Sr. was set for March 19.

On January 10, 2008, the State filed a motion for termination of Mario Sr.'s and Ida's parental rights to Mario Jr. and Esperanza pursuant to § 43-292(1), (4), and (6). The State alleged that the parents had abandoned the juveniles for 6 months or more immediately prior to the filing of the petition; that "[t]he parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the juvenile[s]"; and that reasonable efforts to preserve and reunify the family had failed to correct the conditions leading to the adjudication.

Ida voluntarily relinquished her parental rights to Mario Jr. and Esperanza on March 13, 2008. Her signed relinquishments were not filed with the juvenile court, but are in our record. In an order filed on June 17, 2009, the court dismissed the allegations against Mario Sr. and dismissed the case.

On July 22, 2011, Ida filed notice, in case No. JV06-470, of her intent to withdraw her voluntary relinquishment of her parental rights to Mario Jr. and Esperanza, even though that case had been dismissed in 2009. And on August 16, 2011, Ida filed her withdrawal of her voluntary relinquishment of her parental rights. A hearing on Ida's request to withdraw her relinquishments was held on August 22. In an order filed that same day, the court took Ida's withdrawal of her relinquishments under advisement. We note that case No. JV10-505 was ongoing at the time Ida filed her withdrawal of her relinquishments. And the proceedings on August 22 were held in conjunction with those of case No. JV10-505. In an order filed on June 25, 2012, in both cases Nos. JV06-470 and JV10-505, the juvenile court denied Ida's request to withdraw the relinquishment of her parental rights.

Case No. JV10-505.

The State filed a petition on November 1, 2010, alleging that Mario Jr., Esperanza, and Nery were within the meaning of § 43-247(3)(a) by reason of the faults or habits of their "parent, guardian, or custodian." At the bottom of the petition, under "Name & Address of Parent/Custodian," it listed Mario Sr. and Ida both at the same address in Grand Island. The State alleged that on October 26, the children (1) lacked "proper parental care by reason of the fault or habits of [their] parent, guardian, or custodian" and (2) were "in a situation or engage[d] in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile[s]." Also on November 1, the juvenile court filed an ex parte custody order finding, "[Mario Sr.] is not providing care—delegated to [Ida] who previously relinquished her rights to older two children. She is unable to provide care for children due to mental health and/or drug issues." The juvenile court granted temporary custody and placement of the children to DHHS.

An "Initial/Detention" hearing was held on December 2, 2010 (no transcription of this hearing appears in our record), and the order resulting from such hearing recites that Mario Sr. and Ida were present with their respective counsel. The court's order, entitled "Initial/Detention Hearing" and written in checklist form, has a checkmark by "Parent(s) deny allegations," followed by a handwritten notation that is not legible. The juvenile court again granted temporary custody and placement of the children to DHHS. The preadjudication hearing was set for January 3, 2011, and the adjudication hearing was set for March 3. The order indicates that the proceedings for Ida were with respect to Nery only.

A NICWA notice was sent to the Rosebud Sioux Tribe on December 3, 2010, regarding the State's § 43-247(3)(a) petition and the juvenile court's order for immediate custody. A return receipt was signed on December 7.

On December 8, 2010, the State filed a motion for termination of Mario Sr.'s and Ida's parental rights to Mario Jr., Esperanza, and Nery pursuant to § 43-292(2). The State alleged that the parents had "substantially and continuously or repeatedly neglected and refused to give the juvenile[s] or a

sibling of the juvenile[s] necessary parental care and protection." We note that the State's motion seeks to terminate Ida's parental rights to all three children but does not account for the fact that Ida had already relinquished her parental rights to Mario Jr. and Esperanza, and we note that the State's amended termination motions were pled this way as well.

In a "Notice of Intervention" dated January 31, 2011, but not filed until February 4, the Rosebud Sioux Tribe "invoke[d]" its right to intervene in the child custody proceedings, noting that all three children were "enrollable" members of the tribe. The juvenile court "grant[ed]" the Rosebud Sioux Tribe's notice of intervention. The juvenile court ordered:

> [C]opies of all future motions and pleadings are to be served upon the Rosebud Sioux Tribe as a party herein. Opportunity to examine all relevant documents filed with the Court upon which a decision may be based must be afforded to the Rosebud Sioux Tribe's authorized representatives pursuant to 25 U.S.C., Section 1912(c).

On August 16, 2011, Ida filed a motion to dismiss the State's motion to terminate parental rights, alleging that the State failed to provide proper notice to the Indian children's tribe. In a separate motion to dismiss filed that same day, Ida alleged that the State failed to state a proper cause of action in that it failed to allege an essential element of NICWA (that active efforts have been made to prevent the breakup of the Indian family, but that such have proved unsuccessful) to sustain a finding and order for termination. Ida also filed a motion to have the children immediately returned to the parental home, alleging that removal of the Indian children was not proper because the applicable statute required 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. A hearing on Ida's motions was held on August 22. In an order titled "Motion," file stamped on both August 22 and November 22, the court stated that all three motions were "under advisement." The court proceeded with the termination hearing on August 22.

The termination proceedings were spread over a substantial period of time, as hearings were held on August 22 and 23, September 6 and 13, and November 22, 2011, and January 31, 2012. Pleadings were filed during the course of the termination proceedings, as will be noted below. No representative of the Rosebud Sioux Tribe was in attendance at any of these hearings.

On September 13, 2011, the fourth day of the termination proceedings, the State filed an amended motion for termination of Mario Sr.'s and Ida's parental rights to Mario Jr., Esperanza, and Nery. In addition to alleging grounds for termination under § 43-292(2), the State alleged that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family and that these efforts have been unsuccessful." See Neb. Rev. Stat. § 43-1505(4) (Reissue 2008) (of NICWA).

On October 21, 2011, the State again filed an amended motion for termination of Mario Sr.'s and Ida's parental rights to Mario Jr., Esperanza, and Nery. In addition to alleging grounds for termination under § 43-292(2) and "active efforts" under § 43-1505(4), the State alleged that continued custody by the parents is likely to result in serious emotional or physical damage to the children. See § 43-1505(6) (of NICWA). The final 2 days of the termination proceedings were held after this amended motion was filed.

On November 22, 2011, Mario Sr. filed a motion for post-termination visitation with all three children during appeal, in the event the court entered an order terminating Mario Sr.'s parental rights. Ida filed a similar motion regarding Nery on April 19, 2012. The motions were considered and ruled on prior to the juvenile court's determination of whether parental rights should in fact be terminated. In an order filed on June 1, the juvenile court overruled Mario Sr.'s and Ida's motions for posttermination visitation. The juvenile court stated that "[v]isitation, if any, provided after an order of termination of parental rights in this case would be in the sole discretion of [DHHS]."

The juvenile court filed its dispositive order on June 25, 2012. The juvenile court stated, "The Court, at this time, has

contemporaneously entered an order in [case No.] JV06-470 denying the request of Ida . . . to withdraw her relinquishments of her parental rights" to Mario Jr. and Esperanza dated March 13, 2008. Thus, the juvenile court proceeded to consider the motion to terminate the parental rights of Mario Sr. to all three children and the parental rights of Ida to Nery, first dealing with several pretrial motions from August 2011.

Regarding Ida's August 2011 motion to dismiss for insufficient notice to the Indian children's tribe, the juvenile court found that the tribe did receive notice and, in fact, intervened in the case, but apparently chose not to participate. Accordingly, the juvenile court overruled Ida's motion to dismiss for insufficient notice.

Regarding Ida's August 2011 motion to dismiss for insufficient pleadings—asserting that the State failed to state a proper cause of action in that it failed to articulate an essential element, i.e., "active efforts" in accordance with § 43-1505(4)—the juvenile court stated, "It is acknowledged that the pleadings at the time they were initially filed were legally insufficient based on later developments and knowledge obtained concerning the enrollment of the children in the Rosebud Sioux Tribe." However, the court found that once it was determined that the children were entitled to enrollment, the State filed an amended petition which cured any defects in the prior pleading. The juvenile court stated that the matter would proceed under the requirements of NICWA and overruled Ida's motion to dismiss based on improper pleadings.

The juvenile court found that grounds for termination of Mario Sr.'s rights to Mario Jr., Esperanza, and Nery existed under § 43-292(2). The juvenile court found that grounds existed to terminate Ida's rights to Nery under § 43-292(2). The juvenile court found that active efforts, pursuant to § 43-1505(4), had been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, but that said efforts had proved unsuccessful. The juvenile court also found that continuing the custody of the children by Mario Sr. and Ida would likely result in serious emotional or physical damage to the children and that it was in the children's best interests that Mario Sr.'s and Ida's

parental rights be terminated. The juvenile court terminated Mario Sr.'s parental rights to all three children and Ida's parental rights to Nery after finding that grounds for termination existed and that such was in the children's best interests. Mario Sr. appeals in case No. A-12-629, and Ida appeals in case No. A-12-662.

ASSIGNMENTS OF ERROR

In case No. A-12-629, Mario Sr. assigns that the juvenile court erred by (1) failing to rule on pretrial motions for over 10 months, (2) allowing the State to file and proceed on a second amended motion to terminate parental rights, (3) proceeding with the termination proceedings when insufficient notice was provided to the Indian tribe, (4) failing to properly apply the rules of evidence to an adjudicative hearing and improperly admitting evidence prejudicial to Mario Sr., (5) finding that the State satisfied its burden to prove all statutorily required elements for terminating parental rights under NICWA, (6) denying Mario Sr.'s request for posttermination visitation, and (7) allowing and considering evidence regarding the foster parents' desire and ability to provide permanency for the children.

In case No. A-12-662, Ida assigns that the juvenile court erred by (1) denying Ida's withdrawal of her relinquishment of her parental rights to Mario Jr. and Esperanza, (2) failing to rule on pretrial motions for over 10 months, (3) allowing the State to file and proceed on a second amended motion to terminate parental rights, (4) proceeding with the termination proceedings when insufficient notice was provided to the Indian tribe, (5) proceeding with the termination proceedings when insufficient notice was provided to Ida, (6) finding that the State satisfied its burden to prove all statutorily required elements for terminating parental rights under NICWA, (7) denying Ida's request for posttermination visitation, (8) allowing and considering evidence regarding the foster parents' desire and ability to provide permanency for the children, and (9) failing to properly apply the rules of evidence to an adjudicative hearing and improperly admitting evidence prejudicial to Ida.

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 Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012). 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] 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.*

ANALYSIS

Ida's Withdrawal of Her Relinquishments of Her Parental Rights to Mario Jr. and Esperanza.

On March 13, 2008, during the pendency of case No. JV06-470, Ida signed separate "Relinquishment of Child by Parent" documents for both Mario Jr. and Esperanza wherein Ida voluntarily relinquished her parental rights to Mario Jr. and Esperanza. Neither the relinquishment documents nor an acceptance by DHHS was filed with the court, although the relinquishments are part of the evidence before us. In an order filed on June 17, 2009, the court dismissed the allegations against Mario Sr. and dismissed that case.

More than 3 years after she signed the relinquishments, and more than 2 years after case No. JV06-470 was dismissed, Ida sought to withdraw her voluntary relinquishments of her parental rights to Mario Jr. and Esperanza. On July 22, 2011, while case No. JV10-505 was ongoing, Ida filed her notice of her intent to withdraw her voluntary relinquishments of her parental rights to Mario Jr. and Esperanza in case No. JV06-470. And on August 16, Ida filed her withdrawal of her voluntary relinquishments of her parental rights. In an order dated August 22, 2011, the court took Ida's attempted revocation of her relinquishments under advisement. In an order filed on June 25, 2012, the juvenile court denied Ida's request to withdraw the relinquishments of her parental rights.

Ida argues that the juvenile court erred in denying her request to withdraw her relinquishments of her parental rights. In support of her argument, Ida cites to the following NICWA provisions found in Neb. Rev. Stat. § 43-1506 (Reissue 2008):

> (1) When any parent or Indian custodian voluntarily consents to . . . termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. . . .
>
> . . . .
>
> (3) In any voluntary proceedings for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

Ida argues that the right to withdraw her relinquishments of Mario Jr. and Esperanza found in § 43-1506(3) was erroneously denied.

[4-7] "Under Nebraska law, a party to a proceeding who seeks to invoke a provision of NICWA has the burden to show that the act applies in the proceeding." *In re Adoption of Kenten H.*, 272 Neb. 846, 853, 725 N.W.2d 548, 554 (2007). And the critical issue is not whether the child is an "Indian child," but, rather, when his or her status was established in the proceedings. See *id.* The provisions of the federal Indian Child Welfare Act and NICWA apply prospectively from the date the Indian child's status as such is established on the record. See *id.* In the instant case, the children's status as Indian children was established on the record when the Rosebud Sioux Tribe filed its "Notice of Intervention"

on February 4, 2011, stating that Mario Jr., Esperanza, and Nery were "enrollable" members of the tribe. Thus, NICWA applies prospectively from that date. Accordingly, NICWA was not applicable to Mario Jr. and Esperanza when Ida signed her relinquishments of her parental rights to Mario Jr. and Esperanza on March 13, 2008. And as stated in *In re Adoption of Kenten H.*, "[b]ecause NICWA applies only prospectively from the date it is established on the record, [the biological mother] may not now argue that her consent to [the child's] relinquishment is invalid because it was not obtained pursuant to the substantive provisions of § 43-1506(1)." 272 Neb. at 855, 725 N.W.2d at 555. And we now conclude that it necessarily follows from the holding in *In re Adoption of Kenten H., supra*, that the provisions relating to the withdrawal of a relinquishment provided for in § 43-1506 do not apply to a relinquishment signed prior to the applicability of NICWA, which is the situation we have here.

But Ida argues that even if NICWA did not apply at the time the relinquishments were signed, there was no acceptance of the relinquishment by DHHS. Ida's signed relinquishments were not filed with the court in case No. JV06-470; nor was any acceptance filed by DHHS. The only mention of either the relinquishments or their acceptance in the transcript in case No. JV06-470 is Ida's prior counsel's "Motion to Be Excused" filed on March 25, 2008, wherein counsel asked to be excused from an April 7 hearing because "biological mother, Ida . . . has relinquished her parental rights, and [DHHS] has accepted the relinquishment." The juvenile court granted counsel's motion to be excused from that hearing. While the State suggested at oral argument that we use the contents of this withdrawal motion as evidence of DHHS' acceptance, the document is not in evidence, is not under oath, and is obviously hearsay. Accordingly, we reject that suggestion, although it is not insignificant for the policy reasons we later discuss that DHHS and the court acted for several years as though there was an acceptance. It was not until August 23, 2011, the second day of the termination proceedings in case No. JV10-505, that the relinquishments were offered and received into evidence by the court. However, no written

acceptances of such by DHHS were ever offered or received into evidence. And, there was no testimony that DHHS signed any such acceptances.

[8] The rights of the relinquishing parent are terminated when DHHS, or a licensed child placement agency, accepts responsibility for the child in writing. See, Neb. Rev. Stat. § 43-106.01 (Reissue 2008); *Gomez v. Savage*, 254 Neb. 836, 580 N.W.2d 523 (1998). Section 43-106.01 states in relevant part:

> When a child shall have been relinquished by written instrument . . . to [DHHS] or to a licensed child placement agency and the agency has, in writing, accepted full responsibility for the child, the person so relinquishing shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over such child.

See, also, *In re Interest of Cornelius K.*, 280 Neb. 291, 785 N.W.2d 849 (2010) (fact that relinquishment has not been accepted by DHHS means that mother's parental rights have not been legally extinguished pursuant to § 43-106.01); *In re Interest of Gabriela H.*, 280 Neb. 284, 785 N.W.2d 843 (2010) (juvenile court may order DHHS to accept relinquishment of parental rights in circumstance where child has been adjudicated pursuant to § 43-247(3)(a) and permanency objective of adoption has been determined). Therefore, it is clear that § 43-106.01 applies to DHHS as well as private child placement agencies. In the instant case, there is no evidence of a written acceptance by DHHS of Ida's relinquishments of Mario Jr. and Esperanza. We cannot simply assume that DHHS executed written acceptances of Ida's relinquishments and that they are tucked away in a file cabinet somewhere. That said, there is no authority involving a factual situation where there was an attempted revocation 3 years after the relinquishments, and the record fails to show whether DHHS ever accepted the relinquishments. Accordingly, we face a unique situation and a difficult issue of first impression.

That said, we know of no statute or case law authority that would prevent the execution of acceptance at the present time. The foregoing observation stems from *Kellie v. Lutheran*

Family & Social Service, 208 Neb. 767, 772, 305 N.W.2d 874, 877 (1981), which established that the revocation of a relinquishment of parental rights must occur within a "reasonable time" after the relinquishment.

In *Kellie, supra*, the mother sought to revoke her relinquishment prior to the agency's written acceptance of relinquishment. On November 18, 1978, the mother signed a relinquishment and consent to adoption regarding her 5-year-old daughter, and the child was delivered to a licensed child placement agency and later placed with a prospective adoptive family. Three days after signing the relinquishment, the mother contacted her social worker and told him that she had made a mistake and wanted her daughter back. The social worker advised the mother that she could not get her daughter back. The mother called the social worker again on Thanksgiving Day and went to his office twice thereafter trying to obtain her daughter's return. On December 26, the mother telephoned the prospective adoptive parents asking them to voluntarily return her daughter, but they refused. On December 27, the mother personally delivered a written and notarized revocation of relinquishment to the child placement agency. On January 2, 1979, both natural parents of the child filed suit to regain custody of their daughter. The acceptance of the relinquishment was not signed by the child placement agency until January 12, 1979, approximately 2 weeks after the relinquishment had been revoked by the mother and more than a week after the parents' court action had been commenced. The district court denied the natural parents' petition for a writ of habeas corpus.

[9,10] On appeal, the Nebraska Supreme Court stated that § 43-106.01 was the critical section of the Nebraska adoption statutes. The child placement agency took the position that the statutory requirement of written acceptance is only a technical requirement and that it accepted in fact when it accepted the child at the time the relinquishment was signed. The Supreme Court said:

> Courts have traditionally required substantial if not strict compliance with all statutory requirements with respect to the formalities of execution of a parent's

> consent to adoption or relinquishment of parental rights. A consent or relinquishment which fails to meet statutory requirements cannot be given legal effect. See 2 Am. Jur. *Adoption* § 43 (1962). In this state we have followed the rule that strict compliance with the adoption statutes is required. . . .
>
> This court has noted that a licensed child placement agency is required to accept responsibility for the child, in writing, under § 43-106.01. See *Kane v. United Catholic Social Services*, 187 Neb. 467, 191 N.W.2d 824 (1971).
>
> The respondent contends that to require strict compliance with the statute will place an undue burden upon a licensed child placement agency and create uncertainty during the time period between execution of a relinquishment and its acceptance. We disagree. Arrangements for prompt and strict compliance with the statute can obviously be made by proper administrative procedures.
>
> A duly executed revocation of a relinquishment and consent to adoption delivered to a licensed child placement agency *within a reasonable time* after execution of the relinquishment and before the agency has, in writing, accepted full responsibility for the child, as required by statute, is effective to invalidate the original relinquishment and consent. Basic principles of offer and acceptance, as well as the statute, dictate that result. In the present case [the mother] attempted to revoke within 3 days after execution of the relinquishment, continued her efforts repeatedly, and delivered the duly executed revocation less than 6 weeks after the original relinquishment was signed. Under the circumstances here [the revocation of relinquishment] was within a reasonable time.

Kellie v. Lutheran Family & Social Service, 208 Neb. 767, 771-72, 305 N.W.2d 874, 876-77 (1981) (emphasis supplied). Justice White in his concurrence asserted that the majority opinion injected by judicial action "a separate 'reasonable time' requirement for revocation." *Id.* at 774, 305 N.W.2d at 878 (White, J., concurring; Krivosha, C.J., and Clinton, J., join). Nonetheless, in our view, the majority opinion in *Kellie*

actually imposes four requirements for a valid and effective revocation of a relinquishment: (1) There must be a duly executed revocation of a relinquishment, (2) the revocation must be delivered to the licensed child placement agency (or DHHS), (3) delivery of the revocation must be within a reasonable time after execution of the relinquishment, and (4) delivery of the revocation must occur before the agency has, in writing, accepted full responsibility for the child.

We focus on the third requirement of the four prerequisites for a valid revocation of a relinquishment of parental rights which under *Kellie, supra*, is simply that the revocation must be done within a reasonable time of the relinquishment. We hold that 3 years between relinquishment and the attempted revocation is simply, as a matter of law, an unreasonable time. To hold otherwise would result in relinquished children being suspended in "legal limbo" while a parent took years to decide whether they really meant what they said in the relinquishment document. And, to hold otherwise would clearly place undue hardship on adoption and placement agencies, to say nothing about what it would mean for people willing to adopt these children. Accordingly, we hold as a matter of law that Ida's attempted revocation of the relinquishments of Mario Jr. and Esperanza 3 years after the fact does not and cannot satisfy the requirement that a revocation be delivered in a "reasonable time" after the relinquishment. And therefore, the third of the four conditions for a valid revocation of Ida's relinquishment cannot ever be satisfied.

The timeframe for revocation in the instant case is clearly vastly different from that in *Kellie, supra*. In *Kellie*, the mother attempted to regain her child within 3 days after executing the relinquishment of her parental rights, continued her efforts repeatedly, and delivered a duly executed revocation less than 6 weeks after the relinquishment was signed.

[11] However, we are not done with the requirements laid down in *Kellie v. Lutheran Family & Social Service*, 208 Neb. 767, 305 N.W.2d 874 (1981), which we take as separate and distinct in the sense that the failure to satisfy one of the requirements means that an attempted revocation of a relinquishment is invalid and fails. In the course of the

proceedings here, the State's counsel represented that there had been acceptance in writing by DHHS, but such was never put in evidence by the State, as it obviously should have been—if it existed. We cannot know, nor can we assume, that such written acceptance exists. But, when we bear in mind the *Kellie* court's rubric that a relinquishment is essentially a matter of contract, i.e., offer and acceptance, we conclude that because Ida's attempted revocation was not as a matter of law done in a reasonable time after the relinquishment, the relinquishment has become irrevocable for the policy reasons outlined above. Thus, if such has not already been accepted, it can still be accepted. For the policy reasons we have articulated, we are, in effect, saying that in the circumstances before us, the requirement that a revocation of relinquishment must be done in a reasonable time trumps the requirement that DHHS must accept the relinquishment before there is a valid relinquishment. Upon the remand that we outline below, the trial court should direct DHHS to accept the relinquishments, if it has not previously done so. See *In re Interest of Gabriela H.*, 280 Neb. 284, 785 N.W.2d 843 (2010). Thus, we reject Ida's assignment of error that the juvenile court erred in not giving effect to her attempted revocation of her relinquishment of Mario Jr. and Esperanza.

Notice to Tribe.

[12,13] Mario Sr. and Ida argue that the juvenile court erred in proceeding with the termination proceedings when insufficient notice was provided to the Rosebud Sioux Tribe. Section 43-1505(1) states:

> In any involuntary proceeding in a state court, when the court knows or has reason to know that an Indian child is involved, the party seeking . . . termination of parental rights to[] an Indian child shall notify . . . the Indian child's tribe, by certified or registered mail with return receipt requested, of the pending proceedings and of [the tribe's] right of intervention. . . . No . . . termination of parental rights proceedings shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the [S]ecretary [of the Interior].

There is no evidence that the Rosebud Sioux Tribe was ever given notice of the termination of parental rights proceedings as required by § 43-1505(1). The record shows that notice was given to the tribe only with respect to the adjudication proceedings.

The State filed a petition on November 1, 2010, alleging that Mario Jr., Esperanza, and Nery were within the meaning of § 43-247(3)(a) by reason of the faults or habits of their "parent, guardian, or custodian." That same day, the juvenile court entered an ex parte custody order granting temporary custody and placement of the children to DHHS. A NICWA notice was sent to the Rosebud Sioux Tribe on December 3 regarding the State's § 43-247(3)(a) petition and the juvenile court's order for immediate custody. A return receipt was signed on December 7. This was the only NICWA notice, via certified mail or otherwise, that the Rosebud Sioux Tribe received, insofar as the record before us reveals.

The State filed its motion to terminate Mario Sr.'s and Ida's parental rights on December 8, 2010. The termination proceedings included hearings held on August 22 and 23, plus September 6 and 13, 2011. Also on September 13, the State filed its first amended motion—adding an allegation that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family and that these efforts have been unsuccessful," a required NICWA element pursuant to § 43-1505(4). The State filed its second amended motion on October 21, adding language that "[c]ontinued custody by the parents is likely to result in serious emotional or physical damage to the children," a required NICWA element pursuant to § 43-1505(6). The shortcomings in the pleadings, and subsequent remedial steps to correct such, are before us via assignments of error from both Mario Sr. and Ida. We note the obvious fact that only the October 21 amended motion contains the proper pleadings for a NICWA case involving potential termination of parental rights. The termination hearings proceeded on November 22, 2011, and January 31, 2012, both of which occurred after the State's pleadings were corrected to allege that the NICWA requirements had been satisfied. In the end,

we find that we need not address the assignments of error aimed at the pleading issues in order to resolve the appeal. See *In re Trust Created by Hansen*, 281 Neb. 693, 798 N.W.2d 398 (2011) (appellate court is not obligated to engage in analysis that is not needed to adjudicate controversy before it).

