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THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

JULY 7, 2015 and MAY 2, 2016

IN THE

# Nebraska Court of Appeals

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# NEBRASKA APPELLATE REPORTS

## VOLUME XXIII

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PEGGY POLACEK
OFFICIAL REPORTER

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Frankie J. Moore, Chief Judge
John F. Irwin, Associate Judge
Everett O. Inbody, Associate Judge
Michael W. Pirtle, Associate Judge
Francie C. Riedmann, Associate Judge
Riko E. Bishop, Associate Judge

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Peggy Polacek . . . . . Reporter
Teresa A. Brown . . . . . Clerk
Corey Steel . . . . . State Court Administrator

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## LIST OF CASES DISPOSED OF BY MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Author judge listed first.)

(† Indicates opinion selected for posting to court Web site.)

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†No. A-13-1094: **In re Estate of Flemming**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Irwin, Judge.

No. A-14-384: **Filipcic v. York Heating & Air Conditioning**. Reversed and remanded with directions. Bishop, Inbody, and Pirtle, Judges.

No. A-14-569: **McCall v. Nebraska Methodist Health System**. Affirmed. Bishop and Inbody, Judges. Moore, Chief Judge, participating on briefs.

†No. A-14-662: **NRS Properties v. Agribusiness & Food Assocs**. Reversed and remanded with directions. Moore, Chief Judge, and Pirtle and Bishop, Judges.

†No. A-14-723: **State v. Alhakemi**. Affirmed. Riedmann, Irwin, and Inbody, Judges.

†No. A-14-736: **In re Guardianship of Celeste T**. Reversed and remanded with directions. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-14-740: **Cohrs v. Bruns**. Affirmed in part, and in part reversed and remanded with directions. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-14-825: **State v. Galindo**. Affirmed. Irwin, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-14-831: **State v. Rollie**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-14-847: **Carmody v. Carmody Mechanical**. Affirmed. Inbody, Irwin, and Riedmann, Judges.

†No. A-14-856: **Stewart v. Pirrucello**. Affirmed as modified. Moore, Chief Judge, and Inbody and Bishop, Judges.

†No. A-14-877: **Morehead v. Morehead**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

†No. A-14-917: **S.P. v. Wells**. Appeal dismissed. Per Curiam.

Nos. A-14-919, A-14-920: **State v. Dehning**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-14-922: **In re Trust of Bresel**. Affirmed as modified. Moore, Chief Judge, and Inbody and Bishop, Judges.

No. A-14-926: **Malmberg v. Malmberg**. Affirmed. Riedmann, Irwin, and Inbody, Judges.

No. A-14-929: **Welton v. Welton**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-14-938: **In re Guardianship & Conservatorship of Burke**. Appeal dismissed. Irwin, Inbody, and Riedmann, Judges.

No. A-14-948: **Kemnitz v. Thalken**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-14-949: **McBurnett v. Nebraskaland Tire**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-14-952: **Ames v. Ames**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-14-954: **State v. Jackson**. Affirmed. Moore, Chief Judge, and Inbody and Riedmann, Judges.

No. A-14-955: **Groene v. Groene**. Affirmed. Riedmann, Irwin, and Inbody, Judges.

No. A-14-958: **Greve v. Greve**. Affirmed. Inbody, Irwin, and Riedmann, Judges.

No. A-14-963: **Mowery v. Lovrien**. Affirmed. Irwin, Inbody, and Riedmann, Judges.

†No. A-14-967: **Ludtke v. Ludtke**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-14-970: **In re Estate of Goodrich**. Appeal dismissed. Irwin, Inbody, and Riedmann, Judges.

†No. A-14-982: **Marshall v. FedEx Freight East**. Affirmed. Riedmann, Irwin, and Inbody, Judges.

No. A-14-983: **State v. Williams**. Affirmed. Riedmann, Irwin, and Pirtle, Judges.

No. A-14-987: **Stover v. Branch**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Irwin, Judge.

†No. A-14-990: **Graham v. City of Lincoln Personnel Board**. Affirmed. Moore, Chief Judge, and Irwin and Inbody, Judges.

†No. A-14-1002: **Fochtman v. Fochtman**. Affirmed in part, and in part reversed and remanded with directions. Irwin, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-14-1005: **State v. McDougald**. Affirmed. Riedmann, Irwin, and Pirtle, Judges.

†No. A-14-1007: **Passauer v. Kelley**. Affirmed as modified. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

CASES DISPOSED OF BY MEMORANDUM OPINION

No. A-14-1033: **Holloway v. Hrynciw**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-14-1035: **In re Interest of Sara E**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-14-1043: **Lang v. Watson**. Reversed and remanded with directions. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-14-1044: **State v. Rodriguez-Rojas**. Affirmed. Irwin, Pirtle, and Riedmann, Judges.

†No. A-14-1053: **State v. Martinez**. Affirmed. Irwin, Inbody, and Riedmann, Judges.

†No. A-14-1055: **Kester v. Kester**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-14-1061: **Meier Masonry v. KRT Constr**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

†No. A-14-1064: **State on behalf of Jenna W. & Jayden W. v. Dennis W**. Affirmed. Moore, Chief Judge, and Irwin and Inbody, Judges.

†No. A-14-1081: **State v. Bates**. Affirmed. Riedmann, Pirtle, and Bishop, Judges.

†Nos. A-14-1082, A-14-1083: **State v. Haynes**. Judgment in No. A-14-1082 affirmed. Judgment in No. A-14-1083 affirmed in part, and in part vacated and remanded for resentencing. Bishop, Inbody, and Pirtle, Judges.

No. A-14-1093: **Johnson v. Johnson**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-14-1094: **State v. Woodard**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-14-1096: **Nelson v. Tri-Miller, Inc**. Remanded with directions. Irwin, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-14-1103: **Simmons v. Precast Haulers**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-14-1104: **Zapata v. Roberts**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Irwin, Judge.

†No. A-14-1105: **Nicholson v. LeBron**. Reversed and remanded with directions. Pirtle, Irwin, and Riedmann, Judges.

†No. A-14-1107: **McCracken v. Thomas Jackson Family Office**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

No. A-14-1108: **State v. Bargmann**. Affirmed. Reidmann, Irwin, and Inbody, Judges.

†No. A-14-1114: **White v. George**. Affirmed. Riedmann, Irwin, and Pirtle, Judges.

CASES DISPOSED OF BY MEMORANDUM OPINION

†No. A-14-1116: **State v. Newcomb**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

†No. A-14-1117: **Buehler v. Gibb**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

†No. A-14-1121: **State v. Valverde**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

No. A-14-1127: **Mogensen v. Mogensen**. Reversed and remanded. Pirtle, Irwin, and Riedmann, Judges.

No. A-14-1131: **State v. Stuart**. Affirmed. Inbody, Irwin, and Riedmann, Judges.

†No. A-14-1137: **State v. Davis**. Affirmed. Moore, Chief Judge, and Irwin and Inbody, Judges.

†No. A-14-1138: **City of Lincoln v. Dial Realty Development**. Affirmed. Riedmann, Irwin, and Inbody, Judges.

†No. A-14-1140: **State v. Graves**. Affirmed. Bishop, Pirtle, and Riedmann, Judges.

No. A-14-1142: **In re Interest of Angel S**. Affirmed. Inbody, Irwin, and Riedmann, Judges.

No. A-14-1151: **State v. Pritchard**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-14-1155: **Hussman v. Hussman**. Affirmed. Irwin, Pirtle, and Riedmann, Judges.

†No. A-14-1160: **State v. Rothenberger**. Affirmed. Bishop, Pirtle, and Riedmann, Judges.

No. A-14-1161: **Koch v. City of Sargent**. Affirmed. Moore, Chief Judge, and Irwin and Inbody, Judges.

†No. A-14-1162: **Wilson v. Waste Connections**. Affirmed in part, and in part reversed and remanded with directions. Riedmann, Irwin, and Inbody, Judges.

†No. A-14-1167: **Peterson v. Leprino Foods**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

†No. A-14-1169: **Dunlap v. Dunlap**. Affirmed as modified. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-15-001: **In re Interest of Takenya P**. Affirmed. Irwin, Inbody, and Riedmann, Judges.

†No. A-15-004: **Laird v. Laird**. Affirmed. Riedmann, Irwin, and Pirtle, Judges.

†No. A-15-005: **State v. Summage**. Affirmed. Pirtle, Riedmann, and Bishop, Judges.

No. A-15-008: **Robinson v. Department of Corrections**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Bishop, Judge.