There is no evidence that the Rosebud Sioux Tribe was properly notified of the original motion to terminate parental rights, filed on December 8, 2010, which came after the tribe was given NICWA notice only of the § 43-247(3)(a) adjudication petition but before the tribe filed its "Notice of Intervention." Since the tribe filed its notice of intervention in February 2011, the termination motion has been amended twice to conform to the elements necessary for a termination under NICWA, yet there is no showing in the record that the tribe was given notice of these amended pleadings. And as stated previously in our opinion, the juvenile court ordered:

> [C]opies of all future motions and pleadings are to be served upon the Rosebud Sioux Tribe as a party herein. Opportunity to examine all relevant documents filed with the Court upon which a decision may be based must be afforded to the Rosebud Sioux Tribe's authorized representatives pursuant to 25 U.S.C., Section 1912(c).

Even though the original termination motion was not a "future" motion or pleading, the Rosebud Sioux Tribe should have been notified, by "certified or registered mail with return receipt requested, of the pending proceedings" in order to comply with § 43-1505(1). But there is no evidence in our record that the tribe was notified of the original motion to terminate parental rights, as required by § 43-1505(1).

[14] At the time the termination proceedings began, the original motion for termination of parental rights was the operative motion and the tribe had not been provided notice of such proceedings as required by § 43-1505(1). In *In re Interest of Walter W.*, 14 Neb. App. 891, 900-901, 719 N.W.2d 304, 311-12 (2006), we said:

> [T]he [tribe's] representative . . . stated that the tribe intervened because it wanted to be informed of the progress of the case, and the tribe did not waive notice

> of future proceedings in this case. Since the plain language of the statute provides that "[n]o . . . termination of parental rights proceedings shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the secretary," [§ 43-1505(1)], we determine that the termination hearing conducted in this case was invalid, and thus, the order of termination must be vacated. We therefore remand this cause to the juvenile court for further proceedings to be conducted following provision of proper notice to the Yankton Sioux Tribe.

Similarly, because the Rosebud Sioux Tribe was not given proper notice, the termination proceedings conducted in the instant case were invalid, and thus, the order of termination must be vacated. We therefore remand the causes to the juvenile court for further proceedings to be conducted following provision of proper notice to the Rosebud Sioux Tribe.

Moreover, there were numerous notification failures by the State. Despite the court's order that "copies of all future motions and pleadings are to be served upon the Rosebud Sioux Tribe as a party herein," the amended motions filed on September 13 and October 21, 2011, do not contain a certificate of service showing to which parties, if any, the pleadings were sent or any indication that they were sent, whether it was via regular mail or certified mail with return receipt requested. The amended motions simply contain the following notation, which we quote, following the signature of State's counsel: "cc: Consulate of Mexico[,] Ogallala Sioux Tribe." Thus, to the extent that such is considered service, it is service on the wrong tribe. And therefore, we must conclude that notice was not provided to the Rosebud Sioux Tribe of the amended motions to terminate parental rights, which were filed midtrial.

The State argues that after the Rosebud Sioux Tribe filed its notice of intervention, the court sent notices to the tribe of all further hearing dates, but the record does not verify that assertion.

The State also argues that notice of the second amended motion to terminate was sent to the Rosebud Sioux Tribe by

registered mail more than 10 days prior to the next hearing date on the motion, January 31, 2012. Exhibit 29 is a signed return receipt stamped with a date of January 9, 2011, for an "Article Addressed to: Rosebud Sioux Tribe[,] Attn: Shirley J. Bad Wound." At the termination hearing held on January 31, 2012, the State offered the return receipt into evidence and counsel said, "[F]or some reason it has a stamp on it that says January 29th, which is when they got it, but it says 2011, so apparently they didn't turn — somebody forgot the year or something." The State "concedes that notice by registered mail on the second Amended Motion to Terminate was accomplished late. . . . The notice was still sent by registered mail ten days prior to the next hearing date on the motion, January 31, 2012." Briefs for appellee State in cases Nos. A-12-629 and A-12-662 at 19. Thus, the State concedes that the date stamp on exhibit 29 has the wrong year, which should actually be 2012, not 2011.

That said, there is still no proof of what was sent to the Rosebud Sioux Tribe on January 9, 2012. Exhibit 29 is merely evidence that the State sent "something" to the Rosebud Sioux Tribe prior to the last day of the termination proceedings held on January 31, but there is no evidence as to what was sent. While the State refers to exhibit 29 as the notice of the amended motion, there is no evidence in the record that such statement is correct. Exhibit 29 is only a return receipt from the Rosebud Sioux Tribe, and there is no indication as to what was actually sent to and received by the tribe. While it could have been the amended termination motion, "could have" does not satisfy the State's burden to prove proper notice to the tribe under NICWA. Furthermore, § 43-1505(1) states that "[n]o . . . termination of parental rights proceedings shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the secretary." The termination proceedings began on August 22, 2011. Thus, the State's argument that late notice was "harmless error" because the amended motion was sent "ten days prior to the next hearing date on the motion, January 31, 2012," is without merit and contrary to law, given that a number of hearings on the termination of parental rights had already

occurred. See briefs for appellee State in cases Nos. A-12-629 and A-12-662 at 19.

Were Pleadings Sufficient for Purposes of NICWA?

Although the failure to give proper notice to the Rosebud Sioux Tribe means that the termination decision of the trial court in each case must be vacated, and the causes remanded, there are assignments of error dealing with the adequacy of the pleadings that we briefly address. In a NICWA case, there are strict pleading requirements to which prosecutors and courts must adhere. On December 8, 2010, the State filed its motion to terminate Mario Sr.'s and Ida's parental rights to Mario Jr., Esperanza, and Nery pursuant to § 43-292(2), but this termination motion did not include any allegations under NICWA. And this was the operative motion when the termination proceedings began on August 22, 2011, and continued on the next day and then proceeded on September 6 and 13. But on September 13, the State filed its first amended motion that alleged grounds for termination under § 43-292(2) and alleged that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family and that these efforts have been unsuccessful"—a required NICWA element pursuant to § 43-1505(4). But the State did not include all required NICWA elements in its termination motion until October 21, when it alleged that "[c]ontinued custody by the parents is likely to result in serious emotional or physical damage to the children." This is a necessary NICWA element under § 43-1505(6) that is part of the State's burden of proof.

Argument on Ida's pretrial motion going to the pleading deficiency was heard on August 22, 2011, prior to the court's proceeding with the termination hearing, and Mario Sr. joined in Ida's motion at that time. The court inexplicably did not resolve these well-taken motions prior to proceeding with the termination hearing.

[15] In *In re Interest of Sabrienia B.*, 9 Neb. App. 888, 621 N.W.2d 836 (2001), we held that NICWA requires the State to plead (1) active efforts by the State to prevent the breakup

of the family and (2) that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical harm. We found the State's failure to include the applicable NICWA elements in its motion was not remedied by the facts that the applicability of NICWA had been discussed in court and that the juvenile court specifically found that the State had proved the relevant NICWA requirements. Accordingly, we found that the demurrer filed by the mother should have been granted. However, we found that the State could, by amendment, cure the defects of the motion for termination of parental rights and that the State must be given the opportunity to amend. We therefore vacate, and remand for further proceedings.

[16] In these cases, there was no reason we can discern why the State could not have amended its motion to terminate parental rights to comply with NICWA prior to the commencement of the termination hearing on August 22, 2011. The children's status as Indian children was established by the Rosebud Sioux Tribe's "Notice of Intervention" filed on February 4 of that year. Given our holding in *In re Interest of Sabrienia B., supra*, amendment of the State's motion would be appropriate. We can envision no reason to delay ruling on a motion raising the adequacy of the allegations under NICWA, but given the other issues which are dispositive of this appeal, we need not go any further with this pleading issue, other than to emphasize the importance of proper pleading in a NICWA case. And we take this approach and do not discuss the other assignments of error that are not necessary to dispose of these appeals. See *In re Trust Created by Hansen*, 281 Neb. 693, 798 N.W.2d 398 (2011) (appellate court is not obligated to engage in analysis that is not needed to adjudicate controversy before it).

CONCLUSION

For the reasons stated above, in case No. A-12-662, we find that Ida's relinquishments of her parental rights to Mario Jr. and Esperanza are valid and effective. Accordingly, we affirm the juvenile court's decision to deny Ida's request to revoke such relinquishments. However, because there is no evidence

that the Rosebud Sioux Tribe was given proper notice of the termination of parental rights proceedings as required by § 43-1505(1) of NICWA, we find that the termination proceedings conducted in the instant cases were invalid, and thus, the orders of termination must be vacated. We therefore remand the cause in each case to the juvenile court for further proceedings to be conducted following provision of proper notice to the Rosebud Sioux Tribe. Such further proceedings are limited to Nery in case No. A-12-662, because Ida's relinquishments as to Mario Jr. and Esperanza mean that her parental rights as to those two children are already finally terminated. In case No. A-12-629, we vacate the order terminating Mario Sr.'s rights as to all three children—Mario Jr., Esperanza, and Nery. Thus, the causes are remanded for further proceedings to this extent.

JUDGMENT IN NO. A-12-629 VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.
JUDGMENT IN NO. A-12-662 AFFIRMED IN PART AND IN PART VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

RIEDMANN, Judge, concurring.

I concur with the result, but write separately because I do not agree that Ida should be required to revoke her relinquishment "within a reasonable time" without requiring the placement agency to sign the acceptance of revocation within a reasonable time as well. The majority would hold that 3 years is too long for Ida to file a revocation of relinquishment, but would allow DHHS to sign a valid acceptance of revocation 6 years after it was provided to it. In *Kellie v. Lutheran Family & Social Service*, 208 Neb. 767, 305 N.W.2d 874 (1981), the Nebraska Supreme Court recognized that a signed relinquishment is not a mere formality, and it required strict compliance with the statute. The court specifically rejected the contention that to require strict compliance would place an undue burden on a licensed child placement agency or create uncertainty during the period between execution of a relinquishment and its acceptance. The court stated that "[a]rrangements for prompt and strict compliance with the statute can obviously be made by proper administrative procedures." *Id.* at 772,

305 N.W.2d at 877. To suggest that the State can sign an acceptance of revocation 6 years after it has been provided to it does not comport with "prompt and strict compliance with the statute."

If parents are required to revoke their relinquishments within a reasonable time, so, too, should the placement agency be required to accept the relinquishment within a reasonable time. Under the facts of this case, however, I agree that Ida is precluded from revoking her relinquishment at this late date. Although it does not appear from our record that Ida's relinquishment documents were filed with the court, copies of the documents are included in the record. On June 17, 2009, upon the representation of Ida's prior counsel that Ida had signed relinquishments and that DHHS had accepted the relinquishments, the court dismissed allegations against Mario Sr. and dismissed case No. JV06-470. Thereafter, DHHS, Ida, and the court acted for several years as though an acceptance existed. Under these facts, I concur that the policy reasons expressed by the majority require the result ultimately reached.

DONALD G. KLINGELHOEFER, INDIVIDUALLY, AS BENEFICIARY OF THE CONSTANCE K. KLINGELHOEFER REVOCABLE TRUST, AND AS REPRESENTATIVE OF CONSTANCE KLINGELHOEFER, L.L.C., APPELLANT, V. PARKER, GROSSART, BAHENSKY & BEUCKE, L.L.P., APPELLEE.

834 N.W.2d 249

Filed June 4, 2013. No. A-12-477.

1. **Appeal and Error.** An appellate court addresses only issues assigned and argued.
2. **Standing: Jurisdiction.** Standing requires that a litigant have a personal stake in the outcome of a controversy that warrants invocation of a court's jurisdiction and justifies exercise of the court's remedial powers on the litigant's behalf.
3. **Standing: Claims: Parties: Proof.** To have standing, a litigant must assert its own rights and interests and demonstrate an injury in fact, which is concrete in both a qualitative and temporal sense.
4. **Corporations: Derivative Actions.** A member of a limited liability company bringing a derivative action must set forth in the complaint what actions were taken to comply with Neb. Rev. Stat. § 21-165 (Reissue 2012).

5. **Trusts: Actions.** Beneficiaries of a trust may generally enforce a cause of action that the trustee has against a third party only if the trustee cannot or will not do so.
6. **Corporations: Actions: Parties.** As a general rule, a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property. Such a cause of action is in the corporation and not the shareholders. The right of a shareholder to sue is derivative in nature and normally can be brought only in a representative capacity for the corporation.
7. **Corporations: Actions: Parties: Proof.** If a shareholder can establish an individual cause of action because the harm to the corporation also damaged the shareholder in his or her individual capacity, then the individual can pursue his or her claims.
8. **Corporations: Actions: Parties: Proof: Words and Phrases.** In order to establish an individual harm, the shareholder must allege a separate and distinct injury or a special duty owed by the party to the individual shareholder. A "special duty" is a duty owed to the shareholder separate and distinct from the duty owed to the entity.
9. **Corporations: Actions: Parties: Damages.** Even if a shareholder establishes that there was a special duty, he or she may only recover for damages suffered in his or her individual capacity, and not injuries common to other shareholders.
10. **Corporations: Trusts: Actions: Parties.** The duty a third person owes to an individual trust beneficiary or member of a limited liability company must be separate and distinct from the duty owed to the trust or the limited liability company.
11. **Attorney and Client: Parties: Negligence: Liability.** The Nebraska Supreme Court set out factors the court is to examine to determine the extent of an attorney's duty, if any, to a third party. These factors include: (1) the extent to which the transaction was intended to affect the third party, (2) the foreseeability of harm, (3) the degree of certainty that the third party suffered injury, (4) the closeness of the connection between the attorney's conduct and the injury suffered, (5) the policy of preventing future harm, and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession.
12. **Appeal and Error.** In the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed.

Appeal from the District Court for Buffalo County: JAMES E. DOYLE IV, Judge. Affirmed.

David J. Lanphier, of Broom, Clarkson, Lanphier & Yamamoto, for appellant.

Anne Marie O'Brien, of Lamson, Dugan & Murray, L.L.P., for appellee.

SIEVERS, PIRTLE, and RIEDMANN, Judges.

RIEDMANN, Judge.

I. INTRODUCTION

Donald G. Klingelhoefer appeals the decision of the district court for Buffalo County granting summary judgment in favor of Parker, Grossart, Bahensky & Beucke, L.L.P. (Parker Grossart), and denying Donald's motion to alter or amend the judgment. The district court found Donald lacked standing to bring this professional malpractice action because Parker Grossart owed no duty to Donald as a member of Constance Klingelhoefer, L.L.C. (LLC); as a beneficiary of the Constance K. Klingelhoefer Revocable Trust (Trust); or as one of the heirs of his mother, Constance K. Klingelhoefer. Because we find no merit to the issues raised on appeal, we affirm.

II. BACKGROUND

Donald is one of the 11 children of Constance. In 1996, Constance hired Damon Bahensky, an attorney and member of Parker Grossart, to assist her in developing and implementing a comprehensive estate plan. Constance's goals were to reduce estate taxes, avoid the need for probate, and ensure that her three sons who were actively engaged in farming had the opportunity to purchase some or all of the real estate she owned in Buffalo County.

To reduce estate taxes, Constance created the LLC and transferred her real estate into the LLC. She gave interests in the LLC to each of her 11 children and kept an interest for herself. To avoid the need for probate, Constance created the Trust, of which she was the initial trustee, and transferred her personal property into the Trust. Constance also executed a will, directing that upon her death, any remaining real or personal property in her possession be transferred to the Trust. Constance died on March 19, 2006. Donald filed his initial complaint on October 29, 2009. He brought the action solely in his name. Parker Grossart filed a motion to dismiss for failure to state a claim, primarily raising the issue of Donald's standing to bring an action in his own name for injuries he allegedly sustained as a member of the LLC and as a beneficiary of the Trust. Instead of granting the motion to dismiss, the district court allowed Donald 30 days to amend

his complaint. The court noted that Donald was suing, in part, as a member of the LLC and that as such, he could bring a derivative action if it was properly alleged. The court granted Donald leave to file an amended complaint containing proper allegations for a derivative suit and otherwise clarifying his allegations. Particularly, the court noted that to properly assert a derivative action, Donald either must assert that he requested that the manager or appropriate member institute the action or explain why such request would be futile.

Donald filed an amended complaint, changing the caption to reflect himself individually and as "Beneficiary of [the Trust] and as Representative of [the LLC]." He inserted an allegation stating that he did not

> secure an initiation of this action *against* [*the*] *LLC* by the manager of the LLC and certain other members, because the same would be futile since the acting manager and certain other named members . . . were beneficiaries of the misconduct alleged in this Amended Complaint, and further were previously represented by [Parker Grossart].

(Emphasis supplied.) Donald did not include an allegation that he had requested that the LLC file the present action or why such request would be futile.

After Donald filed the amended complaint, Parker Grossart moved for summary judgment. The district court granted the motion, concluding that Donald lacked standing to maintain a professional negligence action against Parker Grossart based on his status as an heir of Constance or as a member of the LLC. The court further concluded that Parker Grossart owed no duty to Donald as a beneficiary of the Trust.

Donald filed a motion for a new trial, arguing that the district court should reconsider its previous ruling in light of *Sickler v. Kirby*, 19 Neb. App. 286, 805 N.W.2d 675 (2011), an opinion this court released just prior to the district court's grant of summary judgment. The district court, treating the motion as one to alter or amend, denied the motion. In a lengthy order, the court addressed its prior ruling as it related to Donald's status as a member of the LLC and as a beneficiary of the Trust. The court determined that Donald did not

challenge the court's finding regarding his lack of standing to sue as Constance's heir. Expanding on its prior order, the court stated that Donald had no standing either as a member of the LLC or as a beneficiary of the Trust and that Parker Grossart owed Donald no duty in either of these capacities. This timely appeal followed.

III. ASSIGNMENTS OF ERROR

Donald assigns, restated and renumbered, that the district court erred in (1) granting Parker Grossart's motion for summary judgment based on a finding that Donald lacked standing, (2) denying Donald's motion to alter or amend the court's previous ruling, and (3) requiring Donald to amend his complaint to allege a derivative action and then failing to allow him to present evidence as to damages.

IV. STANDARD OF REVIEW

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. *Wolski v. Wandel*, 275 Neb. 266, 746 N.W.2d 143 (2008). 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.*

V. ANALYSIS

[1] The record establishes that Constance employed Bahensky to assist her with legal matters relating to her estate. Donald does not allege he employed Bahensky; rather, his complaint seeks recovery on his status as a beneficiary of the Trust, an heir of the estate, and a member of the LLC to assert that Bahensky owed him a duty of reasonable care. Because Donald only assigns, and does not argue, that his status as an heir of the estate gives him standing, we do not address this assigned error. See *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003) (appellate court addresses only issues assigned and argued).

1. Standing to Sue

[2,3] Donald argues the district court erred in granting Parker Grossart's motion for summary judgment, because Bahensky owed a duty to members of the LLC and beneficiaries of the Trust and therefore he had standing to bring this action. Standing requires that a litigant have a personal stake in the outcome of a controversy that warrants invocation of a court's jurisdiction and justifies exercise of the court's remedial powers on the litigant's behalf. *Butler Cty. Sch. Dist. v. Freeholder Petitioners*, 283 Neb. 903, 814 N.W.2d 724 (2012). To have standing, a litigant must assert its own rights and interests and demonstrate an injury in fact, which is concrete in both a qualitative and temporal sense. *Id.*

(a) Donald Did Not Plead Derivative Action

Donald purports to bring this action individually and as a "representative" of the LLC and beneficiary of the Trust. For reasons set forth below, we determine that Donald's claims were individual claims and were not pled as a derivative action.

[4,5] Neb. Rev. Stat. § 21-164 (Reissue 2012) allows for a direct action by a member of a limited liability company against only the limited liability company itself, its manager, or another member; however, Neb. Rev. Stat. § 21-165 (Reissue 2012) allows for derivative actions if the member makes a demand upon the manager of the limited liability company to institute the action unless such demand would be futile. A member bringing a derivative action must set forth in the complaint what actions were taken to comply with § 21-165. See Neb. Rev. Stat. § 21-167 (Reissue 2012). Similarly, beneficiaries of a trust may generally enforce a cause of action that the trustee has against a third party only if the trustee cannot or will not do so. 90A C.J.S. *Trusts* § 581 (2013).

We note that in response to Bahensky's motion to dismiss, the court allowed Donald 30 days to amend his complaint to meet the statutory requirements of § 21-167 and to clarify his allegations as a trust beneficiary. The trial court determined

that the amended complaint did not properly allege a derivative action, and we agree.

In his amended complaint, Donald did not aver that he requested the manager of the LLC to institute this professional negligence action; rather, he stated it would have been futile to request that the manager initiate an action against *the LLC*. Even construing this to be an attempt to comply with § 21-167, Donald does not allege anywhere in the amended complaint that his claims were brought *on behalf of* the LLC or *on behalf of* the Trust.

Furthermore, Donald's amended complaint references a prior action filed by the successor trustee and manager of the LLC against Donald and his siblings, seeking a declaration as to the proper interpretation of documents of the Trust and the LLC. This court determined that the successor trustee and manager's interpretation of the documents conformed to Constance's intent in establishing the Trust and the LLC. See *Klingelhoefer v. Monif*, No. A-11-056, 2012 WL 148730 (Neb. App. Jan. 17, 2012) (selected for posting to court Web site). In the present action, Donald now seeks damages from Bahensky based on an interpretation of the Trust and the LLC that we rejected in the prior lawsuit. By doing so, Donald is, in essence, taking a position adverse to the established intent of the Trust and the LLC. It is clear that Donald's personal interests are at the forefront of this litigation, which is inconsistent with a derivative action to further the interests of the entity on whose behalf the action is brought. See *Ferer v. Erickson, Sederstrom*, 272 Neb. 113, 718 N.W.2d 501 (2006).

Given that Donald's amended complaint cannot properly be construed as a derivative action, we address Donald's standing to bring a professional malpractice action as a member of the LLC and as a beneficiary of the Trust.

(b) Donald Lacks Standing to Sue Parker Grossart as Member of LLC or Beneficiary of Trust

[6] The Nebraska Supreme Court has treated an attorney malpractice action by a member of a limited liability company identically to an action by a shareholder of a corporation. See

Freedom Fin. Group v. Woolley, 280 Neb. 825, 792 N.W.2d 134 (2010). As a general rule, a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property. Such a cause of action is in the corporation and not the shareholders. The right of a shareholder to sue is derivative in nature and normally can be brought only in a representative capacity for the corporation. *Id.*

[7-9] If, however, a shareholder can establish an individual cause of action because the harm to the corporation also damaged the shareholder in his or her individual capacity, then the individual can pursue his or her claims. *Id.* In order to establish an individual harm, the shareholder must allege a separate and distinct injury or a special duty owed by the party to the individual shareholder. *Id.* A "special duty" is a duty owed to the shareholder separate and distinct from the duty owed to the entity. See *id.* Even if a shareholder establishes that there was a special duty, he or she may only recover for damages suffered in his or her individual capacity, and not injuries common to other shareholders. *Id.* In the present case, Donald does not allege any injury or damages he sustained separate and distinct from the harm allegedly suffered by other nonfarming members of the LLC and beneficiaries of the Trust. In fact, his argument is that Bahensky's actions benefited the three farming members of the LLC over the nonfarming members and beneficiaries of the Trust, which means his injury is not separate and distinct.

[10] Having failed to prove a separate and distinct injury, Donald must prove Bahensky owed him a special duty. This duty must be separate and distinct from the duty owed to the Trust or the LLC. See *Freedom Fin. Group v. Woolley, supra*. Donald does not allege any special duty; rather, his claim is that the duty that arose in representing the Trust and the LLC extended to him. No separate duty is claimed. Therefore, we conclude that the trial court did not err in ruling that Donald did not have standing to bring this action for injuries he sustained as a member of the LLC or as a beneficiary of the Trust.

2. Motion to Alter or Amend

Donald argues the district court erred in denying his motion to alter or amend, because our decision in *Sickler v. Kirby*, 19 Neb. App. 286, 805 N.W.2d 675 (2011), governs the outcome of this case. *Sickler* was released just prior to the court's grant of summary judgment and focuses on the factors set forth in *Perez v. Stern*, 279 Neb. 187, 777 N.W.2d 545 (2010), to determine whether an attorney owes a duty to individual shareholders of a closely held corporation.

[11] In *Perez v. Stern, supra*, the Nebraska Supreme Court set out factors the court is to examine to determine the extent of an attorney's duty, if any, to a third party. These factors include:

> (1) the extent to which the transaction was intended to affect the third party, (2) the foreseeability of harm, (3) the degree of certainty that the third party suffered injury, (4) the closeness of the connection between the attorney's conduct and the injury suffered, (5) the policy of preventing future harm, and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession.

Id. at 192-93, 777 N.W.2d at 550-51.

In *Sickler v. Kirby, supra*, we applied these factors to hold that an attorney's duty extended to the two individual shareholders of a closely held corporation. The attorney was hired by the corporation, but we concluded that given the closely held nature of the corporation and the commonality of interests between the corporation and its two shareholders, protection via legal representation of the corporation was, for all intents and purposes, protection of the individual owners. *Id.* Thus, we found the owners were the intended beneficiaries of the attorney's representation, because whatever affected the corporation affected the owners in a direct and substantial way. *Id.*

The present case is distinguishable. First, *Sickler v. Kirby, supra*, involved a husband and wife who were the sole shareholders of a closely held corporation. In such a situation, whatever affects the corporation has a profound effect on

the two shareholders. In the present action, Constance was the sole "founder" of the LLC and the Trust. Changes within these entities will have varying effects on Donald and his 10 siblings. Second, in *Sickler*, communication to the corporation was through only the two shareholders. In the present action, communication was via Constance initially, and then through the trustee and manager, without any contact with the other siblings. Third, unlike *Sickler*, where the corporation and the shareholders joined in the action, Donald brings this action as an individual beneficiary and member, with neither the Trust nor the LLC joining in the action. Fourth, unlike the corporation in *Sickler*, where the two shareholders participated in the preparation of the corporate documents, Donald and his siblings had no role in preparing documentation for the Trust or the LLC. Bahensky was retained solely by Constance, and it was Constance's interests that Bahensky was representing in his drafting of the estate planning documents. The interests of Donald and his siblings were not necessarily aligned with those of Constance, as evidenced by her intent to include special provisions for her farming sons.