CASES DISPOSED OF BY MEMORANDUM OPINION

†No. A-15-021: **In re Interest of Adrian W**. Reversed and remanded with directions. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-15-023: **Petersen-Kress v. Kress**. Affirmed. Riedmann, Irwin, and Inbody, Judges.

No. A-15-029: **State v. Pedersen**. Affirmed. Irwin, Inbody, and Riedmann, Judges.

No. A-15-033: **State v. Hernandez**. Affirmed. Moore, Chief Judge, and Irwin and Inbody, Judges.

No. A-15-039: **In re Interest of JaLan B. et al**. Affirmed. Riedmann, Irwin, and Inbody, Judges.

No. A-15-043: **Geiger v. Besmer**. Affirmed in part, and in part reversed and remanded for further proceedings. Inbody, Judge, and Moore, Chief Judge, and Irwin, Judge.

†No. A-15-044: **State v. Aguilar**. Affirmed. Moore, Chief Judge, and Irwin and Inbody, Judges.

†No. A-15-078: **State v. Noyd**. Affirmed in part, sentence of restitution vacated, and cause remanded with directions. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-15-081: **Furstenfeld v. Pepin-Furstenfeld**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

†No. A-15-089: **State v. Jensen**. Affirmed. Bishop, Pirtle, and Riedmann, Judges.

†No. A-15-094: **State v. Shelby**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-15-102: **Ervin v. Associated Staffing**. Affirmed in part, reversed in part, and in part remanded for further proceedings. Inbody, Irwin, and Riedmann, Judges.

†No. A-15-108: **State v. Wells**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-15-111: **State v. Hill**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-15-114: **Brian M. v. Cynthia A**. Affirmed. Bishop, Pirtle, and Riedmann, Judges.

No. A-15-115: **State v. Mumin**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-15-117: **McClelland v. McClelland**. Affirmed. Moore, Chief Judge, and Irwin and Bishop, Judges.

No. A-15-123: **Kochen v. Martin Marietta Materials**. Affirmed. Irwin, Inbody, and Riedmann, Judges.

†No. A-15-126: **Zapata v. QBE Ins. Co**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

CASES DISPOSED OF BY MEMORANDUM OPINION

No. A-15-133: **In re Interest of Corazon B. et al**. Affirmed. Riedmann, Irwin, and Inbody, Judges.

No. A-15-137: **State v. Left Hand**. Affirmed as modified. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-15-141: **Mott v. Tractor Supply Co**. Affirmed in part, and in part reversed and remanded for further proceedings. Riedmann, Pirtle, and Bishop, Judges.

No. A-15-142: **State v. Nguyen**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Irwin, Judge.

†No. A-15-146: **Rasmussen v. Nelson**. Affirmed. Riedmann, Inbody, and Pirtle, Judges.

No. A-15-148: **State v. Baker**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-15-156: **In re Interest of James S. et al**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-15-160: **State v. Hatten**. Affirmed. Pirtle, Irwin, and Riedmann, Judges.

No. A-15-165: **State v. Swanson**. Affirmed. Inbody, Irwin, and Riedmann, Judges.

†No. A-15-168: **Lee v. Fletcher**. Reversed and remanded with directions. Irwin, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-15-178: **Bruzzano v. Bruzzano**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Irwin, Judge.

No. A-15-182: **State v. Herman**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-15-190: **In re Guardianship & Conservatorship of Gabel**. Affirmed. Bishop, Pirtle, and Riedmann, Judges.

†No. A-15-191: **In re Charles L. Gabel Revocable Trust**. Affirmed. Bishop, Pirtle, and Riedmann, Judges.

†No. A-15-195: **Hays v. Hays**. Affirmed. Irwin, Pirtle, and Riedmann, Judges.

No. A-15-196: **State v. Garrett**. Affirmed as modified. Irwin, Pirtle, and Riedmann, Judges.

No. A-15-202: **O'Donnell v. O'Donnell**. Affirmed. Riedmann, Pirtle, and Bishop, Judges.

No. A-15-208: **State v. Harrod**. Affirmed. Pirtle, Irwin, and Riedmann, Judges.

†No. A-15-209: **Winsick v. Winsick**. Affirmed. Irwin, Pirtle, and Riedmann, Judges.

†No. A-15-210: **State v. Ueding-Nickel**. Affirmed. Pirtle, Riedmann, and Bishop, Judges.

CASES DISPOSED OF BY MEMORANDUM OPINION

No. A-15-220: **Jason K. v. Michaela K**. Affirmed. Bishop, Pirtle, and Riedmann, Judges.

†No. A-15-221: **Farmer v. Zapata**. Affirmed in part, and in part reversed and remanded with directions. Inbody, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-15-222: **Cohrs v. Bruns**. Affirmed. Moore, Chief Judge, and Irwin and Bishop, Judges.

No. A-15-224: **White v. White**. Affirmed. Pirtle, Riedmann, and Bishop, Judges.

†No. A-15-229: **In re Interest of Malik T**. Affirmed. Pirtle, Riedmann, and Bishop, Judges.

†No. A-15-238: **Kircher v. The Maschhoffs, LLC**. Affirmed. Pirtle, Riedmann, and Bishop, Judges.

No. A-15-241: **State v. Ruch**. Reversed and remanded with directions. Riedmann, Irwin, and Inbody, Judges.

†No. A-15-242: **State v. Devers**. Affirmed. Bishop, Pirtle, and Riedmann, Judges.

†No. A-15-245: **In re Interest of Branden S**. Affirmed. Moore, Chief Judge, and Irwin and Inbody, Judges.

†No. A-15-246: **In re Interest of Dana H**. Affirmed. Moore, Chief Judge, and Irwin and Inbody, Judges.

No. A-15-248: **Mumin v. Flowers**. Affirmed. Pirtle, Irwin, and Riedmann, Judges.

No. A-15-250: **State v. Dowson**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Irwin, Judge.

No. A-15-251: **State v. Doerschlag**. Affirmed. Riedmann, Irwin, and Pirtle, Judges.

No. A-15-259: **State v. Contreras**. Affirmed. Riedmann, Pirtle, and Bishop, Judges.

No. A-15-261: **State v. Johnson**. Affirmed. Irwin, Pirtle, and Riedmann, Judges.

†No. A-15-269: **Vandelay Investments v. Brennan**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Irwin, Judge.

No. A-15-283: **In re Interest of Traeh T**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-15-284: **In re Interest of Demarcus O**. Affirmed. Moore, Chief Judge, and Irwin and Inbody, Judges.

No. A-15-285: **In re Interest of Aubrei M**. Affirmed. Moore, Chief Judge, and Irwin and Inbody, Judges.

†No. A-15-286: **Donnelly v. Elite Staffing Global**. Affirmed in part, and in part reversed and remanded with directions. Riedmann, Pirtle, and Bishop, Judges.

CASES DISPOSED OF BY MEMORANDUM OPINION

No. A-15-287: **Renner v. Gobbett**. Affirmed in part, and in part reversed. Riedmann, Pirtle, and Bishop, Judges.

No. A-15-288: **In re Interest of Destiny H. et al**. Affirmed. Irwin, Pirtle, and Riedmann, Judges.

†No. A-15-290: **Luebke v. Spano**. Affirmed in part, and in part reversed and remanded with directions. Riedmann, Pirtle, and Bishop, Judges.

No. A-15-295: **State v. Sullivan**. Affirmed. Moore, Chief Judge, and Irwin and Bishop, Judges.

†No. A-15-301: **State v. McKnight**. Affirmed. Bishop, Judge (1-judge).

†No. A-15-304: **State v. Parson**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

†No. A-15-306: **State v. Parson**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Pirtle, Judge.

No. A-15-308: **In re Interest of Jay Maree C**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-15-310: **In re Interest of Tysen V. & Semaj H**. Affirmed. Inbody, Irwin, and Riedmann, Judges.

No. A-15-313: **In re Interest of Neveah S**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-15-314: **In re Interest of Ashton S**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-15-326: **Beddes v. Beddes**. Affirmed. Pirtle, Irwin, and Bishop, Judges.

No. A-15-333: **State v. Haynes**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Irwin, Judge.

No. A-15-347: **State v. Jenkins**. Affirmed. Irwin, Pirtle, and Bishop, Judges.

†No. A-15-348: **State v. McKean**. Affirmed. Pirtle, Riedmann, and Bishop, Judges.

†No. A-15-349: **In re Interest of Grace H**. Reversed and remanded with directions. Bishop, Pirtle, and Riedmann, Judges.

No. A-15-354: **Concannon v. Fuentes**. Affirmed. Riedmann, Irwin, and Pirtle, Judges.