Moreover, were we to extend Bahensky's duty to Donald as a member of the LLC or beneficiary of the Trust, that duty would necessarily extend to Donald's siblings as well, creating conflicting loyalties. This is evidenced by Donald's allegations that Bahensky engaged in actions with respect to the estate plan which were to the benefit of three of Donald's siblings and to the detriment of the other members of the LLC and beneficiaries of the Trust. But Bahensky was charged with drafting the documents and carrying out their provisions through representation of Constance, the trustee, regardless of the beneficial or detrimental effect it had on the individual beneficiaries of the Trust or members of the LLC. We therefore find the district court did not err in determining *Sickler v. Kirby*, 19 Neb. App. 286, 805 N.W.2d 675 (2011), did not apply and denying Donald's motion to alter or amend.

3. Amended Complaint

Donald asserts the district court erred in requiring him to amend his complaint to allege a derivative action and then

failing to grant a new trial and allow him to produce evidence of damages in accordance with *Sickler v. Kirby, supra*.

The crux of Donald's argument is difficult to discern, but to the extent Donald is arguing that his amended complaint brought his claims within the purview of *Sickler v. Kirby, supra*, we have distinguished *Sickler* above. We find no error in the court's dismissal of his amended complaint.

4. Remaining Arguments

[12] Donald also argues evidentiary errors, application of claim preclusion, and the trial court's finding that there was no professional negligence, but did not assign these arguments as errors. In the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed. *Walz v. Neth*, 17 Neb. App. 891, 773 N.W.2d 387 (2009). Because our resolution on the issue of standing is dispositive of the case, we need not address Donald's remaining arguments for plain error. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

VI. CONCLUSION

We conclude Donald does not have standing to bring this action. We also find that the relationship between Donald and the LLC and the Trust is distinguishable from the relationship shareholders have with a closely held corporation, because legal representation of Constance did not equal protection for Donald and his siblings. Finally, we conclude the district court did not err in denying Donald a new trial to present evidence as to damages.

Affirmed.

STATE OF NEBRASKA, APPELLEE, V. FILIBERTO QUEZADA, APPELLANT.

834 N.W.2d 258

Filed June 4, 2013. No. A-12-581.

1. **Trial: Expert Witnesses.** The right of an indigent defendant to the appointment of an expert witness at State expense generally rests in the discretion of the trial court.
2. **Effectiveness of Counsel: Records: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue 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.
3. **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.
4. **Drunk Driving: Blood, Breath, and Urine Tests: Proof: Expert Witnesses: Rebuttal Evidence.** A test made in compliance with the statutory scheme, and its corresponding regulations, is sufficient to make a prima facie case on the issue of breath alcohol concentration. That scheme does not require evidence as to any margin of error for the testing device. And the trial court is not required to accept as credible any expert testimony called by the defendant to rebut the State's prima facie case.
5. **Drunk Driving: Blood, Breath, and Urine Tests: Proof.** Neb. Rev. Stat. § 60-6,201 (Reissue 2010) requires that a chemical test be performed in accordance with the procedures approved by the Department of Health and Human Services Regulation and Licensure and by an individual possessing a valid permit issued by that department for such purpose. 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. A breath test that comports with the foregoing listed requirements makes a prima facie case.
6. **Expert Witnesses.** If proposed expert testimony is fundamentally flawed by the expert's own admission, it is not an abuse of discretion for the trial court to refuse to appoint the expert under Neb. Rev. Stat. § 27-706 (Reissue 2008) when there is no showing that this shortcoming in the expert's proposed testimony has been remedied.
7. **Expert Witnesses: Evidence: Affidavits.** A defendant must provide evidence to support a motion to appoint an expert witness, and this evidence may consist of affidavits.
8. **Effectiveness of Counsel: Drunk Driving: Expert Witnesses.** In order to ensure that the right to effective assistance of counsel does not become a hollow right, it is the duty of the State not only to provide an indigent defendant

with an attorney, but also to provide the lawyer with the appropriate tools and services necessary to provide a proper, competent, and complete defense. An indigent defendant being prosecuted for driving while under the influence may, in certain circumstances, be entitled to the appointment of an expert witness at the State's expense.

9. **Expert Witnesses.** An expert need not be supplied every time a request is made by an indigent defendant, nor must the court provide defense counsel with equipment for a "fishing expedition." There must be some showing by defense counsel that the expert is necessary for an adequate defense.
10. ____. There must be some threshold showing of necessity for expert assistance before a trial court may grant a defendant's request therefor, such as why the requested expert testimony was necessary, how such testimony would likely benefit the defense, or why a vigorous cross-examination of the State's witnesses would not achieve the same result.
11. **Effectiveness of Counsel: Witnesses.** When the record shows that the State's witnesses were thoroughly cross-examined consistent with the defense theory, there was meaningful adversarial testing of the prosecution's case.
12. **Constitutional Law: Effectiveness of Counsel: Proof.** The U.S. Supreme Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent or prevented from assisting the accused during a critical stage of the proceeding. Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

Sarah M. Mooney, of Mooney Law Office, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

SIEVERS, PIRTLE, and RIEDMANN, Judges.

SIEVERS, Judge.

INTRODUCTION

Filiberto Quezada appeals from his conviction and sentence for third-offense aggravated driving under the influence (DUI), a Class IIIA felony due to his .174 breath alcohol content, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010). He claims that the district court erred in denying his motion to hire an expert witness at public expense to testify to the margin of error inherent in the DataMaster breath testing device

which formed the basis of his conviction. Based on the analysis below, we affirm the conviction.

FACTUAL BACKGROUND

Roger Ites testified that on August 2, 2011, at approximately 10 p.m., he was driving his motorcycle eastbound on Q Street in Omaha, Nebraska, when he noticed a vehicle backing out onto Q Street approximately half a block in front of him that did not have its lights on. In an effort to avoid the vehicle, Ites moved from the right-hand lane to the left-hand lane. The driver of the vehicle suddenly attempted to make a U-turn to drive west on Q Street. Ites braked heavily but struck the vehicle with the front end of his motorcycle, laying the bike down. Ites called the 911 emergency dispatch service, and both he and the driver of the vehicle waited at the accident scene.

Two Omaha police officers came to the accident scene, and, upon contact with Quezada, the driver of the vehicle, they smelled a strong odor of alcohol on Quezada's breath and noticed his eyes were bloodshot. Based on those observations, one of the officers called for a traffic officer to process the possible DUI.

Officer Nicholas Prescott came to the scene to investigate the possible DUI. Prescott detected that Quezada had a strong odor of alcohol and glassy, bloodshot eyes. Prescott had Quezada perform field sobriety tests; Prescott testified that Quezada showed impairment on the tests. Prescott waited the required 15 minutes before conducting a preliminary breath test, which Quezada failed. Prescott placed Quezada under arrest for suspicion of DUI and transported Quezada to the main police station for an evidentiary breath test. After waiting the requisite 15 minutes, Prescott had a crime laboratory technician administer the DataMaster test, which produced a result of .174 of one gram of alcohol per 210 liters of breath, hereinafter generally referred to as "breath alcohol content." We will generally refer to the breath test result as "BTR."

James Brady, a senior crime laboratory technician with the Omaha Police Department, testified that he has been responsible for maintenance on DataMasters and Intoxilyzers since

1995. Brady testified as to the process that the DataMaster uses to test an individual's breath, and as to his responsibilities as the maintenance officer, such as checking the calibration of the instruments under the Nebraska Administrative Code's title 177, which maintenance he must do every 40 days. Brady testified that the machine used to test Quezada had been timely and properly checked for calibration before its use. Brady testified as to exhibits 8 and 11, copies of the "Chemical Analysis Certification of Alcohol Breath Simulator Solution," which certifications are used per title 177 to verify that the calibration solutions test within tolerance at .08 and .15. Brady also testified as to exhibit 10, a copy of the "Scheduled Maintenance and Calibration Log" for the DataMaster, which showed that he performed the last required 40-day check on July 3, 2011. During the July 3 check, the .08 solution tested at .081, which is off by .001 and within the acceptable margin of error according to title 177. However, we note that in his role as the maintenance officer for the DataMaster, Brady said that he "personally" uses a 5-percent margin of error, meaning anywhere between .076 and .084, which is a "tighter" margin of error than that required for calibration solutions by title 177, which is plus or minus .01. Brady testified that the .15 solution tested at .154, which is also within the acceptable margin of error, both Brady's "personal" margin of error and that allowed by title 177. Brady testified that the results of his July 3 check were valid for 40 days, until August 12. Based upon his training and experience in the crime laboratory and as DataMaster maintenance officer and the above-detailed test results, Brady concluded and testified that the DataMaster, when used to test Quezada's breath, was in proper working and operational condition.

A technician employed with the Omaha Police Department's crime laboratory testified that on August 2, 2011, she conducted a breath test for Prescott on Quezada. Prior to conducting the test, she determined that the maintenance and calibration checks had been performed on the DataMaster and that it was in proper working order. She testified that she followed all of the required procedures from title 177 and that Quezada's breath alcohol content was .174.

PROCEDURAL BACKGROUND

The information was filed against Quezada on August 8, 2011. On February 10, 2012, Quezada filed a motion for appointment of an expert witness. On March 27, the trial court entered an order denying Quezada's motion to appoint an expert witness. The case was tried to a jury on March 26 and 27. On March 27, the jury returned a verdict finding Quezada guilty of the charge of DUI, and the trial court accepted the jury's verdict. On June 11, Quezada was sentenced to 2 to 2 years' imprisonment, his license was revoked for 15 years, and he was ordered to pay a fine of $10,000. Quezada filed a notice of appeal to this court on June 28.

ASSIGNMENTS OF ERROR

Quezada assigns the following errors: (1) The trial court abused its discretion when it refused to appoint an expert witness, (2) Quezada was denied effective assistance of counsel, and (3) the trial court abused its discretion when it imposed an excessive sentence.

STANDARD OF REVIEW

[1] The right of an indigent defendant to the appointment of an expert witness at State expense generally rests in the discretion of the trial court. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

[2] Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. *State v. Jones*, 274 Neb. 271, 739 N.W.2d 193 (2007). When the issue 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. *Id.*

[3] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004).

ANALYSIS

Denial of Appointment of Expert Witness Regarding Accuracy of DataMaster.

Quezada argues that the trial court erred in failing to appoint an expert witness who could testify that due to the unreliability of the DataMaster machine and its margin of error, Quezada's breath alcohol content may not have been at .15 or over when Quezada was driving the vehicle. Because Quezada was allegedly indigent and could not afford to hire an expert witness, counsel filed a motion to appoint an expert witness pursuant to Neb. Rev. Stat. § 27-706 (Reissue 2008), which allows the court to appoint an expert witness who operates under the written instructions of the court and may testify. This statute specifically provides that the court may inform the jury that the expert is court appointed, but when this statute is used, the parties may still call their own expert witnesses.

In his motion filed on February 10, 2012, Quezada stated that he was "currently represented by retained counsel but [was] financially unable to afford necessary supporting services." In his affidavit in support of the motion, Quezada stated that he paid his attorney by creating a concrete patio at his counsel's home. In support of the motion for appointment of the expert, counsel for Quezada argued that the situation regarding his being retained counsel by way of a "barter arrangement" was simply analogous to a pro bono attorney asking the court to pay deposition fees or other litigation expenses for an indigent defendant. At this hearing on the motion, counsel for the State argued that the State was not bringing in an expert witness, such as a toxicologist, but, rather, that Brady was simply a DataMaster maintenance officer. When the trial court judge asked the State whether it was bringing in someone to say what Quezada would have tested at the time of his driving, the State responded in the negative, saying: "There's no expert or extra evidence that's being brought by the State in this case. The test we're talking about, .174, is well within the margin for error in Title 177 and in the maintenance records that you'll see." The following exchange took place:

> THE COURT: . . . I'm assuming one of the arguments of the defense is that's what he tested when he was tested, but the question to the jury would be what would he have tested when he was driving. And you're not bringing in the expert to establish that information?
>
> [Counsel for the State]: I am not, Your Honor.

The court's order simply states that "[Quezada's] motion to appoint an expert witness is hereby denied," but does not provide any rationale.

Quezada's defense which he wanted to advance at trial was that the BTR of .174 alleged by the State was subject to a margin of error due to the unreliability of the DataMaster and that therefore the State could not prove that Quezada's breath alcohol content was at or above .15 when he was operating the vehicle, preventing him from being convicted of felony aggravated DUI. Quezada wanted Dr. John Vasiliades, a forensic toxicologist, to testify that the DataMaster has a margin of error of ".03" and that absorption and excretion rates of alcohol may have affected Quezada's BTR. We note that Vasiliades has provided similar testimony in several other DUI cases. See, *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008) (Vasiliades testified that his opinion within reasonable degree of scientific certainty was that margin of error for DataMaster was plus or minus .03 of a gram); *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000) (Vasiliades testified that Intoxilyzer Model 4011AS has inherent analytical error of plus or minus .03 of a gram, so that reading of .11 could be as low as .08 or as high as .14). We assume Vasiliades' testimony, if allowed in this case, would have been similar, and we note that defense counsel represented such in his affidavit in support of the motion, although counsel did not specify that the .03 was "grams" but we assume it would have been .03 of a gram, given Vasiliades' testimony in the other reported cases.

In the motion for appointment of an expert witness, counsel for Quezada stated that Quezada was represented by retained counsel but was financially unable to afford necessary supporting services. Quezada's financial affidavit shows that he would be considered indigent, despite having "bartered" for his

retained counsel's services, and we operate on the premise that at the time of the motion under discussion, Quezada would be considered indigent.

[4,5] Thus, the issue is simply whether the trial court abused its discretion in denying the § 27-706 motion to have Vasiliades as a court-appointed expert under that statute, given Quezada's indigent status. We turn to *State v. Kuhl*, 276 Neb. at 510, 755 N.W.2d at 399, where the court said:

> It is a longstanding principle that a test made in compliance with the statutory scheme, and its corresponding regulations, is sufficient to make a prima facie case on the issue of blood alcohol concentration. That scheme does not require evidence as to any margin of error for the testing device. And the trial court is not required to accept as credible any expert testimony called by the defendant to rebut the State's prima facie case.
>
> Currently, § 60-6,201 requires that a chemical test be performed in accordance with the procedures approved by the Department of Health and Human Services Regulation and Licensure and by an individual possessing a valid permit issued by that department for such purpose. We have explained that 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.

The *Kuhl* court makes it clear that a breath test which comports with the foregoing listed requirements makes a prima facie case. Thus, a prima facie case of DUI over .15 was made against Quezada because the requirements for such test as set forth in *Kuhl* were satisfied by the State's evidence, and no claim is advanced here by Quezada that the *Kuhl* requirements for a prima facie case were not satisfied. And, we note that there was no objection to exhibit 14, the result of Quezada's breath test.

Quezada wanted to rebut the prima facie case by having the court appoint an expert, Vasiliades, to testify that the DataMaster's reading of a suspect's breath has a .03-gram margin of error—which on the low side would put Quezada under .15 at .144 if believed by the jury. But, *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008), also makes it clear that the fact finder is not required to accept as credible any expert testimony called by the defendant to rebut the State's prima facie case.

[6] However, the court in *Kuhl* points out a fundamental flaw that existed in Vasiliades' testimony, which was his own admission that "he knew of no studies that specifically related to the DataMaster used to test [the defendant] and that such a particularized study would be necessary to accurately access the machine's margin of error." 276 Neb. at 510-11, 755 N.W.2d at 399-400. If proposed expert testimony is fundamentally flawed by the expert's own admission, it is not an abuse of discretion for the trial court to refuse to appoint the expert under § 27-706 when there is no showing that this shortcoming in the expert's proposed testimony has been remedied. The affidavit made by counsel in the case before us about Vasiliades' proposed testimony did not make any showing that this fundamental shortcoming in Vasiliades' opinion of the margin of error that he thinks is present in the DataMaster machine's reading of the suspect's breath had been remedied. Without any showing that this shortcoming had been remedied, we cannot say that the trial court abused its discretion in refusing to appoint Vasiliades under § 27-706.

[7-10] In *State v. Turco*, 6 Neb. App. 725, 576 N.W.2d 847 (1998), we cited to *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993), *postconviction relief granted*, 249 Neb. 381, 543 N.W.2d 725 (1996), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). In *White*, the Nebraska Supreme Court held that a defendant must provide evidence to support the motion to appoint an expert witness and that this evidence may consist of affidavits. In *Turco*, we concluded that the trial court's denial of the defendant's motion to hire an expert witness to testify regarding the accuracy of breath testing equipment used and the result obtained

was not an abuse of discretion. In reaching this conclusion, we stated:

> In order to ensure that the right to effective assistance of counsel does not become a hollow right, it is the duty of the State not only to provide an indigent defendant with an attorney, but also to provide the lawyer with the appropriate tools and services necessary to provide a proper, competent, and complete defense. . . . Thus, it appears that an indigent defendant being prosecuted for [DUI] may, in certain circumstances, be entitled to the appointment of an expert witness at the State's expense.
>
> However, an expert need not be supplied every time a request is made by an indigent defendant, nor must the court provide defense counsel with equipment for a "fishing expedition." . . . There must be some showing by defense counsel that the expert is necessary for an adequate defense. [In] *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993) . . . , the Nebraska Supreme Court held that although there may be circumstances under which a district court's denial of a defendant's request for funds to hire an expert would be an abuse of discretion, under the circumstances of that case, where no evidence to support the motion was offered, the district court did not abuse its discretion.

6 Neb. App. at 730-31, 576 N.W.2d at 852 (citations omitted). Thus, we concluded:

> Stated simply, defense counsel gave no indication as to why the requested expert testimony was necessary or how such testimony would likely benefit the defense, or as to why a vigorous cross-examination of the State's witnesses would not achieve the same result. There must be some threshold showing of necessity for expert assistance before a trial court may grant a defendant's request therefor.
>
> In sum, while we conclude that there may be circumstances under which the denial of funds for an expert witness would be an abuse of discretion, we conclude that under the circumstances of this case, where no evidence to support the motion was offered, the county court did

> not abuse its discretion in denying the motion to hire an expert witness, and the district court's reversal thereof was error.

Id. at 732, 576 N.W.2d at 852-53.

In the case at hand, while defense counsel did provide an affidavit of Vasiliades' proposed testimony, that affidavit did not reveal that the shortcoming in his testimony as pointed out in *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008), had been addressed or cured. Thus, there could not be any benefit to Quezada, given that the testimony, at least insofar as represented by Quezada's counsel's affidavit, would be plainly inadmissible, given the witness' obvious lack of foundation to opine on a margin of error inherent in the reading of Quezada's breath by the DataMaster, despite the other undisputed evidence showing its proper calibration and functioning of the machine under title 177. Therefore, this assignment of error is without merit.

Ineffective Assistance of Counsel.

Quezada also argues that trial counsel was ineffective for a number of reasons: (1) Counsel did not request that voir dire examination be placed on the record, (2) counsel did not object during the 2-day jury trial, and (3) counsel did not move for a mistrial or for a new trial based on the trial court's denial of his motion for appointment of an expert witness after the State presented Brady's testimony concerning the validity of the DataMaster machine.

Quezada first argues that trial counsel neglected to request that voir dire examination be on the record. Because there is no record of what occurred, any possible appealable issues or prejudicial statements were not preserved. The record is insufficient for us to determine whether Quezada's counsel's performance during voir dire was deficient or whether any such deficient performance prejudiced his defense.

[11,12] Second, Quezada argues that trial counsel neglected to object during the trial. In *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003), the defendant argued that he was denied effective assistance of counsel by his trial counsel's failure to subject the prosecution's case to meaningful adversarial

testing. When the record shows that the State's witnesses were thoroughly cross-examined consistent with the defense theory, there was meaningful adversarial testing of the prosecution's case. In *United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), the U.S. Supreme Court explained that where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." The Court also noted:

> The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. . . .
>
> Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt.

United States v. Cronic, 466 U.S. at 659 n.25, 26.

This holding applies to the case at hand. Quezada argues that he was denied effective assistance of counsel in counsel's failure to make any objections during the trial. However, the record shows that each of the State's witnesses was thoroughly cross-examined consistent with the defense theory regarding the margin of error for the DataMaster test and that Quezada's actual breath alcohol content was unknown at the moment he was driving immediately before the accident. Therefore, there was meaningful testing of the prosecution's case. Quezada identifies numerous instances in which an objection may have been appropriate during trial, but he is unable to show actual prejudice where the result of the DataMaster test was .174, remembering that no objection was made to the admission of the BTR, exhibit 14. Even if it may have been proper for Quezada's counsel to object in specific instances, which we do not address, Quezada must show that counsel's deficient performance resulted in prejudice and how specific errors of counsel undermined the reliability of the finding of guilt. Quezada has failed to meet this burden.

Third, Quezada argues that trial counsel neglected to move for a mistrial or for a new trial based on the trial court's denial of his motion for appointment of an expert witness after the State presented Brady's testimony. Quezada claims that the State specifically stated at the hearing on the motion for appointment of an expert witness that it would not be presenting expert witness testimony. However, the agreement was that the State would not bring in an expert to opine as to what Quezada's breath alcohol content would have been *at the time of the accident*. The court allowed Brady to testify as to the maintenance of the DataMaster machine and the way in which the DataMaster machine operates according to title 177, and such testimony was not a violation of the representations made by the State as to what sort of expert it would or would not call to testify.

Quezada argues that trial counsel should have objected to Brady's testimony and moved for a mistrial and that counsel should have renewed his motion to appoint an expert when the State put on Brady's testimony. Quezada claims that trial counsel's failure to object and exclude the improper testimony, to object and move for a mistrial, or to object and renew the motion for appointment of an expert left Quezada with no expert testimony to counter the DataMaster evidence and the expert opinion given by the State's witness. However, it is clear that Vasiliades' testimony did not go to the accuracy of Brady's calibration testing, but, rather, to a margin of error inherent in the DataMaster's test result of a suspect's breath. Thus, nothing testified to by Brady would have bolstered Quezada's argument to have Vasiliades testify or given the trial judge cause to grant a renewed motion that had been earlier denied. In this regard, it must be remembered that Brady did not present evidence as to the margin of error of the DataMaster machine when it produces a reading of the alcohol content of a suspect's breath. Rather, Brady testified only as to the margin of error in the calibration solutions and the margin of error for the internal standard, which is an entirely different matter. Further, Brady's testimony was not improper, because it was not expert testimony as to Quezada's breath alcohol content at the time he was driving and was also not

expert testimony from an undisclosed expert. Thus, Brady's testimony was permissible and did not include any evidence about whether the BTR reading from a DataMaster has an inherent margin of error when testing an unknown sample such as Quezada's breath. Rather, Brady's testimony addressed only the permissible margin of error when the DataMaster is checked for proper calibration by the use of known solutions. Therefore, it would not have been proper to exclude his testimony. And, as we found above, the court did not abuse its discretion in overruling the motion prior to trial, because there was no showing that Vasiliades' proposed testimony was no longer subject to the shortcoming pointed out in *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008). Thus, on this record, we cannot find any deficient performance of trial counsel that was prejudicial to Quezada.

Excessive Sentence.

Quezada's last argument is that the trial court's sentence of 2 to 2 years' imprisonment, a 15-year license revocation, and a $10,000 fine was excessive. Quezada argues that he had a very minimal criminal record, he has three children, and he has enrolled in outpatient treatment and had openly discussed his alcoholism with the probation officer. However, as the trial court judge noted at the sentencing hearing, this was Quezada's fifth DUI and Quezada is a "dangerous guy" because he continued to drive drunk without insurance. We cannot say that Quezada's sentence, for which he will be eligible for parole in 294 days from the sentencing date, is excessive and an abuse of the trial court's discretion. Thus, the third assignment of error is without merit.

CONCLUSION

For the reasons discussed, we conclude that the district court did not abuse its discretion in denying Quezada's motion to appoint an expert witness at public expense or in sentencing Quezada. We also find that Quezada's ineffective assistance of counsel argument is without merit. We affirm the conviction and sentence.

AFFIRMED.

RICHARD RUDD, APPELLANT, V. HANK DEBORA, APPELLEE.

835 N.W.2d 765

Filed June 18, 2013. No. A-12-196.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact, or as to the ultimate inferences that may be drawn from those facts, and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **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.
4. **Limitations of Actions: Dismissal and Nonsuit: Jurisdiction.** The language of Neb. Rev. Stat. § 25-217 (Reissue 2008) has been deemed to be self-executing and mandatory, depriving the trial court of jurisdiction by operation of law.
5. **Limitations of Actions: Dismissal and Nonsuit.** Neb. Rev. Stat. § 25-217 (Reissue 2008) is self-executing, so that an action is dismissed by operation of law, without any action by either the defendant or the court, as to any defendant who is named in the action and not served with process within 6 months after the complaint is filed.
6. ____: ____. Neb. Rev. Stat. § 25-217 (Reissue 2008) has no provision for an extension of time in which to obtain service of summons or any exceptions to the 6-month time limit. Therefore, a defendant must be served within 6 months from the date the complaint was filed, regardless of whether the plaintiff falsely believed he had served the correct defendant.
7. **Pleadings: Appeal and Error.** An appellate court reviews a district court's decision on a motion for leave to amend a complaint for an abuse of discretion, but a district court's discretion to deny such leave is limited.
8. ____: ____. A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

Matthew A. Lathrop, of Law Office of Matthew A. Lathrop, P.C., L.L.O., for appellant.