No. A-15-365: **State v. Bazyn**. Affirmed. Pirtle, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-15-376: **State v. Gonzales**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

No. A-15-377: **Angela C. & Andrew G. on behalf of Anthony G. v. Vacek**. Reversed and remanded with directions. Moore, Chief Judge, and Inbody and Bishop, Judges.

CASES DISPOSED OF BY MEMORANDUM OPINION

No. A-15-378: **Wildman v. George Witt Serv**. Reversed and remanded with directions. Irwin, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-15-388: **State v. Purdie**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Irwin, Judge.

No. A-15-390: **In re Interest of Tryston R**. Affirmed. Irwin, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-15-391: **In re Interest of Ravin L**. Affirmed. Irwin, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-15-395: **State v. Gatson**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-15-397: **Robert L. v. Robin L**. Affirmed. Bishop, Pirtle, and Riedmann, Judges.

No. A-15-398: **In re Interest of Christopher A**. Affirmed. Riedmann, Pirtle, and Bishop, Judges.

No. A-15-401: **State v. Mohammad**. Affirmed. Pirtle, Inbody, and Riedmann, Judges.

No. A-15-412: **Dostal v. Dostal**. Affirmed. Pirtle, Inbody, and Riedmann, Judges.

No. A-15-413: **State v. Gallegos-Palafox**. Affirmed. Moore, Chief Judge, and Irwin and Bishop, Judges.

†No. A-15-414: **State v. Loyd**. Affirmed. Moore, Chief Judge, and Pirtle and Bishop, Judges.

No. A-15-422: **In re Interest of Brianna B**. Affirmed. Riedmann, Irwin, and Pirtle, Judges.

†No. A-15-427: **State v. Thayer**. Affirmed. Moore, Chief Judge, and Irwin and Inbody, Judges.

No. A-15-441: **State v. Cramer**. Affirmed. Riedmann, Irwin, and Pirtle, Judges.

No. A-15-448: **State v. Haley**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Irwin, Judge.

No. A-15-461: **In re Interest of Shayla H. et al**. Affirmed. Riedmann, Inbody, and Pirtle, Judges.

†No. A-15-462: **State v. Alspaugh**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Irwin, Judge.

No. A-15-464: **State v. Culbertson**. Affirmed. Inbody, Irwin, and Riedmann, Judges.

†No. A-15-466: **State v. St. Louis**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

No. A-15-493: **State on behalf of Caden W. v. Adam W**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-15-496: **Telles v. Excel Corp**. Affirmed in part, and in part reversed. Inbody, Pirtle, and Riedmann, Judges.

†No. A-15-501: **Clouse v. Northwestern Corp**. Affirmed. Irwin, Pirtle, and Riedmann, Judges.

No. A-15-504: **State v. Papazian**. Affirmed. Inbody, Pirtle, and Riedmann, Judges.

†No. A-15-507: **Consbruck v. Consbruck**. Affirmed in part, and in part reversed and remanded with directions. Moore, Chief Judge, and Irwin and Bishop, Judges.

†No. A-15-511: **Martinez v. Akins**. Reversed and remanded with directions. Riedmann, Inbody, and Pirtle, Judges.

†No. A-15-522: **State v. Brooks**. Reversed and remanded with directions. Irwin, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-15-542: **Olsen v. Taylor's Drain & Sewer Serv**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-15-553: **In re Interest of A.H**. Affirmed. Pirtle, Inbody, and Riedmann, Judges.

No. A-15-554: **Boppre v. Cardenas**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Riedmann, Judge.

No. A-15-555: **In re Interest of Daryn M**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

No. A-15-557: **In re Interest of Taylor M**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-15-562: **State v. Mann**. Affirmed. Irwin, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-15-569: **In re Interest of Brennan Z**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Irwin, Judge.

No. A-15-574: **In re Guardianship & Conservatorship of Alfredo B**. Affirmed. Inbody, Pirtle, and Riedmann, Judges.

No. A-15-575: **In re Estate of Liebig**. Affirmed. Riedmann, Inbody, and Pirtle, Judges.

No. A-15-576: **In re Interest of Brantley L**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

No. A-15-577: **In re Interest of Jason L**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

No. A-15-578: **In re Interest of Jadin L**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

No. A-15-579: **In re Interest of Kighley L**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

No. A-15-585: **State v. Furby**. Affirmed. Riedmann, Irwin, and Inbody, Judges.

CASES DISPOSED OF BY MEMORANDUM OPINION

No. A-15-587: **In re Interest of Phaylin D. & Phebie D**. Affirmed. Irwin, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-15-596: **State v. Nelsen**. Affirmed. Pirtle, Riedmann, and Bishop, Judges.

†No. A-15-599: **State v. Baker**. Affirmed. Riedmann, Inbody, and Pirtle, Judges.

†No. A-15-607: **In re Interest of Dante S**. Affirmed. Pirtle, Irwin, and Riedmann, Judges.

†No. A-15-611: **Huse v. Dakota Cty. Bd. of Equal**. Appeal dismissed. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-15-616: **State v. Wise**. Affirmed. Moore, Chief Judge, and Irwin and Inbody, Judges.

†No. A-15-625: **State v. O'Connor**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

No. A-15-637: **In re Interest of Jesus G**. Affirmed. Moore, Chief Judge, and Irwin and Bishop, Judges.

†No. A-15-642: **State v. Fernandez-Suarez**. Affirmed. Pirtle, Inbody, and Riedmann, Judges.

No. A-15-645: **State v. Warford**. Affirmed. Pirtle, Irwin, and Riedmann, Judges.

†No. A-15-646: **Heimes v. Cedar County**. Appeals dismissed. Inbody, Pirtle, and Riedmann, Judges.

†No. A-15-647: **State v. Gutierrez**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-15-650: **Heimes v. Arens**. Appeals dismissed. Inbody, Pirtle, and Riedmann, Judges.

No. A-15-652: **Wilcox v. Rheome-Wilcox**. Affirmed. Moore, Chief Judge, and Inbody and Riedmann, Judges.

No. A-15-653: **Dahlgren v. Dahlgren**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-15-664: **In re Interest of Santiago T**. Affirmed. Irwin, Pirtle, and Riedmann, Judges.

†No. A-15-675: **In re Interest of Precious H. & Blut Law La H**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-15-678: **In re Interest of Angelica R. & Carmen R**. Affirmed. Inbody, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-15-679: **In re Interest of Kennah S. et al**. Affirmed in part, and in part reversed. Irwin, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-15-689: **In re Interest of Audrianna F. et al**. Affirmed. Moore, Chief Judge, and Irwin and Bishop, Judges.

CASES DISPOSED OF BY MEMORANDUM OPINION

No. A-15-693: **In re Interest of Tamia S**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

†No. A-15-703: **Payne v. Gage**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Irwin, Judge.

†No. A-15-719: **Schenck v. Schenck**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Irwin, Judge.

†No. A-15-720: **State v. Hines**. Affirmed. Pirtle, Inbody, and Riedmann, Judges.

No. A-15-725: **In re Interest of Cambrey M. & Chord M**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-15-729: **Merten v. Fross**. Affirmed. Inbody, Pirtle, and Riedmann, Judges.

†No. A-15-731: **State v. Miller**. Affirmed. Riedmann, Irwin, and Pirtle, Judges.

No. A-15-738: **In re Interest of Triniti R. et al**. Affirmed. Moore, Chief Judge, and Irwin and Bishop, Judges.

†No. A-15-745: **Miller v. Money**. Reversed and remanded with directions. Pirtle, Inbody, and Riedmann, Judges.

No. A-15-759: **In re Interest of Brandon H. et al**. Affirmed. Irwin, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-15-764: **State v. Moore**. Affirmed. Irwin, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-15-772: **In re Interest of Sebastian D. & Lillian-Jo D**. Affirmed. Moore, Chief Judge, and Inbody and Riedmann, Judges.

No. A-15-774: **Williams v. EGS Appleton**. Affirmed. Moore, Chief Judge, and Irwin and Bishop, Judges.

No. A-15-791: **Vavra v. Vavra**. Affirmed. Pirtle, Irwin, and Bishop, Judges.

†No. A-15-805: **In re Interest of My'Kyng K. et al**. Affirmed. Bishop, Judge, and Moore, Chief Judge, and Irwin, Judge.

†No. A-15-818: **State v. Valdez**. Affirmed in part as modified, and in part reversed and vacated. Inbody, Judge, and Moore, Chief Judge, and Bishop, Judge.

†No. A-15-837: **Ellenberger v. Charles Vrana & Sons Constr**. Appeal dismissed. Bishop, Judge, and Moore, Chief Judge, and Irwin, Judge.

No. A-15-843: **In re Interest of Dewitt W**. Affirmed. Irwin, Judge, and Moore, Chief Judge, and Bishop, Judge.