Michael F. Scahill and Patrick B. Donahue, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

IRWIN, MOORE, and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

Richard Rudd brought a negligence action against "Hank Debora," whose actual name is "Henk Marten deBoer," in the district court for Douglas County. The father of the intended defendant, who shares the exact same name as his son, was served with summons rather than the son. The district court granted summary judgment in favor of the father and dismissed Rudd's complaint with prejudice. Rudd appeals. Based on the reasons that follow, we affirm.

BACKGROUND

On June 17, 2010, Rudd filed a complaint against Henk Marten deBoer, sued as "Hank Debora," alleging that on December 6, 2006, Rudd was walking in the parking lot of what was then the "Qwest Center" in Omaha, when deBoer ran at Rudd from behind and jumped on him, causing him to fall forward and suffer personal injuries. The Henk Marten deBoer that allegedly caused Rudd's injuries shares the same exact name as his father. Neither one uses a designation such as "Sr." or "Jr." to distinguish his name. For purposes of this opinion, we will refer to one as the son and the other as the father.

In the fall of 2009, prior to the complaint's being filed, Rudd's attorney contacted C.G. Jolly, an attorney who was representing the son in a divorce action at the time, to find out the name of the son's homeowner's insurance carrier, because Rudd intended to file a claim based on the injuries caused by the son. Jolly indicated that he would contact the son and get the information Rudd needed, which he did. A claim was made with the insurance company, and it was denied.

On August 31, 2010, the father was served with a summons and complaint at Hand Picked Auto, his place of business, located in Council Bluffs, Iowa. The praecipe requested summons for personal service upon "Hank Debora" by a sheriff at the named defendant's place of business, Hand Picked Auto, which is a car dealership started by the son in 2002. In January 2010, the son turned the dealership over to his father.

Since that time, the son has had no involvement with Hand Picked Auto.

The father testified in his deposition, taken by Rudd's attorney, that when the sheriff came to serve the summons and complaint on August 31, 2010, regarding an incident at the Qwest Center, he told the sheriff that the complaint would be for his son and that his son could be found at Performance Chrysler Jeep Dodge, his place of employment, located in La Vista, Nebraska, in about 2 weeks, because his son was out of town at the time.

On September 15, 2010, the father again was served with another summons and complaint at Hand Picked Auto. The father testified that he again told the sheriff that if the papers had anything to do with an incident at the Qwest Center, the sheriff needed to go to Performance Chrysler Jeep Dodge in La Vista, which was where his son worked. The father testified that despite what he told the sheriff, the sheriff left the paperwork with him.

The father further testified that a few weeks later, he asked his son about whatever became of the Qwest Center incident and his son told him that the insurance company had denied Rudd's claim, so it was over. The father testified that he told his son a sheriff had dropped off some paperwork at Hand Picked Auto and that the son again stated, "[T]hat thing is all over."

The son testified in his deposition that at some point after the sheriff had left the papers on September 15, 2010, his father told him about the papers and that they involved Rudd. The son testified that he did not realize Rudd was attempting to sue him for the Qwest Center incident, because his insurance company had previously told him that Rudd's claim had been denied, so he believed any claim Rudd had against him was finished. The son assumed Rudd was attempting to sue the car dealership for some other matter and told his father that he should hire an attorney. The son subsequently asked Grant A. Forsberg, a law partner of Jolly's, to contact his father to discuss documents he had received from the sheriff. Forsberg called the father and learned that he had been served with a summons and complaint on two occasions, but that

he was not the person involved in the incident set forth in the complaint.

On October 18, 2010, the father filed a motion for leave to file an answer out of time. The court entered a stipulated order allowing additional time to plead. On November 22, the father filed an answer which consisted of a general denial.

On December 21, 2011, the father filed a motion for summary judgment. A hearing on the motion was held and evidence presented, including two affidavits and the deposition of the father, the deposition of the son, and an affidavit of Forsberg. At the hearing, Rudd made an oral motion to amend the pleadings to correct or substitute the name of the defendant, which motion was denied. On February 14, 2012, the court sustained the father's motion for summary judgment and dismissed Rudd's complaint with prejudice.

ASSIGNMENTS OF ERROR

Rudd assigns, restated, that the trial court erred in (1) failing to allow him to proceed with his claim against the son and (2) dismissing his complaint with prejudice.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record 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. *Smeal v. Olson*, 263 Neb. 900, 644 N.W.2d 550 (2002). 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.*

[3] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

ANALYSIS

We first note that Rudd does not argue that the court erred in granting summary judgment in favor of the father. At the

summary judgment hearing, Rudd's attorney admitted that based on the evidence presented, the father was entitled to summary judgment. The father was the only individual served with a summons and Rudd's complaint, and the father's affidavit and deposition made it clear that he had no involvement in the incident at the Qwest Center on December 6, 2006, as set forth in the complaint. Rather, it was his son who was involved in the incident at the Qwest Center and was the intended defendant. The evidence is undisputed that the father was not the individual involved in the incident described in Rudd's complaint, and he was, therefore, entitled to summary judgment.

Although Rudd does not challenge the granting of summary judgment in favor of the father, he makes several arguments as to why he should be allowed to serve the son with summons and proceed with his claim against him.

Rudd first argues that he should be allowed to serve the son with summons, because the father knew that the wrong individual had been served and he had a duty to provide Rudd with notice of such error but failed to do so. Rudd argues that the Nebraska Court Rules of Pleading in Civil Cases require action on the part of a defendant who believes the wrong individual was served with summons or questions any aspect of service. He suggests that the rules required the father, either by motion or in his answer, to affirmatively allege that he was not the individual described in the complaint.

Neb. Rev. Stat. § 25-516.01 (Reissue 2008) provides that a defense of lack of personal jurisdiction or insufficiency of service of process may be asserted only under the procedure provided in the pleading rules adopted by the Nebraska Supreme Court.

Neb. Ct. R. Pldg. § 6-1112(b) provides that every defense to a claim for relief in any pleading shall be asserted in a responsive pleading, but also allows for certain defenses to be raised by motion at the option of the pleader. The defenses that may be raised by motion or responsive pleading include, among others, lack of jurisdiction over the person and insufficiency of process. In the present case, the father did not file a motion raising a defense and did not raise a defense in his

answer, but, rather, filed a general denial. See Neb. Ct. R. Pldg. § 6-1108(b).

Rudd contends that service of summons on the wrong individual falls under a lack of personal jurisdiction defense or an insufficiency of service of process defense and that therefore, the father was required to raise such defenses in his answer or by motion. We disagree. The father was properly served with a valid summons, and the court thereby obtained personal jurisdiction over him. There is no question of personal jurisdiction over the father, and there are no objections to the service of summons on the father. Accordingly, there was no need for the father to raise these issues in his answer or in a motion, and further, the court rules do not require him to raise in his answer or by motion that the wrong individual was served.

Rudd also argues that the father's filing of a motion to extend the answer deadline and his filing of an answer requesting dismissal of Rudd's lawsuit was a "voluntary appearance" by the father. He contends that because of the voluntary appearance, the father waived any objections to personal jurisdiction or service of process. Rudd relies on § 25-516.01(1), which provides that the voluntary appearance of the party is equivalent to service.

Again, as previously discussed, the father was properly served and the district court obtained personal jurisdiction over him. The father did not allege any error or raise any objections in connection with service of process upon him or personal jurisdiction, so there were no errors to be waived.

Further, in regard to any claim against the son, a voluntary appearance by the father does not waive any error in service on behalf of the son. The son has never been served with a summons and has never made an appearance in this case. A voluntary appearance of the father has no effect on the lack of service of process upon the son.

Rudd next argues that he should be allowed to serve the son outside the statutory time limit for service of process, because the father purposefully led him to believe that the right individual had been served. In Nebraska, a defendant must be served with summons within 6 months after the complaint is filed. Specifically, Neb. Rev. Stat. § 25-217 (Reissue 2008)

provides: "An action is commenced on the date the complaint is filed with the court. The action shall stand dismissed without prejudice as to any defendant not served within six months from the date the complaint was filed." In the instant case, the 6-month grace period for service of process expired on December 18, 2010.

In his brief, Rudd discusses several cases from other jurisdictions to support his argument that he should be granted additional time to serve a summons on the son because he was misled by the actions of the father. See, *Eddinger v. Wright*, 904 F. Supp. 932 (E.D. Ark. 1995); *In re Hollis and Co.*, 86 B.R. 152 (Bankr. E.D. Ark. 1988); *Ditkof v. Owens-Illinois, Inc.*, 114 F.R.D. 104 (E.D. Mich. 1987). However, the applicable service of process rule in each of the cases on which he relies allowed for a defendant to be served outside the set timeframe for service of process upon a showing of good cause. The cases relied on by Rudd are distinguishable from the present case because § 25-217 does not allow for any such exception.

[4] As previously stated, § 25-217 provides that "[t]he action shall stand dismissed without prejudice as to any defendant not served within six months from the date the complaint was filed." The statutory language has been deemed to be self-executing and mandatory, depriving the trial court of jurisdiction by operation of law. See *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000).

In *Smeal v. Olson*, 10 Neb. App. 702, 636 N.W.2d 636 (2001), *reversed on other grounds* 263 Neb. 900, 644 N.W.2d 550 (2002), the Nebraska Court of Appeals specifically found that one of the cases relied on by Rudd, *Eddinger v. Wright, supra*, was not supported by Nebraska law. The plaintiff in *Smeal v. Olson, supra*, made a similar argument to the one Rudd is making, that a plaintiff should be allowed to serve the correct party after the expiration of the grace period for perfecting service because the plaintiff was led to believe that the right defendant had been served.

In *Smeal v. Olson, supra*, Rickard K. Olson was served with a petition filed by the plaintiff, alleging that the defendant negligently caused a motor vehicle accident. Rickard K.

Olson initially filed an answer admitting that he was the driver of the vehicle, but later indicated that it was actually his son, Rickard W. Olson, who was driving the vehicle at issue. The son was ultimately served, albeit after the statute of limitations had run and after the 6-month time limit for service of summons allowed by § 25-217. The district court sustained the son's motion for summary judgment and dismissed the action against him.

In regard to the plaintiff's being misled into believing he served the right defendant, the Court of Appeals found:

> Although the father's answer certainly qualifies as "artful" avoidance, and perhaps part of a "scheme" of deception, . . . we note that § 25-217 does not allow Nebraska courts to extend the time for service of process . . . . [T]he Nebraska courts have held that § 25-217 is a self-executing statute which, once the 6 months has run, deprives the district court of jurisdiction to take any further action in the case. . . .
>
> In a phrase, we have construed § 25-217 as having a "drop dead" effect for a case in which service is not perfected within the grace period. Thus, while the court's opinion in *Eddinger v. Wright, supra*, may resonate with our sense of justice, we are bound to decide this case under Nebraska law. And, the "drop dead" feature of our grace period statute means that *Eddinger v. Wright* is distinguishable. The Arkansas statute specifically allows a court-ordered extension, but under the present state of Nebraska law, courts lack the ability to expand the grace period or dispense with the statute of limitations. If the grace period is to be expanded . . . then the Legislature must change the statute, we cannot.

Smeal v. Olson, 10 Neb. App. at 710-11, 636 N.W.2d at 643-44.

[5] This court and the Nebraska Supreme Court have repeatedly held that § 25-217 is self-executing, so that an action is dismissed by operation of law, without any action by either the defendant or the court, as to any defendant who is named in the action and not served with process within 6 months after the complaint is filed. See *Davis v. Choctaw Constr.*, 280 Neb. 714, 789 N.W.2d 698 (2010).

[6] Section 25-217 has no provision for an extension of time in which to obtain service of summons or any exceptions to the 6-month time limit. Therefore, in Nebraska, a defendant must be served within 6 months from the date the complaint was filed, regardless of whether the plaintiff falsely believed he had served the correct defendant. Rudd cannot be granted additional time to serve a summons on the son because he allegedly was misled by the actions of the father.

Rudd next argues that the trial court erred in denying him the opportunity to amend his complaint and in dismissing his complaint with prejudice. He contends that if he were allowed to amend his complaint, it would "relate back" to the timely filed original complaint, allowing him to maintain the action against the son. At the summary judgment hearing, Rudd made an oral motion to amend the pleadings to name the correct defendant and to include allegations that the son had constructive notice of the lawsuit. The court denied the motion to amend the pleadings.

[7,8] Neb. Ct. R. Pldg. § 6-1115(a) provides: "[A] party may amend the party's pleading only by leave of court or by written consent of the adverse party, and leave shall be freely given when justice so requires." We review a district court's decision on a motion for leave to amend a complaint for an abuse of discretion, but a district court's discretion to deny such leave is limited. *Gonzales v. Union Pacific RR. Co.*, 282 Neb. 47, 803 N.W.2d 424 (2011). A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated. *Id.*

In the instant case, the district court did not abuse its discretion in denying Rudd's motion for leave to amend the pleadings; amending the pleadings would have been futile in this case, because the amended pleadings would not "relate back" to the original complaint, as Rudd contends.

Nebraska's relation-back statute, Neb. Rev. Stat. § 25-201.02 (Reissue 2008), provides in pertinent part as follows:

> (2) If the amendment [to a pleading] changes the party or the name of the party against whom a claim is asserted,

> the amendment relates back to the date of the original pleading if (a) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, and (b) within the period provided for commencing an action the party against whom the claim is asserted by the amended pleading (i) received notice of the action such that the party will not be prejudiced in maintaining a defense on the merits and (ii) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Even if Rudd were allowed to amend the complaint, it would not change "the party or the name of the party against whom [the] claim is asserted," as necessary for § 25-201.02(2) to be applicable. The son was the intended defendant in the complaint and would remain so in an amended complaint. Although an amended complaint could correct the spelling of the defendant's name, such a change is meaningless here, inasmuch as the parties agree the original spelling of the defendant's name in the complaint is simply a misspelling or misnomer. Correcting the spelling changes nothing as far as the party against whom the claim is asserted and would not clear up any confusion, because the father and the son have the exact same name.

Although Rudd's attorney made a motion for leave to amend his complaint at the summary judgment hearing, he previously admitted at that same hearing that there was no reason to amend the complaint: "I can't amend my pleading here because [it's] correct. . . . [A]s I said, I can't amend the pleadings."

The failure in this case is not in naming the right defendant; the failure is in not serving the correct individual who was involved in the incident described in the complaint.

In addition, if Rudd were allowed to file an amended complaint, the relation-back statute would not apply to the amended complaint unless he could show that the son had notice of the action "within the period provided for commencing an action" or, stated differently, that he had notice prior to the statute of limitations' expiring.

The statute of limitations for a personal injury claim in Nebraska is 4 years from the date of the tortious act. See Neb. Rev. Stat. § 25-207 (Reissue 2008). The statute of limitations for Rudd's cause of action expired on December 7, 2010.

The evidence presented at the summary judgment hearing showed that the son did not have notice of the action prior to the statute of limitations' expiring. The son testified that sometime after his father was served with summons in September 2010, his father told him he had been served with some paperwork involving Rudd. The son testified that he believed Rudd was suing his father's business for something unrelated to the Qwest Center incident. He formed this belief because his insurance company had told him Rudd's claim against him in regard to the Qwest Center incident had been denied.

The son also testified that in the year 2010, he did not know Rudd had sued him for injuries arising out of the incident at the Qwest Center. Further, when asked when he first became aware that the present action was a lawsuit filed by Rudd against him, the son responded that he did not know until his new attorney called and told him. The record shows that his new attorney entered his appearance as the son's counsel on January 13, 2011, well after the statute of limitations had expired on December 7, 2010.

The father testified that after being served, he asked his son about the Qwest Center incident and told him that some paperwork had been dropped off by the sheriff involving Rudd. The father testified his son responded that the insurance company had denied Rudd's claim and that therefore, any claim against him was over.

In summary, we acknowledge this is a very unique set of facts, but allowing Rudd to amend his complaint would have been futile, because the relation-back statute would not apply, i.e., the amended complaint would not relate back to the date of the original complaint. Accordingly, any amended complaint would be barred by the applicable statute of limitations.

CONCLUSION

We conclude that under this unusual set of facts, the district court properly granted summary judgment in favor of

the father. We further conclude that the statute of limitations and the grace period for service of process have both expired and that the relation-back statute is inapplicable in the instant case. Accordingly, the district court properly dismissed Rudd's claim with prejudice. The judgment of the district court is affirmed.

AFFIRMED.

MORGAN R. GEISS, NOW KNOWN AS MORGAN R. BENNETT, APPELLEE, V. ERIC M. GEISS, APPELLANT.

835 N.W.2d 774

Filed June 18, 2013. No. A-12-564.

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 determinations 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. **Appeal and Error.** 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.
4. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
5. ____: ____: ____. An appellant's failure to object to the limitation imposed by the trial judge effectively waives the right to raise that ruling as an error on appeal.
6. **Appeal and Error.** An appellate court may consider an issue not raised to the trial court if such issue amounts to plain error.
7. ____. Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion.
8. **Appeal and Error: Words and Phrases.** 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.
9. **Effectiveness of Counsel.** A pro se litigant is held to the same standard as one who is represented by counsel, and the trial court has the inherent power to compel conformity with Nebraska procedural practice.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS, Judge. Affirmed.

Nicholas M. Froeschl, of Morrow, Poppe, Watermeier & Lonowski, P.C., L.L.O., for appellant.

Jeffrey M. Eastman, of Legal Aid of Nebraska, for appellee.

SIEVERS, PIRTLE, and RIEDMANN, Judges.

PIRTLE, Judge.

INTRODUCTION

Eric M. Geiss appeals from the journal entry entered by the district court for Lincoln County on May 30, 2012, which denied Eric's "Complaint to Modify Child Custody." Eric asserts the district court abused its discretion when it prohibited him from cross-examining witnesses and calling any witnesses of his own. For the reasons that follow, we affirm.

BACKGROUND

The parties were divorced pursuant to a decree of dissolution entered by the district court for Lincoln County on August 24, 2009. Pursuant to the decree, Morgan R. Geiss, now known as Morgan R. Bennett, was awarded primary physical custody of the minor children of the parties: a daughter, born in 2003, and a son, born in 2005. Eric was awarded parenting time according to the visitation schedule the parties had previously established.

On June 15, 2010, Eric filed a "Complaint to Modify Child Custody," seeking custody of the children. Eric also requested and was granted an ex parte order awarding him temporary custody of the children subject to Morgan's reasonable visitation. Morgan filed a "Motion to Dissolve Ex Parte Custody Order and Application for Custody" on June 22. On July 19, both parties appeared and were represented by counsel at a hearing regarding temporary custody and support. On July 28, the court awarded Eric temporary custody of the children.

On July 20, 2011, Morgan filed a "Motion to Waive Parenting Education and Mediation or Compel and Sanctions," requesting that Eric be required to complete a parenting course and

participate in mediation or, in the alternative, that he be prohibited from presenting evidence at trial on the issues of custody and visitation. The court's August 22 journal entry required Eric to schedule the parenting course and mediation within 14 days. He did not comply with that order.

On October 25, 2011, Morgan filed a second motion, alleging Eric failed to schedule an appointment with a mediator as previously ordered and seeking the same prohibitions as sanctions that would prohibit him from introducing evidence relating to custody and parenting time. Morgan's motion was set for hearing on November 1. The court's November 11 journal entry indicated that a hearing was held on the second motion and that Eric was to complete mediation by December 1. The court indicated the motion for sanctions would be held in abeyance. On December 14, the district court set a trial date for March 12, 2012. Eric did not complete mediation by December 1, 2011, and he did not participate in mediation prior to trial.

Eric obtained new counsel, who filed a motion to continue on March 6, 2012, which motion indicated the attorney was recently retained and needed time to prepare for trial. Trial was moved from March 12 to May 30. On March 19, Eric filed his "Certificate of Participation in Parenting Act Education Course." Morgan's "Certificate of Participation in Parenting Education Course" was filed in the district court on May 19, 2011.

On April 5, 2012, Eric's attorney filed a motion to withdraw and the court allowed the withdrawal.

On May 30, 2012, Eric appeared for trial without an attorney and was asked if he would like to make an opening statement and whether he opposed Morgan's receiving custody. Eric made no opening statement and stated he was opposed to Morgan's receiving custody. The trial judge stated:

> [D]o you understand that you were ordered by [a judge] on two separate occasions to attend mediation[?] You apparently failed to do that, and so the Court will permit you to testify here today, but you, as a sanction for failure to conform to the parenting plan, will be prevented from

> calling any witnesses in opposition to the motion or complaint filed by the defendant.

Eric responded that he understood.

> The district court rules of the 11th Judicial District provide:
>
> Mediation must be scheduled or a hearing on a qualified request for a waiver of mediation must be scheduled no later than 120 days after the filing of the complaint. Failure of any party to schedule or attend mediation will result in sanctions which may include being prohibited at trial from presenting any evidence on the issues of custody or parenting time.

Rules of Dist. Ct. of 11th Jud. Dist. 11-4(A)(v) (rev. 2012).

Morgan testified and called witnesses, including her new husband, a friend, a coworker, and Eric. The witnesses testified regarding transportation for parenting time, tax exemptions for the children, and the children's progress in school. Morgan also entered exhibit 3 into evidence, showing she had contacted a mediator and signed a "Consent to Participate" in mediation form on June 25, 2011. At the close of Morgan's testimony, the court stated: "[T]he record will reflect that the Court is not allowing [Eric] any cross-examination of [Morgan] or any of [her] witnesses because of his failure to comply with [a judge's] order on two occasions ordering [Eric] to enroll in the mediation, which was not done." The court did give Eric the opportunity to make a statement in his own behalf regarding why he should retain custody or why the court should not change custody to Morgan, and Eric said the following:

> The children have lived with me for the last — over three years, and they started living with me the end of March 2009. Morgan called me and said she couldn't deal with — the kids want to live with me, she couldn't deal with them anymore, so they have been living with me ever since.
>
> As for me refusing to let her see the kids, the only reason that I have not met her is I cannot afford to meet her, Your Honor. I can't afford to meet her every two weeks. That's the only reason that I have. As for — I have been doing this — they have been living with me for three

> years. I am not the greatest father in the world, just like there is no one is the greatest parent. I do my best. I love my children, and I would do anything for them.

The court determined, based upon the evidence at trial, that there were not sufficient grounds to support Eric's complaint to modify and that the ex parte custody should not have changed from Morgan to Eric. The court stated the parties "originally agreed to joint custody with residential placement in [Morgan], and that's probably where the situation should have remained."

Eric timely filed his notice of appeal on June 25, 2012.

ASSIGNMENTS OF ERROR

Eric asserts the district court abused its discretion when it prohibited him from cross-examining Morgan's witnesses and prohibited him from presenting any witnesses on his behalf.

STANDARD OF REVIEW

[1] 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 determinations will normally be affirmed absent an abuse of discretion. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002).

[2] 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.*

[3] 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. *State v. Nadeem*, 284 Neb. 513, 822 N.W.2d 372 (2012).

ANALYSIS

We begin our analysis by taking judicial notice of the trial court's local rules because they were properly filed with the Clerk of the Nebraska Supreme Court. *Mann v. Rich*, 16 Neb. App. 848, 755 N.W.2d 410 (2008).

The district court for Lincoln County is part of the 11th Judicial District. Rule 11-4 of the district court rules of the 11th Judicial District was originally approved by the Nebraska Supreme Court on November 3, 1995, and though it has been amended over the years, it remains in effect. Rule 11-4(A)(v) was approved by the Supreme Court on April 25, 2012.

Rule 11-4(A)(v) states as follows:

> Mediation must be scheduled or a hearing on a qualified request for a waiver of mediation must be scheduled no later than 120 days after the filing of the complaint. Failure of any party to schedule or attend mediation will result in sanctions which may include being prohibited at trial from presenting any evidence on the issues of custody or parenting time.

At the time of the parties' dissolution, the parties developed a parenting plan pursuant to Neb. Rev. Stat. § 43-2929 (Reissue 2008). The plan provides, in relevant part, that

> in the event one or both of the parties wish to change the terms of this Plan in the future, and the parties are unable to agree on the terms of such change, the parties shall attempt to mediate their disagreements by talking to a third person or persons who may be able to help the parties come to an agreement.

In Nebraska, modification proceedings relating to support, custody, parenting time, visitation, other access, or removal of children from the jurisdiction of the court are commenced by filing a complaint to modify. See Neb. Rev. Stat. § 42-364 (Cum. Supp. 2012). Such modification proceedings are governed by the Parenting Act. According to § 42-364(6), an action for modification filed before July 1, 2010, may be referred to mediation, specialized alternative dispute resolution, or other alternative dispute resolution process. On and after July 1, 2010, the parties *shall* be referred to mediation or specialized alternative dispute resolution as provided in the Parenting Act.

In this case, on June 15, 2010, Eric filed a complaint to modify the child custody arrangement. On the same day, he filed an "Application for Temporary Custody and *Ex Parte* Order," requesting the temporary care, custody, and control of

the parties' minor children. The court granted Eric's motion and entered an ex parte temporary custody order on the same day.