No. A-15-875: **Jennifer M. v. Rudy M**. Reversed and remanded with directions. Irwin, Judge, and Moore, Chief Judge, and Bishop, Judge.

CASES DISPOSED OF BY MEMORANDUM OPINION

No. A-15-889: **In re Interest of Taliyah L**. Affirmed. Riedmann, Judge, and Moore, Chief Judge, and Inbody, Judge.

No. A-15-911: **In re Interest of Oliver J. & Jesse V**. Affirmed. Inbody, Pirtle, and Riedmann, Judges.

No. A-15-915: **State v. Rivera**. Affirmed. Irwin, Pirtle, and Riedmann, Judges.

Nos. A-15-924, A-15-925, A-15-927: **State v. Dak**. Affirmed. Irwin, Pirtle, and Riedmann, Judges.

†No. A-15-939: **State v. Allio**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

No. A-15-978: **In re Interest of Andy G. & Daisy C**. Affirmed. Riedmann, Inbody, and Pirtle, Judges.

No. A-15-992: **State v. Cooperwood**. Affirmed. Riedmann, Irwin, and Pirtle, Judges.

†No. A-15-996: **In re Interest of Abbie L. et al**. Reversed and vacated. Bishop, Irwin, and Pirtle, Judges.

†No. A-15-1006: **State v. Bradly M**. Affirmed. Bishop, Irwin, and Pirtle, Judges.

No. A-15-1041: **State v. Beitler**. Affirmed. Moore, Chief Judge, and Inbody and Bishop, Judges.

No. A-15-1063: **In re Interest of Amon W. & Nahla S**. Affirmed. Bishop, Irwin, and Pirtle, Judges.

# LIST OF CASES DISPOSED OF WITHOUT OPINION

No. A-14-640: **State v. Ramos**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-14-789: **Burns v. Burns**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-14-992: **State v. Arrellano**. Stipulation allowed; appeal dismissed.

No. A-14-1028: **Cattle Nat. Bank & Trust Co. v. Watson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-14-1054: **Nebraska Account. & Disclosure Comm. v. Japp**. Stipulation allowed; appeal dismissed.

No. A-14-1090: **State v. Santos**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-14-1120: **Kmoch v. Detienne**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Centurion Stone of Neb. v. Whelan*, 286 Neb. 150, 835 N.W.2d 62 (2013).

No. A-14-1132: **QBE Ins. Corp. v. MWE Servs**. Affirmed. See, § 2-107(A)(1); *Kirchner v. Gast*, 169 Neb. 404, 100 N.W.2d 65 (1959).

No. A-15-009: **Lemars Ins. Co. v. Koenig**. Affirmed. See, § 2-107(A)(1); *First Nat. Bank of Omaha v. Eldridge*, 17 Neb. App. 12, 756 N.W.2d 167 (2008).

No. A-15-052: **State v. Hostetter**. Remanded with directions. See *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972). See, also, *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009); *State v. Johnson*, 22 Neb. App. 747, 860 N.W.2d 222 (2015).

No. A-15-053: **Campo v. Mourton**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-055: **Schriner v. Schriner**. Appeal dismissed. See, § 2-107(A)(2); *Bayliss v. Bayliss*, 8 Neb. App. 269, 592 N.W.2d 165 (1999).

No. A-15-091: **State v. Stanko**. Affirmed. See § 2-107(A)(1).

No. A-15-095: **State v. Ruegge**. Affirmed. See, § 2-107(A)(1); *State v. Wetherell*, 289 Neb. 312, 855 N.W.2d 359 (2014); *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014).

No. A-15-135: **State v. Saner**. 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. Start*, 239 Neb. 571, 477 N.W.2d 20 (1991).

No. A-15-151: **State v. Christensen**. 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-15-162: **State v. Gonzales**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3001(4) (Cum. Supp. 2014).

No. A-15-172: **State v. Fuehrer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-179: **State v. Nice**. 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-15-184: **State v. Matthews**. 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-15-198: **In re Interest of Lamar W. & Wallace B**. Stipulation allowed; appeal dismissed.

No. A-15-203: **State v. Schaefer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Berney*, 288 Neb. 377, 847 N.W.2d 732 (2014).

No. A-15-211: **State v. Adams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

No. A-15-231: **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-15-258: **Johnson v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-262: **Johnson v. Lower Big Blue NRD**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-15-267: **Costello v. Herzog**. Reversed and remanded with directions.