Morgan filed a "Motion to Dissolve Ex Parte Custody Order and Application for Custody" on June 22, 2010. On July 19, both parties appeared and were represented by counsel at a hearing regarding temporary custody and support. On July 28, the court awarded Eric temporary custody of the children.

On July 20, 2011, Morgan filed a "Motion to Waive Parenting Education and Mediation or Compel and Sanctions," citing Neb. Rev. Stat. §§ 43-2928 (Reissue 2008) and 43-2937 (Cum. Supp. 2012), as well as the district court rules of the 11th Judicial District. She requested that Eric be required to complete a parenting course and participate in mediation or, in the alternative, that he be prohibited from presenting evidence at trial on the issues of custody and visitation.

On August 22, 2011, the trial court ordered Eric to schedule the parenting course and mediation within 14 days. He failed to do so.

On October 25, 2011, Morgan filed a second motion, alleging Eric failed to schedule an appointment with a mediator as previously ordered and seeking the same prohibitions as sanctions. Specifically, she requested he be prohibited from introducing evidence relating to custody and parenting time. Morgan's motion was set for hearing on November 1. The court's November 11 journal entry indicated that a hearing was held on the second motion and that Eric was to complete mediation by December 1. Eric did not complete mediation at any time.

A notice of trial was filed on December 14, 2011, and trial was set for March 12, 2012. Eric obtained new counsel, who filed a motion to continue on March 6 which indicated the attorney was recently retained and needed time to prepare for trial. Trial was postponed from March 12 to May 30.

On the day of trial, Eric appeared without counsel. The trial court determined that Eric understood he was ordered on two separate occasions to attend mediation and that he failed to do so. Eric confirmed his understanding that this was a failure to conform to the parties' parenting plan, and as a result, the court

imposed sanctions as provided by rule 11-4(A)(v). Eric did not object to the sanctions imposed at the time of trial.

Eric now asserts the district court violated his procedural due process rights. Specifically, he asserts the trial court deprived him of a substantial right by prohibiting him from cross-examining witnesses and presenting any witnesses on his behalf.

[4,5] However, Eric did not request a continuance or object to the sanctions imposed prior to or during trial. This court has held that failure to make a timely objection waives the right to assert prejudicial error on appeal. *Garrett v. Garrett*, 3 Neb. App. 384, 527 N.W.2d 213 (1995). In *Garrett*, the appellant asserted the trial court erroneously limited the time for his cross-examination. This court held that an appellant's failure to object to the limitation imposed by the trial judge effectively waived his right to raise that ruling as an error on appeal. *Id*. We find Eric's failure to make a timely objection at trial constitutes a waiver of his due process argument.

[6-8] Still, an appellate court may consider an issue not raised to the trial court if such issue amounts to plain error. *State v. Nadeem*, 284 Neb. 513, 822 N.W.2d 372 (2012). Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion, and we elect to review for plain error in this case. See *Nolan v. Campbell*, 13 Neb. App. 212, 690 N.W.2d 638 (2004). 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. *Id*.

Eric asserts that although Morgan requested sanctions, nothing in the record indicates the court ever informed him that his failure to mediate would have such dire consequences. Eric states that as an unrepresented litigant, he was not "fully aware of the potential consequences" brought about by failure to complete mediation. Brief for appellant at 14.

[9] This argument is without merit, as this court and the Nebraska Supreme Court have repeatedly held that a pro se litigant is held to the same standard as one who is represented by counsel, and the trial court has the inherent power to compel conformity with Nebraska procedural practice.

See *Prokop v. Cannon*, 7 Neb. App. 334, 583 N.W.2d 51 (1998). See, also, *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994).

Further, the parties agreed to mediation in the parenting plan, the court is permitted by the Nebraska Revised Statutes to order mediation, and Eric was specifically ordered on at least two occasions to attend mediation. Also, as discussed above, it is clear that the court rules allow for sanctions of the type and severity sought by Morgan, and upon review of the evidence, we find no error in the trial court's application of sanctions in accordance with its local rules.

We also find no error in the court's determination that Eric did not meet his burden to show a material change of circumstances had occurred or that it was in the best interests of the children to change custody.

The evidence shows that Morgan was the primary caregiver prior to the parties' dissolution and that the children resided with Morgan when the parties separated in November 2008. Morgan transported the children to and from school, provided meals, bathed them, and performed their bedtime routines. The parties' parenting plan states the parties agreed that the best interests of the minor children would be served by placing physical custody with Morgan. There is no evidence that Morgan attempted to prevent Eric from seeing the children for scheduled parenting time; rather, she agreed to expand Eric's parenting time without a court mandate.

In June 2010, Eric petitioned the district court for an ex parte custody order and it was granted. The evidence shows that in the 2 years Eric has had physical custody, the children have not had regular medical or dental checkups and Eric admitted he smokes in the home and around the children. The evidence also shows that Eric has resided with multiple roommates, including an "on-and-off" girlfriend and another friend. Eric asked the girlfriend to care for the children when he spent 1½ days in jail for an unpaid fine for a traffic violation. Morgan testified that she was denied visitation with the children and that Eric listens to telephone conversations between Morgan and the children. It is clear the parties have had trouble communicating.

The trial court determined that the joint custody arrangement has not worked and that the best interests of the children would be served by placing their permanent custody in Morgan, subject to the court's standard parenting plan. The evidence supports this conclusion, and having found no evidence of plain error, we affirm the decision of the trial court.

CONCLUSION

We find Eric waived his claim that his due process rights were violated, and we find no plain error in the trial court's application of sanctions for Eric's failure to comply with the parties' parenting plan and the applicable court rules.

AFFIRMED.

RIEDMANN, Judge, concurring.

I concur with the result, but would do so without reliance upon Rules of the Dist. Ct. of the 11th Jud. Dist. 11-4 (rev. 2012), for the reason that rule 11-4(A)(v) was not approved by the Nebraska Supreme Court until April 25, 2012. Prior to that date, the Nebraska Supreme Court had not approved the language that allowed the court to prohibit a party from introducing evidence as a sanction for failure to mediate. Trial in this matter was held on May 30. In terms of procedural due process, I do not believe that the short timespan between approval of the rule and the date on which it was imposed provided adequate notice to Eric. That being said, the trial court had inherent power to impose the sanction. See *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000). Morgan's two prior motions requesting such sanctions provided adequate notice to Eric that failure to mediate could result in the trial court's prohibiting him from adducing evidence. I would therefore affirm the trial court's order based upon the court's inherent power to impose the sanction.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM JOSEPH KELLY, APPELLANT.

835 N.W.2d 79

Filed June 25, 2013. No. A-12-218.

1. **Sexual Assault: Words and Phrases.** A person commits first degree sexual assault if he or she subjects another person to sexual penetration without the consent of the victim.
2. ____: ____. Sexual penetration includes sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes.
3. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.
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. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
6. **Criminal Law: Juries: Appeal and Error.** An appellate court's standard of review for criminal cases requires substantial deference to the factual findings made by the jury.
7. **Sexual Assault: Parent and Child.** A person commits incest if he or she knowingly engages in sexual penetration with any person who falls within the degrees of consanguinity set forth in Neb. Rev. Stat. § 28-702 (Reissue 2008).
8. ____: ____. Neb. Rev. Stat. § 28-702 (Reissue 2008) includes a parent engaging in sexual penetration with his or her child.
9. **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.
10. **Rules of Evidence: Appeal and Error.** 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.
11. **Rules of Evidence: Other Acts.** Before admitting evidence of the accused's commission of another offense or offenses of sexual assault under Neb. Evid. R. 414, Neb. Rev. Stat. § 27-414 (Cum. Supp. 2012), the court shall conduct a hearing outside the presence of any jury. At the hearing, the rules of evidence shall apply and the court shall apply a balancing under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), and admit the evidence unless the risk of prejudice substantially outweighs the probative value of the evidence. In assessing the balancing, the court may consider any relevant factor such as (1) the probability that the other offense occurred, (2) the proximity in time and intervening

circumstances of the other offenses, and (3) the similarity of the other acts to the crime charged.

12. ____: ____. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
13. ____: ____. Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2012), does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime. This rule includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime.
14. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
15. **Effectiveness of Counsel: Waiver: Appeal and Error.** Although Nebraska law requires that issues of ineffective assistance of counsel be raised on direct appeal or be waived, the fact that they are raised does not necessarily mean they can be resolved.
16. **Effectiveness of Counsel: Records: Appeal and Error.** In most instances, claims of ineffective assistance of counsel cannot be resolved on direct appeal, because the trial record that an appellate court reviews is devoted to issues of guilt or innocence and usually will not disclose the facts necessary to decide whether counsel's performance was deficient or whether such deficient performance prejudiced the defense.
17. ____: ____: ____. 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 Cedar County: PAUL J. VAUGHAN, Judge. Affirmed.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

SIEVERS, PIRTLE, and RIEDMANN, Judges.

RIEDMANN, Judge.

I. INTRODUCTION

William Joseph Kelly appeals from the order of the district court for Cedar County convicting him of two counts of first

degree sexual assault and two counts of incest. Kelly argues that the evidence was insufficient to support the convictions, that the district court admitted unfairly prejudicial evidence of prior alleged sexual assaults, and that his trial counsel was ineffective. Finding no merit to Kelly's arguments, we affirm.

II. BACKGROUND

Kelly was charged by second amended information with two counts of first degree sexual assault and two counts of incest against his daughter, K.K. The first count of sexual assault and first count of incest were alleged to have occurred "[b]etween on or about September 1, 2009 and on or about April 30, 2010 . . . ." The second count of sexual assault and second count of incest were alleged to have occurred "[b]etween on or about March 1, 2010 and on or about April 30, 2010 . . . at [Kelly's] Cedar County residence just before K.K.'s decision to move out of [Kelly's] Cedar County residence . . . ." A jury found Kelly guilty of all four counts.

Prior to trial, the State sought permission to elicit testimony from K.K. that Kelly had been sexually assaulting her over the entire 10-year period leading up to the charged offenses. Kelly's counsel objected, arguing that the evidence of other offenses was more prejudicial than probative, and asked that the court conduct a hearing to determine admissibility under Neb. Evid. R. 414, Neb. Rev. Stat. § 27-414 (Cum. Supp. 2012). The district court determined that the history of the relationship between Kelly and K.K. was intertwined with K.K.'s ability to relate what happened on the dates of the charged offenses and, thus, that the prior sexual assaults were not "other bad acts, per se, that would require a 414 type of hearing."

K.K. is the daughter of Kelly and his ex-wife, Jodi K. Kelly and Jodi divorced when K.K. was 4 years old. Kelly is currently married to Tiffany K., and they have three children together. After Kelly and Jodi's divorce, K.K. initially lived with Jodi in and near Sioux City, Iowa, but when she was 13, she moved in with Kelly and his family in Sioux City. In September 2009, when K.K. was 15, she moved with Kelly and his family to a farmhouse in Cedar County.

K.K. testified that Kelly "had sex with [her] and other forms of it." She remembered that the first time anything sexual happened with Kelly, she was 6 or 7 years old and Kelly made her give him a "hand job." K.K. remembered that the first time she gave Kelly oral sex was when she was 10 or 11 years old and he ejaculated in her mouth. The first time Kelly had sexual intercourse with K.K., she was approximately 13 years old; K.K. testified, "It hurt really bad. A pain I never felt before." K.K. also testified that Kelly had anal sex with her twice.

K.K. testified that these sexual assaults occurred at the family's residences, in Kelly's pickup truck, in Kelly's work truck, and once in a hotel. The frequency of incidents varied over the years, but K.K. testified that she never gave her consent. K.K. testified that she asked Kelly to stop, but that Kelly said he had a problem and could not stop.

K.K. lived in the farmhouse with Kelly and his family from September 2009 until she moved out on March 22, 2010. She testified that Kelly had sex with her at the farmhouse on the futon where she slept on approximately 5 to 10 occasions. He also had sex with her in his bedroom five or six times.

K.K. remembered one particular occasion that Kelly had sex with her. The family was having a party at K.K.'s great-grandparents' house that day. She remembered it was on a weekend but could not remember the exact day. K.K. testified that she and her grandmother went to the party early in the morning, but that K.K. left the party sometime in the afternoon to pick Kelly up from work at a truckstop and took him back to the farmhouse so he could take a shower. Before taking a shower, Kelly took K.K. into his bedroom, performed oral sex on her, and then had sexual intercourse with her. K.K. then took Kelly back to the family party.

K.K. recalled another specific incident that happened at the farmhouse. Early one morning in about the middle of the week prior to March 22, 2010, Kelly woke K.K. up and asked for oral sex. She performed oral sex on him, and he ejaculated in her mouth, but he was more aggressive than usual and seemed upset. Afterward, K.K. felt sick and vomited in her closet. K.K.

moved out of Kelly's house that weekend and moved back in with Jodi.

K.K. testified that Kelly asked her not to tell anyone about the sexual assaults because he would "get in big trouble." However, in the fall of 2010, K.K. told her friend what Kelly was doing to her. K.K.'s friend testified that K.K. told her, "[M]y dad has been raping me." According to K.K.'s friend, K.K. said Kelly had sex with her in her bedroom or anywhere in their house.

On Christmas Day in 2010, K.K. told Jodi that Kelly had been sexually abusing her since she was 5 or 6 years old. The following day, Jodi called the "Department of Human Services" and set up an interview with a child advocacy center.

As part of the interview, K.K. underwent a physical examination. The examination revealed a healed tear in the hymen consistent with blunt force penetration. At trial, the nurse who performed K.K.'s examination testified that an injury such as K.K.'s occurs infrequently and is uncommon. K.K. had never had sex with anyone other than Kelly, but a previous boyfriend had consensually digitally penetrated her. The medical director of the child advocacy center testified that the injury found on K.K. would be something that would be painful and would not be consistent with a nonpainful digital penetration. He stated that digital penetration occurring when a teenage girl is sexually aroused would be "extremely unlikely" to cause the injury found on K.K.

Several witnesses testified on Kelly's behalf, including his wife, Tiffany; his mother, Nancy K.; and his sister, Stacy C. Tiffany, Nancy, Nancy's brother, and Kelly testified that the only parties the family had during the time K.K. lived in the farmhouse were on Sunday, January 10, and Sunday, March 14, 2010. Kelly worked as a truckdriver, and his daily trucking logs were admitted into evidence at trial. The logs indicate that Kelly was off duty all day on January 10 and March 14.

During the cross-examinations of Tiffany, Nancy, and Stacy, the State questioned the witnesses about statements they had made during recorded conversations while visiting Kelly in jail. In voicing his objection to these lines of questioning,

Kelly's attorney admitted that he had been provided copies of the hours of recorded conversations but had not listened to them.

Kelly testified in his own behalf. He testified that K.K. had never picked him up when he got off work. He stated that he arrived at the parties on January 10 and March 14, 2010, with Tiffany and his three younger children. Kelly denied ever sexually assaulting K.K.

On the morning of the final day of trial, Kelly's counsel asked the court to allow him to present testimony from six additional witnesses who would testify as to the dates of the family parties. He was allowed to make an offer of proof that the witnesses would testify that the parties were, in fact, held on Sunday, January 10, and Sunday, March 14, 2010. The court refused to allow the testimony, because it would be unfairly prejudicial to the State and the evidence would be cumulative.

The jury ultimately found Kelly guilty of all four counts. Kelly timely appeals his convictions.

III. ASSIGNMENTS OF ERROR

Kelly argues that (1) the evidence was insufficient to sustain his convictions, (2) the trial court erred in admitting unfairly prejudicial evidence of prior alleged sexual assaults, and (3) his trial counsel provided ineffective assistance.

IV. ANALYSIS

1. Sufficiency of Evidence

(a) First Degree Sexual Assault

[1,2] The State charged Kelly with one count of first degree sexual assault and one count of incest occurring "[b]etween on or about September 1, 2009 and on or about April 30, 2010 . . . ," and a second count of first degree sexual assault and a second count of incest occurring "[b]etween on or about March 1, 2010 and on or about April 30, 2010 . . . ." A person commits first degree sexual assault if he or she subjects another person to sexual penetration without the consent of the victim. Neb. Rev. Stat. § 28-319(1)(a) (Reissue 2008). Sexual penetration includes:

> sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes.

Neb. Rev. Stat. § 28-318(6) (Reissue 2008 & Cum. Supp. 2012).

Kelly first contends that the evidence is insufficient to support his convictions for first degree sexual assault. He argues that the State failed to present corroborating evidence and that K.K.'s testimony is not credible. Kelly's argument conflicts with the 1989 enactment of Neb. Rev. Stat. § 29-2028 (Reissue 2008). Since 1989, the State has not been required to corroborate a victim's testimony in cases of first degree sexual assault. See *id*. So, K.K.'s testimony alone is sufficient if believed by the finder of fact.

[3-6] In reviewing a criminal conviction, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009). 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*. Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *Id*. And our standard of review for criminal cases requires substantial deference to the factual findings made by the jury. *Id*.

The State was required to prove that Kelly subjected K.K. to sexual penetration without her consent between September 1, 2009, and April 30, 2010, and again between March 1 and April 30, 2010. Kelly and his family moved into the farmhouse in September 2009, and K.K. moved out in March 2010. K.K. testified that Kelly had sex with her on a futon in the farmhouse on more than one occasion. K.K. testified that she never gave her consent to any sexual activities with Kelly.

K.K. recalled one particular incident that occurred on the day of a party at her great-grandparents' house. K.K. could

not remember the exact date but testified that it occurred on a weekend. She remembered going to the party early in the morning with her grandmother but leaving in the afternoon to pick Kelly up from work at a truckstop. Before going back to the party, K.K. and Kelly stopped at the farmhouse, where he performed oral sex on K.K. and then had sexual intercourse with her.

K.K. also testified about another instance the week before she moved out of the farmhouse in which Kelly forced her to perform oral sex on him early in the morning. K.K. testified that this incident occurred "[a]bout middle of the week" prior to Monday, March 22, 2010.

Kelly argues that his work logbooks and truck "GPS" records contradict the two specific incidents about which K.K. testified. Several witnesses testified that the only family parties during this time period were on Sunday, January 10, and Sunday, March 14, 2010. Kelly's work records indicate that he was off duty all day on January 10 and March 14.

However, K.K. testified she remembered only that the party was on a weekend but could not recall the exact date. It was the defense witnesses who placed the parties on January 10 and March 14, 2010. The logbooks and GPS records would corroborate K.K.'s testimony on other dates; for example, on Saturday, January 16, Kelly got off work at 1:45 p.m., and on Saturday, March 13, Kelly finished work at 4:15 p.m. This evidence is sufficient for the jury to have found that the party occurred on a date other than those suggested by Kelly.

Additionally, there was evidence presented from which the jury could have inferred that Tiffany, Nancy, and Stacy used Kelly's logbooks to determine party dates that would directly contradict K.K.'s testimony. Stacy was cross-examined on the following conversation she had while visiting Kelly in jail:

> Stacy: Did mom tell you we found your log books?
>
> [Kelly]: What?
>
> Stacy: We found your log books.
>
> [Kelly]: Yeah, that's what she said. That would take care of a lot of stuff there.
>
> Stacy: A lot, just a lot, me and Tiff are up to about 2:00 a.m. going through everything and all that so —

> [Kelly]: Did you figure out how all of them lines work?
>
> Stacy: Uh-huh. We put it all on the calendar and everything. I know it stinks right now, but it will work out. It will all work out and then you know who's going to have to deal with it.
>
> [Kelly]: Uh-huh.

Stacy admitted on cross-examination that the person who would "have to deal with it" would be K.K. During Tiffany's cross-examination, she was asked whether she created the defense herself about the logs, and she answered, "Yes." On cross-examination of Nancy, the State refreshed her recollection of a recorded conversation between herself and Kelly while Kelly was in jail in which Nancy stated, "[W]e've got a plan," to which Kelly responded, "Well, I hope so."

As to the second specific incident, K.K. testified it happened in approximately the middle of the week before March 22, 2010, in the early morning hours. According to Kelly's logbooks, he began work at 7:15 a.m. on Monday, March 15, and was off duty in the early morning hours of Saturday, March 20, and Sunday, March 21. Again, this evidence is sufficient for the jury to have found that the incident occurred on a date other than Wednesday, March 17.

Even without the two specific incidents K.K. recalled, there was sufficient evidence to support the convictions for first degree sexual assault because of K.K.'s testimony that Kelly had nonconsensual sexual penetration with her at the farmhouse on numerous occasions during the time periods in the second amended information. The evidence satisfies the elements of first degree sexual assault. While Kelly denied the allegations, a jury determined otherwise. The conflicts in the evidence are not for us to resolve, and we give substantial deference to the jury's factual findings. We conclude the State presented sufficient evidence to prove the first degree sexual assault convictions beyond a reasonable doubt.

(b) Incest

[7,8] Kelly also argues the record lacks sufficient evidence to support his convictions for incest. According to Neb. Rev. Stat. § 28-703 (Reissue 2008), a person commits incest if he or

she knowingly engages in sexual penetration with any person who falls within the degrees of consanguinity set forth in Neb. Rev. Stat. § 28-702 (Reissue 2008). Section 28-702 includes a parent engaging in sexual penetration with his or her child.

It is undisputed that Kelly is K.K.'s biological father. This, in addition to the evidence and testimony summarized above, is sufficient to support the incest convictions. Therefore, Kelly's argument is without merit.

2. Improperly Admitted Evidence

[9,10] Kelly argues that the trial court erred in allowing K.K. to testify about prior sexual assaults allegedly committed by Kelly or, in the alternative, that the court erred by denying Kelly's request for a hearing pursuant to § 27-414. 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. Kibbee*, 284 Neb. 72, 815 N.W.2d 872 (2012). 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. *Id.*

At the outset, we note that the State argues Kelly failed to properly preserve this issue for appeal because he did not object to this testimony on the basis of § 27-414 at trial. At trial, K.K. began describing an incident she said occurred when she was 6 or 7 years old. Kelly objected, stating, "Your Honor, for the record, I'm going to object as to relevance. We know what he's charged with, the dates that we're charged with. Apparently we're going to go back in history." Although Kelly did not explicitly identify rule 414 as his objection, his reference to going "back in history," combined with the fact that admissibility of this evidence had previously been addressed by the court, is sufficient for us to address this assignment of error.

[11] In relevant part, § 27-414 provides:

> (3) Before admitting evidence of the accused's commission of another offense or offenses of sexual assault

> under this section, the court shall conduct a hearing outside the presence of any jury. At the hearing, the rules of evidence shall apply and the court shall apply a section 27-403 balancing and admit the evidence unless the risk of prejudice substantially outweighs the probative value of the evidence. In assessing the balancing, the court may consider any relevant factor such as (a) the probability that the other offense occurred, (b) the proximity in time and intervening circumstances of the other offenses, and (c) the similarity of the other acts to the crime charged.

[12] Prior to § 27-414, which became operative January 1, 2010, evidence of prior bad acts in sexual assault cases was governed by Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[13] Section 27-404(2) (Cum. Supp. 2012) does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime. *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012). This rule includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime. *Id*. The Nebraska Supreme Court has explained:

> "'"'Where evidence of other crimes is "so blended or connected, with the one[s] on trial [so] that proof of one incidentally involves the other[s]; or explains the circumstances; or tends logically to prove any element of the crime charged," it is admissible as an integral part of the immediate context of the crime charged. When the other crimes evidence is so integrated, it is not extrinsic

> and therefore not governed by [r]ule 404 . . . . As such, prior conduct that forms the factual setting of the crime is not rendered inadmissible by rule 404. . . . The State is entitled to present a coherent picture of the facts of the crime charged, and evidence of prior conduct that forms an integral part of the crime charged is not rendered inadmissible under rule 404 merely because the acts are criminal in their own right, but have not been charged. . . . A court does not err in finding rule 404 inapplicable and in accepting prior conduct evidence where the prior conduct evidence is so closely intertwined with the charged crime that the evidence completes the story or provides a total picture of the charged crime. . . .'"'"'

State v. Robinson, 271 Neb. 698, 714, 715 N.W.2d 531, 549 (2006).

We do not read rule 414 to change the law regarding acts which are inextricably intertwined to the charged offenses. Because they were not considered extrinsic and therefore not subject to rule 404 before, they are not extrinsic and not subject to rule 414 now. As a result, even though evidence of prior sexual assaults may be considered prior bad acts, a hearing under rule 414 is not required if this evidence forms the factual setting of the charged offenses and is necessary to present a complete and coherent picture of the facts.

In the present case, we conclude the district court did not abuse its discretion in determining the evidence of prior sexual assaults was inextricably intertwined with the charged offenses. The 10-year history between Kelly and K.K. forms the factual setting of the crimes at issue. Although some of the events to which K.K. testified were more remote in time, they were necessary to present a coherent historical picture of the facts leading up to the charged offenses for the jury. As such, a hearing pursuant to rule 414 was not required.

3. Ineffective Assistance of Counsel

Kelly argues his trial counsel was ineffective for (1) failing to request a jury instruction limiting the jury's consideration of the evidence of prior offenses of sexual assault, (2) failing to adequately prepare for trial by listening to the recordings of

Kelly's conversations with visitors at the jail, and (3) failing to endorse additional witnesses who would have corroborated the testimony called into question by jail recordings.

[14-17] To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. See *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010). Although Nebraska law requires that issues of ineffective assistance of counsel be raised on direct appeal or be waived, the fact that they are raised does not necessarily mean they can be resolved. See *id*. In most instances, they cannot, because the trial record that an appellate court reviews is "'devoted to issues of guilt or innocence'" and usually "'will not disclose the facts necessary to decide either prong of the . . . analysis.'" *Id*. at 607, 780 N.W.2d at 34. 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, supra*.

(a) Limiting Jury Instruction

Kelly claims that his trial counsel was ineffective in failing to request a limiting jury instruction. An evaluation of trial counsel's actions would require an evaluation of trial strategy and of matters not contained in the record. We conclude that the record on direct appeal is not sufficient to adequately review this claim.

(b) Recorded Jail Conversations

Kelly argues that his trial counsel was ineffective in failing to listen to the recorded jail conversations. Because the record does not disclose the contents of the recorded conversations, we cannot determine whether failure of trial counsel to listen to and utilize the conversations at trial prejudiced Kelly's defense. Therefore, we conclude that the record is not sufficient to adequately review this claim.

(c) Additional Witnesses

Kelly asserts that his trial counsel was ineffective in failing to timely endorse additional witnesses whose testimony would

have rehabilitated the testimony of Tiffany, Nancy, and Stacy which had been impeached. The record on appeal is not sufficient to review this claim, because it does not indicate why the proposed additional witnesses were not included on the original witness list, nor does the record disclose trial counsel's strategy in trial preparation.

V. CONCLUSION

We find that there was sufficient evidence to sustain the convictions on all four counts. It was not an abuse of discretion for the trial court to determine that evidence of prior sexual assaults by Kelly against K.K. was inextricably intertwined with the charged offenses and deny Kelly's request for a rule 414 hearing. We conclude that the record is not sufficient to review the grounds for Kelly's ineffective assistance of counsel claims.

AFFIRMED.

EDWIN H. KUHNEL, APPELLANT, V.
BNSF RAILWAY COMPANY,
A CORPORATION, APPELLEE.
834 N.W.2d 803

Filed June 25, 2013. No. A-12-296.

1. **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.
2. **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.
3. **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.
4. **Jury Instructions: Pleadings: Evidence.** A trial court, whether requested to do so or not, has a duty to instruct the jury on issues presented by the pleadings and the evidence.
5. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading,

and adequately cover issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.

6. **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 interpretive decisions of the federal courts construing the act.
7. **Railroads: Employer and Employee.** A railroad has a nondelegable duty to provide its employees with a reasonably safe place to work.
8. **Federal Acts: Railroads: Employer and Employee.** Although not explicitly stated in the statutes, a railroad's duty to use reasonable care in furnishing employees a safe place to work has become an integral part of the Federal Employers' Liability Act.
9. **Verdicts: Juries: Presumptions: Words and Phrases: Appeal and Error.** The "general verdict" rule, which is also referred to as the "two issue" rule, is a policy rule which provides that where a general verdict is returned for one of the parties, and the mental processes of the jury are not tested by special interrogatories to indicate which issue was determinative of the verdict, it will be presumed that all issues were resolved in favor of the prevailing party, and, where a single determinative issue has been presented to the jury free from error, any error in presenting another issue will be disregarded.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Reversed and remanded for a new trial.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., and James L. Cox, of Brent Coon & Associates, for appellant.

Nichole S. Bogen and Thomas C. Sattler, of Sattler & Bogen, L.L.P., for appellee.

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

INBODY, Chief Judge.

INTRODUCTION

Edwin H. Kuhnel appeals from a jury verdict in favor of BNSF Railway Company (BNSF) on his claim of a workplace injury under the Federal Employers' Liability Act (FELA) and the subsequent denial of his motion for a new trial on the basis that the jury was not instructed properly. On appeal, Kuhnel contends that the district court erred in failing to instruct

the jury on BNSF's duty to provide a reasonably safe place to work.

STATEMENT OF FACTS

In July 2009, Kuhnel filed a complaint against BNSF pursuant to FELA, alleging that he injured his lower back when he was thrown against a locomotive cab seat during the recoupling of train cars. Kuhnel claimed that his injuries were caused, in whole or in part, by BNSF's negligent breach of its duty to exercise ordinary care to provide its employees with a reasonably safe place to work, in, among other things, failing to properly train engineers regarding the operation of distributive power; failing to provide an accurate car count to guard against hard coupling of train cars; failing to comply with specific federal regulations; and failing to comply with BNSF's own operating rules, safety rules, train handling rules, and general code of operating rules. A jury trial was held. During the jury instruction conference, both Kuhnel and BNSF tendered several jury instructions and proposed jury verdict forms to the district court and BNSF tendered requested verdict interrogatories. Among the instructions tendered by Kuhnel was the following instruction:

PLAINTIFF'S TENDERED
INSTRUCTION NO. 5

> At the time and place in question, [BNSF] had a continuing duty as an employer to use ordinary care under the circumstances in furnishing . . . Kuhnel . . . with a reasonably safe place in which to work. It was also [BNSF's] continuing duty to use ordinary care under the circumstances to maintain and keep such place of work in a reasonably safe condition.
>
> This does not mean that [BNSF] is a guarantor or insurer of the safety of the place to work. The extent of [BNSF's] duty is to exercise ordinary care under the circumstances to see that the place in which the work is to be performed is reasonably safe under the circumstances shown by the evidence in the case.
>
> [BNSF's] duty to provide a safe place to work may not be delegated to a third party. [BNSF] has a duty to

provide a safe place to work even when an employee's duties require the employee to enter property or use equipment owned or controlled by a third party.

[BNSF's] duty includes the responsibility to inspect the premises where [its] employees will be working and their equipment. [BNSF] must take reasonable precautions to protect its employees from possible danger whether on [its] own premises or on the premises of third parties where [its] employees are required to work.

During the conference, the court stated that "both parties have filed proposed instructions and the court will make a finding that those will not be given so . . . if you think an additional record is necessary that's fine." Although Kuhnel's attorney did state objections to the jury instructions both before and after the court's aforementioned comments, he did not make any objections related to the instructions as to BNSF's duty as an employer to provide Kuhnel with a reasonably safe place to work. At the conclusion of the jury instruction conference, the court overruled all objections raised by both parties and refused all instructions tendered by both Kuhnel and BNSF, noting that "both parties . . . have filed tendered instructions [and] all tendered jury instructions will not be given, right or wrong." Instead, the court adopted its own instructions which it gave the jury, including the following:

INSTRUCTION NO. 2
I. CLAIMS OF THE PARTIES
A. Plaintiff's Complaint

. . . .

. . . Kuhnel further claims that his injuries were caused, in whole or in part, by BNSF's negligence, as follows:

a. Failing to provide Kuhnel with a reasonably safe place to work[.]

. . . .

C. BNSF's Affirmative Defenses

BNSF claims that Kuhnel's injuries were caused, in whole or in part, by his own negligence as follows:

a. Failing to exercise reasonable care; and

b. Failing to maintain a proper lookout; and

c. Failing to utilize reasonable precautions for his own safety; and

d. Failing to be alert and anticipate train movements; and

e. Failing to employ safe work habits and procedures.

. . . .

The claims of the parties are only allegations. Except for admissions, the claims frame the issues you will decide by your verdict, but they are not to be regarded as evidence in the case.

II. BURDENS OF PROOF

A. Plaintiff's Burden of Proof (Negligence)

Before Kuhnel can recover against BNSF he must prove, by the greater weight of the evidence, all of the following:

1. That at the time of the alleged accident Kuhnel was working in the course and scope of his employment by BNSF; and

2. That BNSF was negligent in one or more of the ways claimed by Kuhnel; and

3. That BNSF's negligence was a cause, in whole or in part, to some damage to Kuhnel; and

4. The nature and extent of Kuhnel's damages.

. . . .

III. EFFECT OF FINDINGS

1. If you find that Kuhnel failed to meet his burden of proof, then your verdict must be for BNSF on Verdict Form No. 1, and you will NOT complete any of the other verdict forms.

2. If you find that Kuhnel has met his burden of proof and that BNSF has not established its claim that Kuhnel was also negligent, then your verdict must be for Kuhnel and using these instructions you must determine the amount of damages suffered by Kuhnel and complete only Verdict Form [No.] 2.

3. If you find that both Kuhnel and BNSF have met their respective burdens of proof regarding negligence and contributory negligence, then you must determine

> to what extent Kuhnel's negligence and BNSF's negligence contributed to Kuhnel's damages, expressed as a percentage of 100 percent. You will first determine Kuhnel's total damages in accordance with Instruction No. 3 without regard to Kuhnel's own negligence. You will then reduce those damages by the percentage of Kuhnel's own negligence. For example, if Kuhnel's total damages were $100.00 and Kuhnel's percent of the total negligence was 25%, you would reduce his damages by 25% of $100.00, or $25.00. You will do all of this by completing only Verdict Form No. 3.

During deliberations, the jury submitted a question to the court which stated: "Can the lack of a rule or rules addressing standing in the cab of a locomotive while coupling operations are taking place be considered negligence on the part of BNSF[?]" The court's response stated: "You must decide the case on the court's written instructions and the evidence received during trial." The jury returned a verdict for BNSF, using verdict form No. 1, finding that Kuhnel had not met his burden of proof. Kuhnel filed a motion for a new trial, alleging that none of the jury instructions given by the court properly addressed BNSF's duty of care under FELA to provide a safe place to work and that the omission erroneously left the jury without guidance as to BNSF's duty of care. Kuhnel's motion for a new trial also alleged that he had tendered a proposed jury instruction relating to BNSF's duty under FELA and that the court had declined to so instruct the jury.

On March 16, 2012, citing the same portions of jury instruction No. 2 as quoted above, the district court overruled Kuhnel's motion for a new trial. The court concluded that although "Kuhnel's suggested jury instruction is well taken . . . the instructions given to the jury, taken as a whole, sufficiently instructed the jury on the law of the case and did not prejudice [Kuhnel]." The court concluded that its instructions "included the substance of Kuhnel's requested instruction regarding BNSF's duty to provide a reasonably safe place to work."

ASSIGNMENT OF ERROR

Kuhnel contends that the district court committed reversible error when it failed to instruct the jury on BNSF's duty to provide a reasonably safe place to work.

STANDARD OF REVIEW

[1] Whether jury instructions given by a trial court are correct is a question of law. *State v. Payne-McCoy*, 284 Neb. 302, 818 N.W.2d 608 (2012); *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012). 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. Payne-McCoy, supra*; *State v. Nolan, supra*.

ANALYSIS

Kuhnel contends that the district court committed reversible error when it failed to instruct the jury on BNSF's duty to provide a reasonably safe place to work. However, because Kuhnel did not object to the jury instructions based upon a failure to instruct the jury on BNSF's duty to provide a reasonably safe place to work, our review of the jury instructions is limited to plain error review. See *Tolliver v. Visiting Nurse Assn.*, 278 Neb. 532, 771 N.W.2d 908 (2009) (failure to object to jury instruction after it has been submitted to counsel for review precludes raising objection on appeal absent plain error).

[2,3] 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); *Centurion Stone of Nebraska v. Trombino*, 19 Neb. App. 643, 812 N.W.2d 303 (2012). 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, supra*; *Centurion Stone of Nebraska v. Trombino, supra*.

[4,5] In considering whether plain error exists in the instant case, we are cognizant of the requirement that the trial court,

whether requested to do so or not, has a duty to instruct the jury on issues presented by the pleadings and the evidence. *Centurion Stone of Nebraska v. Trombino, supra*. See, *Nguyen v. Rezac*, 256 Neb. 458, 590 N.W.2d 375 (1999); *Sand Livestock Sys. v. Svoboda*, 17 Neb. App. 28, 756 N.W.2d 299 (2008). In our review, we must read all the jury instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. *Nguyen v. Rezac, supra*. See *Centurion Stone of Nebraska v. Trombino, supra*.

[6-8] In considering whether the jury instructions as given by the trial court in the instant case were adequate, we look to the substantive federal law—FELA—which formed the basis of Kuhnel's lawsuit. 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 interpretive decisions of the federal courts construing FELA. *Ballard v. Union Pacific RR. Co.*, 279 Neb. 638, 781 N.W.2d 47 (2010). "'A railroad has a non-delegable duty to provide its employees with a reasonably safe place to work.'" *Deviney v. Union Pacific RR. Co.*, 18 Neb. App. 134, 138-39, 776 N.W.2d 21, 26 (2009), quoting *Pehowic v. Erie Lackawanna Railroad Company*, 430 F.2d 697 (3d Cir. 1970). Although not explicitly stated in the statutes, the railroad's duty to use reasonable care in furnishing employees a safe place to work has become "an integral part" of FELA. *Ragsdell v. Southern Pacific Transp. Co.*, 688 F.2d 1281, 1283 (9th Cir. 1982).

The jury instructions given by the district court set forth that Kuhnel claimed that BNSF was negligent, inter alia, for failing to provide him with a reasonably safe place to work, and the jury instructions specifically informed the jury that the claims of the parties were only allegations and were not to be regarded as evidence in the case. Rather than properly instructing the jury that BNSF had a nondelegable duty under federal law to provide Kuhnel with a reasonably safe place to work, the jury instructions as given erroneously left it up to the jury to decide,

as a factual determination, whether BNSF had a duty to provide a reasonably safe place to work.

A similar situation was considered by the Seventh Circuit in *Schmitz v. Canadian Pacific Ry. Co.*, 454 F.3d 678 (7th Cir. 2006). In *Schmitz*, a railroad worker who was walking alongside the railroad tracks late at night inspecting his train's brakes with a lantern was injured when he stepped into a hole obscured by vegetation. The worker sued under FELA, alleging that the railroad negligently allowed trackside vegetation to grow so tall that he could not see the hole. A federal regulation imposed a duty on the railroad to control vegetation, and, although the trial judge agreed during the jury instruction conference to give an instruction on the duty created by the regulation, the reference to the duty was removed before the court instructed the jury. The Seventh Circuit found that by failing to instruct the jury on the federal regulation, the trial court erroneously left it up to the jury to decide whether the railroad had a duty to keep the vegetation trimmed, when the question had already been answered affirmatively by federal regulation. The court noted that "there is a world of difference between telling the jury that [the plaintiff] alleged the railroad should have taken a particular precaution and telling the jury that the federal law *required* the railroad to take that very precaution." *Schmitz v. Canadian Pacific Ry. Co.*, 454 F.3d at 684 (emphasis in original). The Seventh Circuit found that the jury's role should have been limited to deciding whether the railroad violated the regulation and whether the violation was a cause of the plaintiff's injury and that the plaintiff's case was prejudiced by the court's withdrawal of the instruction on the federal regulation, requiring that the case be remanded for a new trial on liability.

Like the situation in *Schmitz v. Canadian Pacific Ry. Co., supra*, the jury instruction given in the instant case erroneously left it up to the jury to decide whether BNSF had a duty to provide Kuhnel with a reasonably safe place to work. Because FELA already answered that question affirmatively—BNSF had the duty to provide a reasonably safe workplace—the jury instructions, as given by the district court, did not correctly state the law. By submitting the question of whether BNSF had

a duty to provide a safe work environment for its employees, a legal issue that was controlled by federal law, the district court erroneously turned this legal issue into a threshold question of fact for the jury, resulting in prejudice to Kuhnel. Despite this, BNSF contends that this court may ignore the error committed by the district court when it failed to instruct the jury as to BNSF's duty to provide a reasonably safe place to work, because of the "general verdict" rule announced in *Lahm v. Burlington Northern RR. Co.*, 6 Neb. App. 182, 571 N.W.2d 126 (1997).

[9] A general verdict by a jury "pronounce[s], generally, upon all or any of the issues either in favor of the plaintiff or defendant." Neb. Rev. Stat. § 25-1122 (Reissue 2008). The "general verdict" rule, which is also referred to as the "two issue" rule, is a policy rule which provides that where a general verdict is returned for one of the parties, and the mental processes of the jury are not tested by special interrogatories to indicate which issue was determinative of the verdict, it will be presumed that all issues were resolved in favor of the prevailing party, and, where a single determinative issue has been presented to the jury free from error, any error in presenting another issue will be disregarded. See *Lahm v. Burlington Northern RR. Co., supra*.

This court applied the "general verdict" rule in *Lahm v. Burlington Northern RR. Co., supra*, wherein we considered whether a general verdict returned by a jury could stand where one issue was submitted to the jury without error and where another issue may have been submitted upon erroneous instructions. In *Lahm*, the jury was instructed on both the merits of the plaintiff's FELA claim and the statute of limitations. The defendant railroad requested a special verdict form requiring the jury to answer whether the action violated the statute of limitations, but the plaintiff resisted and the trial court ultimately gave the jury only a general verdict form. The jury delivered a general verdict in favor of the defendant. We found that in a case such as *Lahm*, where the defendant had specifically requested a special verdict form, which was resisted by the plaintiff, application of the "general verdict" rule was appropriate. We upheld the jury's verdict in favor of

the defendant on the basis that the statute of limitations issue had been properly submitted to the jury free from error and there was sufficient evidence to support a finding in favor of the defendant on that determinative issue.

Unlike *Lahm v. Burlington Northern RR. Co., supra*, in which the "general verdict" rule was applied where the case had been submitted to the jury on two independent alternatives upon which the jury could have based its decision (FELA and the statute of limitations) and a single determinative issue had been properly presented to the jury free from error, the instant case has a substantial, and crucial, difference. In the instant case, the case was submitted to the jury on Kuhnel's negligence claim against BNSF, which could be proved in one or more different ways, and BNSF's affirmative defense that Kuhnel was contributorily negligent, which also could be proved in one or more different ways. However, the jury never reached BNSF's affirmative defense, as evidenced by its return of verdict form No. 1 finding that Kuhnel had not met his burden of proof. Since the only issue upon which the jury could have reached its verdict was Kuhnel's claim of negligence, upon which it was erroneously instructed, there was no independent issue, free from error, upon which the jury could have reached its decision. Therefore, the "general verdict" rule is not applicable to the instant case.

CONCLUSION

Having viewed the jury instructions given as a whole, we find that the district court's failure to instruct the jury of BNSF's duty to provide a safe place to work prejudiced Kuhnel because the jury was required to decide whether BNSF had a duty to provide a safe place to work, rather than being limited to the factual questions of whether BNSF violated its duty to provide a safe place to work and whether the violation resulted in Kuhnel's injury. Because of this failure and the resulting prejudice, we reverse the jury verdict in favor of BNSF and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

BENJAMIN D. JOHNSON, APPELLANT, V. VANESSA R. JOHNSON, APPELLEE.

834 N.W.2d 812

Filed June 25, 2013. No. A-12-587.

1. **Modification of Decree: Child Support: Appeal and Error.** An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Motions to Dismiss: Directed Verdict: Appeal and Error.** For purposes of appellate review, a motion to dismiss and a motion for directed verdict are treated similarly.
4. **Motions to Dismiss: Proof.** In the context of a motion to dismiss made at the close of all of the evidence in a proceeding on an application to modify a dissolution decree, in a court's review of evidence on a motion to dismiss, the nonmoving party is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can be reasonably drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and the plaintiff has made a prima facie case, the motion to dismiss should be overruled.
5. **Motions to Dismiss.** If, on a motion to dismiss, there is any evidence in favor of the nonmoving party, the case may not be decided as a matter of law.
6. ____. When a trial court sustains a motion to dismiss, it resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw only one conclusion.
7. **Modification of Decree: Child Support: Proof.** A party is entitled to a modification of an award of child support if he proves a material change in circumstances which has occurred since the entry of the decree or a previous modification and if such change was not contemplated when the decree was entered.
8. **Child Support: Evidence.** Earning capacity should be used in determining a child support obligation only when there is evidence that the parent can realize that capacity through reasonable efforts.
9. ____: ____. When the evidence demonstrates that a parent is unable to realize a particular earning capacity by reasonable efforts, it is clearly untenable for the trial court to attribute that earning capacity to the parent for purposes of determining child support.
10. **Modification of Decree: Child Support: Rules of the Supreme Court.** Changes in career or occupation which reduce the ability to provide child support are allowed, so long as they are made in good faith, and future support obligations should generally be based on present income and the Nebraska Child Support Guidelines.
11. **Modification of Decree: Child Support: Evidence.** The decision of whether to modify a child support obligation must be based upon the evidence presented by

the parties, and it would be improper for the court to focus on anything but the most recent circumstances ascertainable from the evidence.

12. **Modification of Decree: Child Support.** Among the relevant factors to be considered in determining whether a material change of circumstances has occurred is any change in the financial position of the parent obligated to pay child support.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Reversed and remanded for further proceedings.

Benjamin M. Belmont and Amanda M. Phillips, of Brodkey, Peebles, Belmont & Line, L.L.P., for appellant.

Brent M. Kuhn, of Harris Kuhn Law Firm, L.L.P., for appellee.

Inbody, Chief Judge, and Irwin and Moore, Judges.

Irwin, Judge.

I. INTRODUCTION

Benjamin D. Johnson appeals an order of the district court for Douglas County, Nebraska, granting a directed verdict at the close of Benjamin's evidence on his complaint for modification of a marital dissolution decree. On appeal, Benjamin asserts that the court erred in granting the directed verdict, in finding that he did not demonstrate a material change of circumstances, and in denying his proffer of evidence of his living expenses. We find that the court erred in denying relevant evidence, in finding that Benjamin had failed to demonstrate a material change of circumstances, and in granting a motion for directed verdict. As such, we reverse, and remand for further proceedings.

II. BACKGROUND

This is the second appeal related to Benjamin's complaint for modification of the decree dissolving his marriage to Vanessa R. Johnson. See *Johnson v. Johnson*, No. A-10-849, 2011 WL 2427055 (Neb. App. June 14, 2011) (selected for posting to court Web site). We dismissed the prior appeal for lack of jurisdiction. Much of the relevant factual background

concerning this case is set forth in our memorandum opinion in the prior appeal and recounted as necessary here.

In October 2006, the district court entered an order dissolving the parties' marriage, providing the parties with joint legal custody of their two children and providing Vanessa with primary physical possession, and ordering Benjamin to pay child support and alimony. In June 2009, Benjamin filed a complaint to modify, seeking to reduce his child support and alimony obligations and to modify his responsibility for nonreimbursed medical expenses. Vanessa denied that there had been a material change of circumstances, but cross-petitioned for other modifications.

On May 14, 2010, the parties appeared before a district court referee. At the outset of the hearing, it was determined that the issues to be heard before the referee were limited to those raised by Benjamin and that the issues raised by Vanessa would be heard by the district court judge at a later time.

At the hearing before the referee, Benjamin was the only witness to testify. Benjamin testified that his complaint for modification was based upon a substantial decrease in his income compared to his earning capacity at the time of the dissolution decree. Benjamin testified that prior to the dissolution trial, he had been employed in a job where he was earning approximately $140,000 per year. He testified that he had left that employment prior to the dissolution trial because of a hostile workplace environment and had started his own business. He testified that at the time of the dissolution trial and decree, he had anticipated he would be able to continue earning income at the same rate as his prior employment and that the child support and alimony awards had been based on his earning capacity, because he had no monthly income at the time of the decree. According to Benjamin, he testified at the dissolution trial concerning the fact that he had left his employment prior to the dissolution trial.

Benjamin testified that between October 2006 and June 2009, his business actually resulted in no earned income. He testified that during that time, he exhausted his severance from his prior employment and liquidated his retirement account of more than $200,000 in order to satisfy his obligations

under the dissolution decree. He testified that because of the economic recession during that time, his business venture failed. He testified that he had sought comparable employment and had applied for jobs consistent with the earning capacity used in the dissolution decree, including applications for employment with "Kiewit," "Mutual of Omaha," and "Cox Communications." He eventually secured employment, but was earning only $75,000 per year.

During the hearing before the referee, Benjamin offered an exhibit detailing his monthly expenses. He testified that the failure of his business venture and his inability to secure employment commensurate with the earning capacity he had anticipated at the time of the dissolution decree had resulted in an accumulation of debt and related monthly expenses.

Benjamin also testified that Vanessa had been unemployed at the time of the dissolution decree, but had since succeeded in running a daycare business and earning income of approximately $60,000 per year. Benjamin offered tax returns to support his testimony.

After Benjamin's testimony, he rested and Vanessa moved for a directed verdict. Vanessa asserted to the referee that Benjamin had failed to establish a prima facie case demonstrating a material change of circumstances, because Benjamin's change of employment and decrease in income had occurred prior to the entry of the dissolution decree. Benjamin argued that the motion should be overruled because, at the time of the dissolution trial, he had expected to keep earning at the same rate as his prior employment, but had not actually been able to do so.

The referee recommended that the directed verdict be granted. The referee found that there had been no change of circumstances and that, if anything, Benjamin was actually earning more at the time of the hearing than at the dissolution trial, because he had no actual income at the time of the dissolution trial. The referee also found that Benjamin had voluntarily left his former employment, making it appropriate to base his support obligations on earning capacity instead of actual earnings.

On August 12, 2010, the district court adopted the referee's recommendation in all respects. Benjamin perfected an appeal to this court, which appeal we dismissed because we found that the district court's order adopting the referee's recommendation did not dispose of the issues that the parties had agreed would not be addressed by the referee. On remand, Vanessa withdrew her requests for relief and the district court specifically dismissed her cross-complaint for modification. The district court then, again, adopted and confirmed the report and recommendation of the referee. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Benjamin has assigned that the district court erred in dismissing his complaint for modification of child support and alimony by finding that he had not proven a prima facie case demonstrating a material change of circumstances and erred in not admitting proffered evidence of his living expenses.

IV. ANALYSIS

Benjamin challenges the findings that he failed to prove a prima facie case demonstrating a material change of circumstances and that proffered evidence of his living expenses was not relevant. Both of these were findings recommended by the referee and adopted by the district court. We find both to be erroneous.

[1,2] An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion. *Collins v. Collins*, 19 Neb. App. 529, 808 N.W.2d 905 (2012). A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

1. Granting of Directed Verdict

In the present case, it is first worth noting that the referee stopped the hearing at the conclusion of Benjamin's evidence, concluding that Vanessa's motion for directed verdict should

be sustained. As such, the referee never heard any evidence from Vanessa and the only evidence before the referee was that adduced by Benjamin. We conclude that the district court abused its discretion in adopting the referee's recommendation of a directed verdict at the close of Benjamin's evidence. Benjamin clearly adduced sufficient evidence to demonstrate a prima facie case of a material change of circumstances.

[3-6] For purposes of appellate review, a motion to dismiss and a motion for directed verdict are treated similarly. See *American Central City v. Joint Antelope Valley Auth.*, 281 Neb. 742, 807 N.W.2d 170 (2011) (motion to dismiss at close of evidence has same legal effect as motion for directed verdict). In the context of a motion to dismiss made at the close of all of the evidence in a proceeding on an application to modify a dissolution decree, the Nebraska Supreme Court has noted that in a court's review of evidence on a motion to dismiss, the nonmoving party is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can be reasonably drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and the plaintiff has made a prima facie case, the motion to dismiss should be overruled. See *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994). If, on a motion to dismiss, there is any evidence in favor of the nonmoving party, the case may not be decided as a matter of law. *Id.* When a trial court sustains a motion to dismiss, it resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw only one conclusion. *Id.*

[7] In the present case, the referee essentially concluded at the end of Benjamin's evidence that, as a matter of law, he had failed to present any evidence demonstrating that he was entitled to a modification of his child support award. A party is entitled to a modification of an award of child support if he proves a material change in circumstances which has occurred since the entry of the decree or a previous modification and if such change was not contemplated when the decree was entered. *Id.*

In finding that Benjamin had failed to adduce any evidence demonstrating a material change of circumstances,

the referee relied on two somewhat contradictory conclusions. First, the referee concluded that Benjamin had not demonstrated a change in his actual earnings and that, if anything, his actual earnings had increased because he had no earnings at the time of the dissolution trial and had now secured employment. Second, the referee concluded that it was appropriate to base Benjamin's support obligation on his earning capacity, because he had voluntarily chosen to leave his prior employment.

The record is clear, and the parties clearly agree, that Benjamin had left the employment he had throughout the marriage prior to the dissolution proceedings and entry of the dissolution decree. At the time of the dissolution proceedings and entry of the dissolution decree, he had no income. At that time, he agreed to base his support obligation on his prior earning capacity, because he anticipated and believed that he would be able to earn a comparable income through a business he was starting.

At the time of the dissolution proceeding and the dissolution decree, Benjamin's earning capacity was the basis for his support obligation. This was because Benjamin had no actual earnings but the parties contemplated that he would be able to continue earning income approximating the $140,000 per year that he had earned during the marriage. Unfortunately, that did not happen. Benjamin testified that his business failed and that he was not able to earn any income between October 2006 and June 2009. He also testified that he made efforts to secure employment that would have allowed him to realize that earning capacity, but was unsuccessful. He also took a variety of steps to continue meeting his support obligations despite a lack of income, including exhausting his retirement account. He eventually was able to secure employment earning approximately $75,000 per year.

Benjamin's unrefuted testimony, in light of the standards for granting a directed verdict, clearly constitutes evidence demonstrating a material change of circumstances. The material change of circumstances is that Benjamin has not been able to realize the earning capacity which the parties contemplated at the time of trial and which he had realized throughout the

marriage. There is nothing in the record to suggest that, since the time of the decree, he has voluntarily failed to realize that earning capacity or failed to make reasonable and good faith efforts to realize it.

[8,9] This court has noted that earning capacity should be used in determining a child support obligation only when there is evidence that the parent can realize that capacity through reasonable efforts. *Collins v. Collins*, 19 Neb. App. 529, 808 N.W.2d 905 (2012). When the evidence demonstrates that the parent is unable to realize a particular earning capacity by reasonable efforts, it is clearly untenable for the trial court to attribute that earning capacity to the parent for purposes of determining child support. See *id*.

In addition, while it is true that Benjamin voluntarily chose to leave the employment through which he had realized the $140,000-per-year earning capacity throughout the marriage, the record is clear that he did so prior to the dissolution proceedings and the dissolution decree. This is not a case where a parent has voluntarily left employment after a support order was entered and has sought to reduce his or her obligation as a result. Rather, Benjamin left that employment and then agreed to a support order based on the contemplation that he would continue to realize the same earning capacity. He also took steps to continue meeting his obligations for a period of years despite not realizing that earning capacity.

[10] Changes in career or occupation which reduce the ability to provide child support are allowed, so long as they are made in good faith, and future support obligations should generally be based on present income and the Nebraska Child Support Guidelines. See *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994). Remembering that the referee chose to recommend granting a directed verdict and ended the hearing after Benjamin's evidence, there is no evidence in the record to demonstrate that Benjamin's voluntarily leaving his prior employment was not done in good faith, and his willingness to contemplate continuing the same earning capacity and exhaust his retirement account to keep his obligations current despite a lack of income for several years suggests that there was no bad faith.

In addition to the evidence Benjamin adduced to demonstrate that despite the parties' contemplation at the time of the dissolution decree he would be able to realize an earning capacity of $140,000 per year, his circumstances have changed and he has been unable to do so, he also adduced evidence suggesting that Vanessa's financial situation has changed substantially since the time of the dissolution decree. Benjamin testified that at the time of the dissolution proceeding, Vanessa was unemployed, but that since the entry of the dissolution decree, she has earned as much as $60,000 per year running a daycare operation. He introduced tax documents to further support his assertion. Because the referee recommended granting the motion for directed verdict at the conclusion of Benjamin's evidence, Benjamin's testimony and evidence on this matter were unrefuted.

In short, Benjamin adduced evidence indicating that at the time of the dissolution decree, both he and Vanessa were without income, he had already left the employment through which he had earned $140,000 per year during the marriage, he was in the process of starting his own business venture, and the parties contemplated he would be able to realize an earning capacity comparable to his prior employment. Those circumstances and the parties' contemplation about his earning capacity resulted in the support entered as part of the decree. After that time, his business failed, he was unable to earn income at all for several years, he sought employment that would allow him to realize an earning capacity consistent with the parties' contemplation, and he was unsuccessful. He eventually secured employment at a substantially lower income. At the same time, Vanessa's income went from nothing to as much as $60,000 per year.

Based on this evidence, it was clearly untenable for the referee to conclude that Benjamin had failed to adduce any evidence that would support a conclusion that there was a material change of circumstances. Giving Benjamin the benefit of all inferences based upon his evidence, he clearly adduced sufficient evidence to prevent a ruling that, as a matter of law, there was no material change of circumstances. The district

court clearly abused its discretion in adopting the referee's recommendation to grant Vanessa a directed verdict.

2. Denial of Proffered Evidence

Benjamin also asserts that it was error to deny his proffer of evidence concerning his living expenses. We agree.

[11,12] We have noted that the decision of whether to modify a child support obligation must be based upon the evidence presented by the parties and that it would be improper for the court to focus on anything but the most recent circumstances ascertainable from the evidence. *Collins v. Collins*, 19 Neb. App. 529, 808 N.W.2d 905 (2012). Among the relevant factors to be considered in determining whether a material change of circumstances has occurred is any change in the financial position of the parent obligated to pay child support. See *id*.

In the present case, as noted extensively above, Benjamin adduced evidence indicating that his income was not, and had not been at any time since entry of the decree, consistent with the earning capacity that was used for the initial determination. He also testified that in an attempt to remain current on his obligations, he had exhausted his retirement account and had accumulated debt, which had influenced his monthly expenses. He offered an exhibit to demonstrate his monthly living expenses so that the court could, when considering both his income level and expenses, determine whether his financial situation had materially changed since the entry of the decree. The referee, however, concluded that evidence of living expenses was not relevant and that the only relevant consideration was his earning capacity.

Even if Benjamin's earning capacity, as opposed to actual income, was the key factor when determining his income, his monthly expenses would clearly be relevant to determining his ability to pay a support award. Even if he had, in fact, been able to realize the earning capacity contemplated by the parties at the time of the dissolution decree, if his monthly living expenses had reasonably changed substantially, then he might have been able to demonstrate a material change of circumstances and evidence of his living expenses would clearly be

relevant evidence. The referee erred in excluding evidence of expenses, and the district court abused its discretion to the extent it adopted the referee's findings.

V. CONCLUSION

We conclude that the referee who conducted the hearing in this case erred in granting Vanessa's motion for directed verdict, because there was clearly sufficient evidence adduced to prevent judgment as a matter of law. We also conclude that the referee erred in excluding clearly relevant evidence. As such, the district court abused its discretion in adopting the referee's recommendations and dismissing Benjamin's application for modification on the basis of a motion for directed verdict. We reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
ROGER L. DALLAND, APPELLANT.
835 N.W.2d 95

Filed June 25, 2013. No. A-12-615.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings of fact for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that it reviews independently of the trial court's determination.
2. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures.
3. **Motor Vehicles: Warrantless Searches: Probable Cause.** A warrantless search of a vehicle is permissible upon probable cause that the automobile contains contraband.
4. **Police Officers and Sheriffs: Probable Cause.** A law enforcement officer has probable cause to search when it is objectively reasonable.
5. **Search and Seizure.** A search is objectively reasonable when known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that he will find contraband or evidence of a crime.

6. **Probable Cause.** Probable cause depends on the totality of the circumstances.
7. **Police Officers and Sheriffs: Probable Cause.** If contraband is seen or smelled, the officer is not required to close his eyes or nostrils, walk away, and leave the contraband where he sees or smells it.
8. **Police Officers and Sheriffs: Motor Vehicles: Warrantless Searches: Probable Cause.** While an officer need not walk away from contraband where he sees or smells it, the scope of a warrantless search of an automobile is limited to the places where there is probable cause to believe particular contraband might be found.
9. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure: Probable Cause.** The Fourth Amendment's requirement that an officer have probable cause before conducting a warrantless search does not allow police officers to make guesses about where evidence might be located.
10. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Hamilton County: MICHAEL J. OWENS, Judge. Reversed and remanded for a new trial.

Michael P. Kneale, of Bradley, Elsbernd, Andersen, Kneale & Mues Jankovitz, P.C., for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

SIEVERS, PIRTLE, and RIEDMANN, Judges.

RIEDMANN, Judge.

INTRODUCTION

This appeal raises one primary issue: Does the odor of marijuana emanating from a person inside a building give a police officer probable cause to search that person's vehicle once he enters it? We find it does not. Accordingly, we reverse Roger L. Dalland's conviction for possession of methamphetamine and remand the cause for a new trial.

BACKGROUND

In May 2011, Dalland received a call from Deputy Aaron Smith asking him to come to the law enforcement center in Aurora, Nebraska, for an interview to discuss "irrigation pipe thefts." While Dalland was at the law enforcement center,

Cpl. Chad Mertz walked by Dalland and "immediately could smell an overwhelming odor of burnt marijuana." By the time Mertz was ready to make contact with him, however, Dalland had left the law enforcement center and was seated outside in his vehicle. Mertz approached the vehicle, and upon request, Dalland got out and Mertz performed a pat-down search. Finding nothing, Mertz then searched Dalland's vehicle. While searching the vehicle, Mertz found needles that contained trace amounts of methamphetamine.

A complaint filed in the Hamilton County Court alleged that Dalland had possessed a controlled substance. He was bound over to district court, and an indictment charging him with possession of a controlled substance was filed. In the course of the proceedings, Dalland filed a motion to suppress to exclude any evidence seized when Mertz searched his vehicle. In his motion, Dalland argued that Mertz violated his constitutional rights by illegally searching his vehicle.

At the hearing on the motion to suppress, the following testimony was adduced:

Dalland was with his girlfriend, Jennifer Dahl, in Grand Island, Nebraska, when he received a telephone call from Smith requesting him to come in for an interview. After receiving the call, Dalland drove Dahl and himself to Aurora in his vehicle. He parked in the public stalls outside the law enforcement center and entered the building.

Smith interviewed Dalland and Dahl separately. He interviewed Dalland first, for a little over an hour. While Smith interviewed Dahl, Dalland sat in the lobby, occasionally retreating to his vehicle to smoke a cigarette.

During one of the time periods when Dalland was seated in the lobby, Mertz walked past him. Mertz noticed the odor of "burnt marijuana" emanating from the location where Dalland was sitting. There was nobody else in the lobby at the time.

After noting the odor, Mertz sought out Smith to determine whether he still needed Dalland for his investigation. Learning that Dalland's interview was finished, Mertz intended to make contact with Dalland, but by this time, Dalland had left the law enforcement center and was sitting in his vehicle with

the window rolled down. Mertz followed Dahl out of the law enforcement center and toward the vehicle.

As Dahl got in the passenger side of the vehicle, Mertz approached Dalland from the driver's side, informed him that he could smell marijuana, and asked him if he had smoked any. Dalland denied smoking marijuana, but advised he had been around people who had. Mertz then asked Dalland to exit the vehicle and informed him he was going to search him. About this time, Dahl exited the vehicle and Mertz directed her to sit on the sidewalk. She sat down about 7 feet away.

After performing the pat-down search, Mertz searched Dalland's vehicle and found needles. He asked Dalland if the needles in the vehicle were used for methamphetamine, and Dalland said they were. The needles were then sent to the Nebraska State Patrol crime laboratory, where trace amounts of methamphetamine were found.

The parties disputed the events directly preceding Mertz' search of Dalland's vehicle. In his affidavit of probable cause for a warrantless arrest, Mertz reported in part:

> Mertz made contact with Dalland. Dalland stated that he did not smoke marijuana but he was with people who were smoking it earlier . . . . Mertz asked Dalland if he had anything in his vehicle or on his person. Dalland stated no. Mertz searched Dalland and the vehicle he was sitting in. Mertz located a bag of syringes which were hidden inside of a glove.

At the hearing on the motion to suppress, Mertz testified that Dalland told him there were needles in his vehicle *before* Mertz searched it. He said that he informed Dalland he was going to search him and asked him if there was anything located on his person or in his vehicle that could "stick" or "poke" him. According to Mertz, Dalland volunteered that he had needles in his vehicle that were used for methamphetamine. Mertz explained that he searched the vehicle *after* Dalland made these statements. On cross-examination, defense counsel impeached Mertz with his prior inconsistent affidavit. Neither defense counsel nor the State on redirect asked Mertz to explain the inconsistency between his testimony and affidavit.

Dahl testified, however, that *after* Mertz began searching the vehicle, he asked Dalland if he was going to find any drugs or paraphernalia in the vehicle and Dalland said there were needles inside. Dalland testified that he initially denied there were drugs or paraphernalia in the vehicle, but that *after* Mertz began searching, he informed Mertz of needles behind the seat.

On cross-examination, Mertz admitted that he did not have a search warrant or permission to search. He also stated that nothing was in plain view and that it was not a traffic stop, a search pursuant to an emergency situation, an inventory search, or a search pursuant to an arrest.

The trial court denied Dalland's motion to suppress. In its order, the court stated that the legal issue before it was whether or not an officer has probable cause to search a motor vehicle after detecting the odor of marijuana emanating from a person occupying the vehicle. Relying on *State v. Watts*, 209 Neb. 371, 307 N.W.2d 816 (1981), the trial court determined that Mertz' detection of the odor of marijuana provided him with probable cause to search Dalland's vehicle. The trial court did not rely on Dalland's statement that there were needles in the vehicle as a basis for its finding of probable cause, but it did mention the statement as part of its factual introduction. The court wrote that after Mertz advised Dalland that he intended to search the vehicle, "[Dalland] indicated to Mertz that there might be used needles in the vehicle . . . . Mertz then conducted a search and found controlled substances in the vehicle."

At trial, the parties introduced exhibits 1 through 8. Exhibit 1 contains the stipulated testimony that individual witnesses would offer. The stipulated testimony includes the testimony from the hearing on the motion to suppress and testimony from a forensic scientist of the Nebraska State Patrol crime laboratory identifying the substance found on the needles in Dalland's vehicle as methamphetamine. Exhibit D of exhibit 1 is a report from the crime laboratory stating that the syringes that were tested contained methamphetamine. Exhibit 2 is a stipulation to chain of custody, and exhibits 3 through 8 are physical evidence.

Defense counsel objected to the exhibits on the grounds outlined in his motion to suppress, and the trial court took the matter under advisement before admitting the exhibits.

The trial court found Dalland guilty of possession of a controlled substance, a Class IV felony, and sentenced him to serve 270 days in the Hamilton County jail.

This timely appeal followed.

ASSIGNMENT OF ERROR

On appeal, Dalland argues that the trial court erred by receiving evidence that was illegally seized by law enforcement in violation of his rights guaranteed by the U.S. and Nebraska Constitutions.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings of fact for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that it reviews independently of the trial court's determination. *State v. Garcia*, 281 Neb. 1, 792 N.W.2d 882 (2011).

ANALYSIS

Dalland argues that the trial court erred in admitting into evidence the needles that Mertz seized from his vehicle, because they were seized in violation of his Fourth Amendment rights. The State argues that Mertz' search was an exception to the Fourth Amendment protection against unreasonable searches and seizures, because Mertz had probable cause based on smelling the odor of marijuana and Dalland's admission that he had needles used for methamphetamine in his vehicle. The State concedes in its brief that the district court found that the odor of marijuana alone provided probable cause for the search, without reliance upon Dalland's alleged admission that there were needles in the vehicle.

[2,3] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals

against unreasonable searches and seizures. *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010). A warrantless search of a vehicle is permissible upon probable cause that the automobile contains contraband. See *California v. Carney*, 471 U.S. 386, 105 S. Ct. 2066, 85 L. Ed. 2d 406 (1985). See, also, *State v. Alarcon-Chavez*, 284 Neb. 322, 821 N.W.2d 359 (2012).

[4-6] A law enforcement officer has probable cause to search when it is objectively reasonable. See *State v. Craven*, 253 Neb. 601, 571 N.W.2d 612 (1997). A search is objectively reasonable when known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that he will find contraband or evidence of a crime. See *id*. Probable cause depends on the totality of the circumstances. See *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006).

In this case, Dalland concedes that Mertz' initial pat-down search was permissible, but he argues that Mertz did not have probable cause to expand the search to encompass Dalland's vehicle. Therefore, we limit our analysis to whether Mertz had probable cause to search Dalland's vehicle.

[7] The trial court reasoned that the odor of marijuana provided Mertz with sufficient probable cause to search Dalland's vehicle, relying upon *State v. Watts*, 209 Neb. 371, 307 N.W.2d 816 (1981). In *Watts*, the Nebraska Supreme Court stated: "We have constantly held that the smell of marijuana, standing alone, is sufficient to furnish probable cause for the warrantless search of a motor vehicle where, as here, there was sufficient foundation as to the expertise of the officer." 209 Neb. at 374, 307 N.W.2d at 819. However, *Watts* and the cases upon which it relies involved traffic stops and situations in which the officer smelled the marijuana emanating from the vehicle. See, e.g., *State v. Daly*, 202 Neb. 217, 218-19, 274 N.W.2d 557, 558 (1979) (stating that "[w]hen the rear door of the pickup was opened, [the officer] could smell a strong odor of marijuana"); *State v. Wood*, 195 Neb. 353, 356, 238 N.W.2d 226, 228 (1976) (stating that "after being invited to inspect the camper, the officer detected a strong odor of marijuana"). The court in *State v. Ruzick*, 202 Neb. 257, 258, 274 N.W.2d 873, 875 (1979), recognized this limitation when it stated: "In

a number of cases we have held that the odor of marijuana coming from a vehicle is sufficient to furnish probable cause for a search of the vehicle." And in *State v. Romonto*, 190 Neb. 825, 830, 212 N.W.2d 641, 644 (1973), the court explained why a warrantless search of a vehicle is permissible when it said: "An officer is entitled to rely on his senses in determining whether contraband is present in a vehicle. If contraband is seen or smelled, the officer is not required to close his eyes or nostrils, walk away, and leave the contraband where he sees or smells it."

[8] While an officer need not walk away from contraband where he sees or smells it, the scope of a warrantless search of an automobile is limited to the places where there is probable cause to believe particular contraband might be found. See *U.S. v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1983). In *U.S. v. Ross*, 456 U.S. at 824, the U.S. Supreme Court went to great lengths to illustrate that different factual scenarios give rise to probable cause to search different areas, explaining:

> Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

The factual scenario in the case at bar differs substantially from the line of cases involving an officer's search of a vehicle pursuant to a traffic stop. While *State v. Watts*, 209 Neb. 371, 307 N.W.2d 816 (1981), involved a scenario where a police officer smelled the odor of marijuana emanating from the defendant's vehicle, in this case, Mertz smelled the odor of marijuana emanating from Dalland's person while Dalland was in a location separate from that of his vehicle. In *State v. Watts, supra*, the police officer could have reasonably believed that he would find evidence of criminal activity in the defendant's vehicle, because he smelled the odor of an illegal substance emanating from the interior of the vehicle.

In this case, however, there was no reason for Mertz to believe that evidence of criminal activity would be located in Dalland's vehicle as opposed to any other location. In order to have probable cause to search the vehicle, Mertz needed objective information indicating a fair probability that contraband or evidence of crime would be found. See *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). Accordingly, we must examine the facts from the perspective of Mertz at the time he made the search. The record indicates that Mertz entered the law enforcement center and observed the odor of marijuana emanating from Dalland's person. Mertz then consulted Smith to determine that he had completed his interview with Dalland. At this point, Dalland had been sitting in the law enforcement center for at least an hour. Mertz knew that Dalland had been interviewed and also observed Dahl leave her interview. Based on the odor emanating from Dalland's person, Mertz searched him and found no evidence of criminal activity. Dalland repeatedly denied having smoked any marijuana. At this point, Mertz then expanded his search to encompass Dalland's vehicle.

In the line of cases involving traffic stops, the arresting officer approaches individuals seated in a vehicle. Smelling marijuana, the officer reasonably suspects that he might find evidence of criminal activity in the vehicle, which is the area from which the marijuana odor emanated. The officer then has probable cause to search the area from which the odor is emanating because an odor indicates a probability that one might find evidence of criminal activity in the location of the odor.

[9] In the case at bar, Mertz searched Dalland's person, which was the location from which the odor emanated. After finding no evidence of criminal activity, he then proceeded to search a second location, Dalland's vehicle. He did not state that the vehicle emanated an odor of marijuana, but, rather, that the odor emanated from Dalland himself. These facts did not provide Mertz probable cause to search Dalland's vehicle. Although Dalland's odor may have reasonably led Mertz to believe that Dalland was around marijuana at some point during the day, the record indicates no reason to suspect

evidence of marijuana would be located in Dalland's vehicle. Given that the odor remained on Dalland the entire time he was at the law enforcement center, we can ascertain that the odor lingered on his person for a substantial period of time. Mertz, as a "certified drug recognition expert," would likely have knowledge of marijuana's lingering odor. The lasting nature of Dalland's odor, combined with the lack of evidence in Dalland's immediate vicinity, raised the question of where Dalland encountered marijuana and acquired the odor. While Dalland may have encountered it in his vehicle, he may have encountered it any number of ways and in any number of locations throughout the day. The Fourth Amendment's requirement that an officer have probable cause before conducting a warrantless search does not allow police officers to make guesses about where evidence might be located. See *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). To the contrary, it requires that the facts indicate a fair probability that the officer will find contraband in the particular location he seeks to search. See *id*. In this case, Dalland's odor did not give rise to a fair probability that contraband would be found in Dalland's vehicle.

The State argues, however, that Mertz had additional justification to search Dalland's vehicle because Dalland stated that needles were located within it before the search occurred. Although the trial court did note that Dalland made this statement before Mertz searched his vehicle, the only evidence supporting this finding of fact was Mertz' trial testimony. Both Dalland and Dahl contradicted Mertz' testimony, but more important, Mertz' testimony conflicted with his prior affidavit of probable cause. In his affidavit of probable cause, Mertz said that he asked Dalland if he would find anything in the vehicle and that Dalland said he would not. Mertz did not provide an explanation for the difference between his testimony at trial and the previous statement in his sworn affidavit.

The record before our court indicates that Mertz changed his testimony to meet the exigencies of trial without a reasonable explanation. Accordingly, we must disregard his inconsistent trial testimony as a matter of law and assume that Dalland did not state needles were present in his vehicle prior

to Mertz' initiating the search of the vehicle. See, *State v. Robertson*, 223 Neb. 825, 394 N.W.2d 635 (1986); *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981). See, also, *Clark v. Smith*, 181 Neb. 461, 149 N.W.2d 425 (1967); *Sacca v. Marshall*, 180 Neb. 855, 146 N.W.2d 375 (1966); *Kirchner v. Gast*, 169 Neb. 404, 100 N.W.2d 65 (1959).

Because we find that the trial court improperly admitted evidence that was seized in violation of Dalland's rights, we reverse the decision of the trial court and remand the cause for proceedings consistent with this opinion.

[10] Having determined that Mertz did not have probable cause to search the vehicle, we find that the court erred in denying the motion to suppress. This error is reversible error; therefore, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Dalland's conviction. If it was not, then the concepts of double jeopardy would not allow a remand for a new trial. See *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011). The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *State v. Borst, supra*.

The evidence presented, including the needles seized and the subsequent test results thereon, was sufficient to sustain a conviction for possession of methamphetamine. The cause should therefore be remanded for a new trial.

CONCLUSION

Mertz' detection of the odor of marijuana emanating from Dalland while he was seated inside the law enforcement center did not give rise to probable cause to search Dalland's vehicle. The evidence seized from the vehicle was therefore seized in violation of Dalland's Fourth Amendment rights. Because we find that the trial court improperly admitted evidence seized in violation of Dalland's Fourth Amendment rights, and the evidence was otherwise sufficient to sustain his conviction, we reverse the conviction and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

In re Interest of Mya C. and Sunday C., children under 18 years of age. State of Nebraska, appellee, v. Nyamal M., appellant.

835 N.W.2d 90

Filed June 25, 2013. No. A-12-811.

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. **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 from the decisions made by the lower courts.
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 tribunal from which the appeal is taken.
5. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which 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 judgment is rendered.
6. **Juvenile Courts: Final Orders.** Juvenile court proceedings are special proceedings.
7. **Final Orders: Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
8. **Juvenile Courts: Final Orders: Constitutional Law: Parental Rights.** The substantial right of a parent in juvenile proceedings is a parent's fundamental, constitutional right to raise his or her child.
9. **Juvenile Courts: Words and Phrases.** The State's right in juvenile cases is derived from its parens patriae interest in the proceedings. This means, in essence, that the State has a right to protect the welfare of its resident children.
10. **Juvenile Courts: Final Orders: Parental Rights.** Whether a substantial right of a parent has been affected by an order entered in a juvenile proceeding 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 by the order.
11. **Juvenile Courts: Final Orders: Appeal and Error.** In juvenile cases, where an order from a juvenile court is already in place and a subsequent order merely extends the time for which the previous order is applicable, the subsequent order by itself does not affect a substantial right and does not extend the time in which the original order may be appealed.

12. ____: ____: ____. A dispositional order which merely continues a previous determination of the juvenile court is not an appealable order.

Appeal from the Separate Juvenile Court of Lancaster County: REGGIE L. RYDER, Judge. Appeal dismissed.

Matt Catlett for appellant.

Joe Kelly, Lancaster County Attorney, and Daniel J. Zieg for appellee.

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

MOORE, Judge.

Nyamal M., the mother of Mya C. and Sunday C., appeals from a dispositional order entered by the separate juvenile court of Lancaster County. Nyamal challenges the provision in the order that required her to actively pursue either a diploma through the GED program or a high school diploma. We conclude that the dispositional order is not an appealable order and, therefore, dismiss the appeal for lack of jurisdiction.

FACTUAL BACKGROUND

Nyamal is the mother of Mya, born in December 2006, and Sunday, born in January 2008. On September 24, 2010, Mya and Sunday were adjudicated to be children as described in Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). The reason for adjudication was a lack of proper care due to the faults or habits of Nyamal. At the time of the adjudication, Nyamal was a minor and was herself a ward of the State under a separate juvenile court case.

On December 7, 2010, the juvenile court held the initial dispositional hearing. Mya and Sunday were placed in the temporary legal custody of the Department of Health and Human Services, with placement with Nyamal in the same foster home in which Nyamal was placed through her juvenile court case. The primary permanency plan was family preservation, with reunification as the alternative plan. Among the provisions of its order, issued December 10, the court required Nyamal to participate in therapy, seek part-time employment to provide financial support for her children, and cooperate with family

support services. The court also ordered that Nyamal "shall continue her education as [sic] Lincoln High School. [She] should not switch her education plans without approval from the Department of Health and Human Services." No appeal was taken from this order.

The juvenile court has held three dispositional review hearings since the initial dispositional order. For purposes of this appeal, the first two review orders, dated June 7, 2011, and December 8, 2011, contained provisions that were essentially the same as those in the original order. Those provisions included a requirement that Nyamal continue her education. In its orders, the court specified that Nyamal was required to "continue with her education at Bryan Community School." No appeals were taken from those orders.

When the matter came for review hearing on May 24, 2012, Nyamal had reached her 19th birthday. Nyamal had also recently begun attending GED classes. Because there was insufficient time to conclude the hearing that day, the hearing was continued to July 31. At the time of the continued hearing, Nyamal had obtained temporary full-time employment and decided to stop attending GED classes. Nyamal testified that she would continue her education later in life, but did not have time to pursue it as of the time of the hearing.

At the conclusion of the testimony, the court found the recommendations contained in the guardian ad litem's report to be in the children's best interests and approved those recommendations. The court also ordered Nyamal to "actively pursue a GED or a high school diploma." The court noted that this requirement was relevant to Nyamal's ability to provide for her children. The court stated that even though Nyamal had found current employment, it was important that she have a fallback plan. Following this hearing, the court issued an order on August 9, 2012, from which Nyamal now appeals.

ASSIGNMENT OF ERROR

Nyamal assigns that the juvenile court erred when it ordered that she actively pursue either a diploma through the GED program or a high school diploma as part of its rehabilitative plan.

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 Diana M. et al., ante* p. 472, 825 N.W.2d 811 (2013).

[2] 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 from the decisions made by the lower courts. *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999).

ANALYSIS

[3,4] 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 Diana M. et al., supra*. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken. *Id.*

[5,6] The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which 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 judgment is rendered. *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012). It has long been held that juvenile court proceedings are special proceedings. *Id.* Therefore, we must determine whether the juvenile court's order affected one of Nyamal's substantial rights.

[7-10] A substantial right is an essential legal right, not a mere technical right. *In re Interest of Sarah K., supra*. The substantial right of a parent in juvenile proceedings is a parent's fundamental, constitutional right to raise his or her child. *In re Interest of Karlie D., supra*. The State's right in juvenile cases is derived from its parens patriae interest in the proceedings. This means, in essence, that the State has a right to protect the welfare of its resident children. *Id.* The Nebraska Supreme Court has made it clear that the question of whether

a substantial right of a parent has been affected by an order entered in a juvenile proceeding 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 by the order. 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); *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

[11,12] Nevertheless, in juvenile cases, where an order from a juvenile court is already in place and a subsequent order merely extends the time for which the previous order is applicable, the subsequent order by itself does not affect a substantial right and does not extend the time in which the original order may be appealed. *In re Interest of Tayla R., supra*. In other words, a dispositional order which merely continues a previous determination of the juvenile court is not an appealable order. See *In re Interest of Diana M. et al., supra*.

Nyamal argues that the provision of the latest dispositional order requiring her to obtain her GED diploma or high school diploma affects a substantial right. She urges us to find that the rule stated above regarding continuing orders should not apply in this case. First, she argues that there is a clear intervening circumstance in this case that breaks the chain of continuity between the dispositional orders. Nyamal reached her 19th birthday on December 17, 2011, with the result that the juvenile court's jurisdiction in her own docketed case had ended. She argues that "'aging out'" of the system after the December 8, 2011, order and before the August 9, 2012, order breaks the chain of continuity between the orders. Reply brief for appellant at 2. She contends such a break should allow her to appeal from the August 9 order. In addition, Nyamal argues that the December 8, 2011, and August 9, 2012, orders are not the same. She contends that an order to "continue with her education at Bryan Community School" is different from being required to "actively pursue a GED or a high school diploma."

We decline Nyamal's suggestion that we carve out an exception in this case to the rule prohibiting appeals from orders

which are a continuation of previous determinations of the court. The juvenile court has ordered Nyamal to continue with her education in all of its dispositional orders. Nyamal argues that because she is now an adult, the education provision is not reasonable or material to the court's jurisdictional basis over her children and has no relationship to the goal of reunifying her with her children. See *In re Interest of T.T.*, 18 Neb. App. 176, 779 N.W.2d 602 (2009) (plan for rehabilitation to correct underlying conditions leading to adjudication must be reasonably related to objective of reunifying parent with children). However, Nyamal was not prohibited from making this argument in connection with the previous orders prior to her 19th birthday. Although Nyamal's circumstances have arguably changed since the original dispositional order, the education provisions have continued and we find no justification or authority for creating an exception to the jurisdictional prohibition.

Additionally, while the subsequent orders changed the location or method of obtaining such education, the orders are essentially the same; that is to say, Nyamal was required to work toward the equivalent of a high school education. When a subsequent order merely repeats the essential terms of a prior order, the order is not appealable. See *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009). We conclude that the August 9, 2012, order is merely a continuation of the original December 10, 2010, dispositional order. Therefore, any appeal to the court's education requirement should have been made within the applicable period after the December 10 order. The current appeal is an impermissible collateral attack on a prior judgment.

CONCLUSION

The juvenile court order requiring Nyamal to actively pursue either a diploma through the GED program or a high school diploma was a continuation of the prior orders. Therefore, it is not an appealable order. This appeal must be dismissed for lack of jurisdiction.

APPEAL DISMISSED.

KATRINA YVETTE BECKER, APPELLANT, V.
KURT DANIEL BECKER, APPELLEE.
834 N.W.2d 620

Filed June 25, 2013. No. A-12-814.

1. **Divorce: Alimony: Appeal and Error.** In an action for dissolution of marriage, an appellate court reviews de novo on the record the trial court's determination of alimony; a determination regarding alimony, however, is initially entrusted to the trial court's discretion and will normally be affirmed in the absence of an abuse of that discretion.
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. **Alimony.** In addition to the criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 2008), in considering alimony upon a dissolution of marriage, a trial court is to consider the income and earning capacity of each party, as well as the general equities of each situation.
4. ____. In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
5. ____. 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.
6. ____. Disparity in income or potential income may partially justify an award of alimony.
7. **Alimony: Appeal and Error.** In reviewing a trial court's award of alimony, 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.
8. **Alimony.** While need is certainly a factor in analyzing alimony, it is only one of several factors within a court's analysis.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Michael B. Lustgarten and Britt Carlson, Senior Certified Law Student, of Lustgarten & Roberts, P.C., L.L.O., for appellant.

Jamie E. Kinkaid, of Cordell & Cordell, P.C., for appellee.

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

IRWIN, Judge.

I. INTRODUCTION

This case confronts the reality that increasingly unstable and fluid job markets may cause internal family roles to evolve and

change throughout the years. This case illustrates the legally articulated notion that alimony is gender neutral.

Katrina Yvette Becker appeals from a decree of dissolution entered by the district court, which decree dissolved her marriage to Kurt Daniel Becker; awarded alimony, child support, and attorney fees to Kurt; and divided the marital assets and debts. On appeal, Katrina asserts that the district court erred in awarding Kurt any alimony, given both parties' present and past financial circumstances. Upon our de novo review of the record, we find no abuse of discretion by the district court in its award of alimony to Kurt. Accordingly, we affirm the decision of the district court.

II. BACKGROUND

Katrina and Kurt were married on January 20, 1990. Two children were born of the marriage; however, one of the children had reached the age of majority by the time of the dissolution proceedings. The parties have one remaining minor child, who was born in 1994.

On February 13, 2012, Katrina filed a complaint for dissolution of marriage. In the complaint, Katrina specifically asked that the parties' marriage be dissolved, that they be awarded joint custody of their minor child, and that their marital assets and debts be equitably divided. On March 2, Kurt filed an answer and a countercomplaint for dissolution of the marriage. In the countercomplaint, Kurt specifically asked that the parties' marriage be dissolved, that they be awarded joint custody of their minor child, that their marital assets and debts be equitably divided, and that he be awarded alimony and attorney fees.

On April 12, 2012, the district court entered a temporary order. Pending the dissolution trial, the court granted the parties joint legal and physical custody of their minor child. The court awarded Katrina the exclusive possession of the marital residence and ordered her to pay Kurt $1,000 per month in child support. The court denied Kurt's request for temporary alimony.

Trial was held on July 20, 2012. At trial, the parties indicated to the court that they had come to an agreement on

many issues. The remaining issues left for the court to decide included Katrina's child support obligation, Kurt's request for alimony and attorney fees, and whether an equalization payment was due to Kurt after the division of the parties' bank accounts.

The evidence presented by both parties at the trial focused on their past and present incomes and financial circumstances.

At the time of the trial, Katrina was 46 years old. She was employed at "TD Ameritrade" as the managing director of communications and public affairs. Katrina had been employed in that capacity since 2007. Her base salary was $175,000 per year, and she was eligible for bonuses. In fact, Katrina testified that she had earned a substantial bonus each year since 2008. Her total average income from 2008 through 2011 was $281,727. Her income in 2011 alone totaled $315,000.

Katrina testified that she had worked almost continuously throughout the duration of the parties' marriage. However, she indicated that prior to 2007, when she accepted her current position with TD Ameritrade, she had earned a much lower salary. Katrina also testified that early on in the parties' marriage, she was forced to interrupt her career on two separate occasions due to the family's having to relocate for Kurt's career.

At the time of the trial, Kurt was 48 years old. He was employed with "ConAgra Foods" as a research scientist and had been employed in that capacity for 2 or 3 years prior to the trial. Kurt earned a salary of $84,000 per year.

Kurt testified that he had actually been employed with ConAgra Foods for a majority of the parties' marriage; however, his position within the company had changed. He had worked as a technical services manager for approximately 12 years. Then, in 2003 or 2004, this position was eliminated and he became unemployed. Kurt testified that he searched for new employment and was offered two different jobs at companies that were located "out of town." He turned down both opportunities due, in part, to Katrina's job and her ability to earn more income for the family. Kurt decided to return to ConAgra Foods after being unemployed for approximately 7 months. He

accepted an "entry" level job doing basic chemistry laboratory work and earned $60,000 a year. Since then, he has taken a wide variety of positions with ConAgra Foods, working toward his current position as a research scientist.

After the trial, the district court entered a decree of dissolution. The court divided the parties' marital assets and debts such that Katrina and Kurt each received one-half of the retirement accounts, the TD Ameritrade stock and stock options, and the proceeds of the sale of the marital home. In addition, the court awarded the parties the bank accounts in their own names and awarded Kurt, as a property settlement, an additional $5,500. The court ordered Katrina to pay Kurt child support in the amount of $904 per month and alimony in the amount of $2,000 per month for 84 months. Finally, the court ordered Katrina to pay $7,204 toward Kurt's attorney fees.

Katrina appeals from the district court's decree of dissolution.

III. ASSIGNMENT OF ERROR

On appeal, Katrina challenges the district court's award of alimony to Kurt.

IV. ANALYSIS

1. Standard of Review

[1,2] In an action for dissolution of marriage, an appellate court reviews de novo on the record the trial court's determination of alimony; a determination regarding alimony, however, is initially entrusted to the trial court's discretion and will normally be affirmed in the absence of an abuse of that discretion. *Smith v. Smith, ante* p. 192, 823 N.W.2d 198 (2012). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Id.*

2. Alimony Award

In the decree, the district court ordered Katrina to pay Kurt alimony in the amount of $2,000 per month for a period of 84 months. Katrina argues that such an award was an abuse of discretion, because Kurt does not need alimony, for the reason

that his current monthly income exceeds his expenses; because her income has only significantly exceeded Kurt's income for the last few years; and because Kurt did not forgo any employment or educational opportunities during the marriage. Upon our de novo review of the record, we cannot say that the district court's award of alimony to Kurt was an abuse of discretion. Accordingly, we affirm.

Before we address Katrina's specific assertions, we detail the relevant statutory and case law which overlays a trial court's decision to award alimony. Neb. Rev. Stat. § 42-365 (Reissue 2008) provides:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other . . . 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.

[3-6] In addition to the criteria listed in § 42-365, in considering alimony upon a dissolution of marriage, a trial court is to consider the income and earning capacity of each party, as well as the general equities of each situation. *Smith v. Smith, supra*. In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004). 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. *Id*. Disparity in income or potential income may partially justify an award of alimony. *Id*.

[7] In reviewing a trial court's award of alimony, 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. See *id*.

Katrina and Kurt's marriage was one of long duration. The record reflects that they were married for approximately 22 years prior to separating and that they raised two children, one to the age of majority, during the marriage.

Evidence from the dissolution trial revealed that both parties made significant financial contributions to the marriage. Katrina and Kurt both worked full time throughout the marriage, with only minor interruptions to each party's career. In particular, we note that contrary to Katrina's assertion on appeal, there was evidence presented which demonstrated that both Katrina and Kurt forwent certain employment opportunities in an effort to give the other spouse's career priority. Ultimately, the evidence showed that as a result of the parties' joint efforts, they amassed significant assets during the course of their marriage. These assets were essentially divided evenly between the parties in the decree of dissolution.

In addition, the evidence revealed that both parties made significant contributions to raising their children and taking care of their home. Katrina testified that early on in the marriage, she was the children's primary caregiver and handled many of the day-to-day responsibilities because Kurt traveled a great deal for his job. Kurt testified that later on in the marriage, as Katrina's career flourished, he took on a larger role at home, becoming the primary caregiver for the children.

In the decree, the district court calculated Katrina's gross monthly income to be $23,601.08 and her net monthly income to be $14,249.12. Presumably, the court made this calculation utilizing Katrina's average annual income from the years 2009 through 2011. Katrina does not dispute the district court's calculation of her current monthly income.

At trial, Katrina offered an exhibit to demonstrate that her monthly expenses total close to $13,500. However, upon our review of this exhibit, it is clear that some of the items and amounts included in Katrina's monthly budget are speculative in nature and that many of her expenses are not for necessary or essential items. Upon our de novo review of all of the evidence presented at the dissolution trial, we conclude that it is clear that Katrina has a significant disposable monthly income.

The district court calculated Kurt's gross monthly income to be $7,076.75 and his net monthly income to be $4,826.76. Katrina does not dispute the court's calculation of Kurt's current monthly income. At trial, Kurt testified that his monthly expenses total approximately $3,600. As such, Kurt has approximately $1,225 in disposable income each month.

Clearly, there is a significant disparity in the parties' current incomes. Yet, this is not a situation where either party is struggling to pay his or her monthly expenses. Rather, both Katrina's and Kurt's monthly incomes exceed their monthly expenses.

In her brief to this court, Katrina urges us to focus on whether Kurt "needs" any additional income that would justify an award of alimony. She argues that Kurt does not need alimony to "bridge a period of unemployment or get proper training . . . since he is currently employed and his income exceeds his expenses." Brief for appellant at 11. In fact, at trial, Kurt did not testify that he "needed" alimony. Instead, he indicated that he believed that the additional income provided by an award of alimony would assist him in being able to live the same lifestyle he had become accustomed to during the marriage. In addition, he indicated that he wanted to use any alimony to be able to assist Katrina in paying for the children's educations and to financially support the children in their future endeavors.

[8] While need is certainly a factor in analyzing alimony, it is only one of several factors within our analysis. See *Titus v. Titus*, 19 Neb. App. 751, 811 N.W.2d 318 (2012). If we were to focus solely on the element of need, as suggested by Katrina, we would be ignoring several of the other factors relevant to an award of alimony. As we discussed more thoroughly above, such factors include the relative economic circumstances, the disparity in the parties' incomes and earning capacities, and the general equities of the case. See *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004); *Smith v. Smith, ante* p. 192, 823 N.W.2d 198 (2012).

After considering all of the factors involved in an award of alimony and the particular facts of this case, we cannot say that the district court's award of alimony to Kurt was an

abuse of discretion simply because Kurt does not "need" the additional income in order to pay his monthly expenses. It is clear from the evidence presented at the dissolution trial that Katrina earns significantly more money than Kurt and that she is more than capable of paying the award of alimony. Indeed, the award of $2,000 per month is less than 9 percent of Katrina's gross monthly income and less than 15 percent of her net monthly income.

Katrina also argues that the district court's award of alimony is an abuse of discretion because she has earned a significantly higher income than Kurt for only a few years and, prior to that time, they had earned similar incomes or Kurt had earned a higher income. Katrina's argument in this regard has no merit.

The evidence presented at the dissolution trial revealed that Katrina has earned a significantly higher income than Kurt since at least 2007, when she accepted her current position at TD Ameritrade. The evidence demonstrated that as Katrina's career progressed, Kurt struggled because his long-time position with ConAgra Foods was eliminated and he was forced to take a lower paying, less prestigious position with the company after a period of unemployment.

Despite the parties' economic histories, this evidence demonstrates that by the time of the dissolution trial, Katrina was flourishing in her career, earning a significant income, while Kurt was still working to improve his position with ConAgra Foods and to gradually increase his salary. Moreover, we note that the district court divided the parties' marital assets essentially in half so that both parties benefited equally from the other spouse's past incomes and economic circumstances. When we consider both parties' current economic circumstances, in addition to the division of the parties' marital assets, we cannot say that the district court abused its discretion in its award of alimony to Kurt.

Based on our de novo review of all of the evidence presented at the dissolution trial, we conclude that the district court's decision to award Kurt alimony in the amount of $2,000 per month for 84 months is not an abuse of discretion.

V. CONCLUSION

We find no abuse of discretion in the alimony award. Accordingly, we affirm the decision of the district court to award Kurt alimony in the amount of $2,000 per month for a period of 84 months.

AFFIRMED.

SOUTHWEST OMAHA HOSPITALITY, L.P., APPELLANT, V. GAIL WERNER-ROBERTSON ET AL., APPELLEES.

834 N.W.2d 617

Filed June 25, 2013. No. A-12-1008.

1. **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.
2. **Actions: Parties: Final Orders: Appeal and Error.** With the enactment of Neb. Rev. Stat. § 25-1315(1) (Reissue 2008), one may bring an appeal pursuant to such section only when (1) multiple causes of action or multiple parties are present, (2) the court enters a final order as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal.
3. **Final Orders: Appeal and Error.** Certification of a final judgment must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Appeal dismissed.

Rodney K. Vincent and Darla J. Johnson, of Vincent Law Office, for appellant.

No appearance for appellees.

IRWIN, MOORE, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

This lawsuit began in June 2005. In a 2011 appeal to this court, we dismissed the appeal for the reason that no final,

appealable order existed because all of the claims relating to all of the parties had not been disposed of. We now have the second appearance of this case on appeal and dismiss for the same reason—there is no final, appealable order, despite the district court's attempt to certify that there was a final, appealable order. Such a certification is reserved for the "unusual case" in which the pressing needs of the litigants for an early and separate judgment as to some claims or parties outweigh the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket. The power Neb. Rev. Stat. § 25-1315(1) (Reissue 2008) confers upon the trial judge should be used only in the infrequent harsh case as an instrument for the improved administration of justice, based on the likelihood of injustice or hardship to the parties of a delay in entering a final judgment as to part of the case.

II. BACKGROUND

This is the second appearance of this case before this court. In June 2005, Southwest Omaha Hospitality, L.P. (SOH), and numerous other plaintiffs brought an action against Gail Werner-Robertson; GWR Investments, Inc.; CGS I, Inc.; and Van Dorn Management, L.L.C., in which the plaintiffs asserted several causes of action, including breach of contract, breach of fiduciary duty, and negligence in connection with the purchase and financing of an Omaha hotel. In an appeal docketed in this court as case No. A-11-761, SOH appealed from an order which granted, in part, the defendants' motion to dismiss the fifth amended complaint and which ordered SOH to file a sixth amended complaint. That appeal was dismissed for lack of a final, appealable order.

In the instant case, SOH has appealed from some prior orders of the district court, as well as its most recent order, entered on October 17, 2012. This order granted summary judgment in favor of defendant Werner-Robertson and dismissed the seventh amended complaint as to her. The court also dismissed defendants GWR Investments and Van Dorn Management as to SOH's claims of gross negligence and promissory estoppel, but found that SOH should be able to pursue its claims of negligence against them. The court noted that counts 1, 2,

4 through 7, and 9 remained as to those two defendants. SOH appealed to this court on October 25.

III. ANALYSIS

[1] 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. *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012). While the district court's order terminated the action as to one of the defendants, the existence of multiple parties implicates § 25-1315(1), which provides, in part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

In dismissing the complaint against Werner-Robertson, the court stated that "there is no just reason for delay," language that is required when a court certifies an order as final for purposes of § 25-1315(1). The court did not explicitly cite § 25-1315, nor did it make an express direction for the entry of a final judgment. The order also did not include the court's reasoning for certifying its order under § 25-1315(1), if that was, in fact, what it was trying to accomplish.

[2] There are three elements constituting a certification pursuant to § 25-1315(1). With the enactment of § 25-1315(1), one may bring an appeal pursuant to such section only when (1) multiple causes of action or multiple parties are present, (2) the court enters a final order within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 2008) as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal. *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007). The instant case involves

multiple parties as well as a final order dismissing Werner-Robertson from the action. However, the district court failed to properly certify the order under § 25-1315(1) by not invoking the statutory language of both "express determination" and "express direction" and by not following the dictate in *Cerny* to make specific findings. To the extent that the court intended to make such a certification, it abused its discretion. See *Murphy v. Brown*, 15 Neb. App. 914, 738 N.W.2d 466 (2007).

[3] We caution here that the *Cerny* decision has put substantial limitations on circumstances when a trial court may properly certify an order or judgment as ripe for an appeal. We remind the trial court that the court in *Cerny* instructed that

> certification of a final judgment must be reserved for the "unusual case" in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties. The power § 25-1315(1) confers upon the trial judge should only be used "'"in the infrequent harsh case"'" as an instrument for the improved administration of justice, based on the likelihood of injustice or hardship to the parties of a delay in entering a final judgment as to part of the case.

273 Neb. at 809-10, 733 N.W.2d at 886.

Because the district court's order does not dispose of all of the claims against all of the parties, and does not make an express determination and direction under § 25-1315, this appeal must be dismissed for lack of jurisdiction.

IV. CONCLUSION

To the extent that the district court was attempting to certify its October 17, 2012, order pursuant to § 25-1315, it abused its discretion. The district court's order is not final and appealable.

APPEAL DISMISSED.

HEADNOTES
Contained in this Volume