Nos. A-15-271, A-15-272, A-15-276: **State v. Pinkston**. 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-15-289: **State v. Swenson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Huston*, 291 Neb. 708, 868 N.W.2d 766 (2015); *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

No. A-15-292: **State v. Heckman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Berney*, 288 Neb. 377, 847 N.W.2d 732 (2014).

Nos. A-15-294, A-15-297, A-15-298: **State v. Wulbern**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-15-300: **Wolkins v. Wolkins**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-305: **State v. Wuowrut**. 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-15-307: **Rodriguez v. Hoch, Inc**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-15-315: **Kuil v. Kuil**. Affirmed. See § 2-107(A)(1). See, also, *Greenhall Investments v. Wiese Dev. Corp.*, 14 Neb. App. 155, 706 N.W.2d 552 (2005).

No. A-15-316: **Koch v. Koch**. Affirmed. See, § 2-107(A)(1); *Gress v. Gress*, 274 Neb. 686, 743 N.W.2d 67 (2007).

No. A-15-319: **State v. Cavanaugh**. Motion of appellee for summary disposition sustained; appeal affirmed in part, and in part dismissed.

No. A-15-320: **State v. Gardner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-325: **State v. Floyd**. 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-15-328: **In re Interest of Bailey M**. Affirmed. See, § 2-107(A)(1); *In re Interest of Taeven Z.*, 19 Neb. App. 831, 812 N.W.2d 313 (2012).

No. A-15-331: **In re Interest of Nathaniel M. et al**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-334: **State v. Benson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-340: **Hansen v. Hansen**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-341: **State v. Stokes**. 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).

Nos. A-15-342, A-15-343: **State v. Delaney**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

Nos. A-15-344, A-15-345: **State v. Grace**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Berney*, 288 Neb. 377, 847 N.W.2d 732 (2014).

No. A-15-351: **State v. Maske**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-353: **State v. Anaya**. 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-15-356: **State v. Novak**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

Nos. A-15-358, A-15-360: **State v. Osman**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-15-359: **State v. Osman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-15-364: **Shepard v. Frankes**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-366: **Tira B. on behalf of Minor Progeny v. Health & Human Servs**. Affirmed. See §§ 2-107(A)(1) and 2-109(D)(1).

No. A-15-371: **State v. Diego-Antonio**. 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-15-374: **State v. Borene**. 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-15-375: **State v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-15-383, A-15-384: **State v. Ross**. 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-15-385: **State v. Allen**. Stipulation allowed; appeal dismissed.

Nos. A-15-400, A-15-410: **State v. Morgan**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-15-407: **State v. Ret**. 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-15-409: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-15-415: **Escobar v. Chavez**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-418: **State v. Kitt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Wetherell*, 289 Neb. 312, 855 N.W.2d 359 (2014).

No. A-15-424: **State v. Bunz**. 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-15-425: **State v. Neemann**. 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-15-428: **Pease v. Custer Public Power**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-430: **State v. Deckert**. 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-15-432: **State v. Tyler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-15-433: **Cole v. Morello**. Appellee's suggestion of remand granted; remanded with directions.

No. A-15-437: **State v. Lowery**. 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-15-440: **State v. Sinnard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-15-444: **Quinn v. Morgan**. Appeal dismissed as moot. See, § 2-107(A)(2); *Yancer v. Kaufman*, 22 Neb. App. 320, 854 N.W.2d 640 (2014).

No. A-15-450: **Vandelay Investments v. Brown**. Appeal dismissed for lack of jurisdiction.

No. A-15-451: **Essink v. City of Gretna**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-454: **In re Guardianship of Abigale B**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-15-456: **State v. Berning**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-457: **In re Guardianship & Conservatorship of Kyoka R**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-460: **Aloi v. Western Engineering Co**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-15-463: **State v. Wilson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-15-465: **Maxwell v. Ross**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-467: **State v. Bibb**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 29-826 (Reissue 2008).

No. A-15-468: **State v. Wesner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-15-471: **Cutaia v. Larose**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-474: **Gray v. Farhart**. Appeal dismissed. See, § 2-107(A)(2); *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010); *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989).

No. A-15-475: **Tyler v. Medicaid**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-477: **State v. Scott**. 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-15-479: **In re Interest of Shelby H**. Motion of appellee for summary dismissal sustained; appeal dismissed. See § 2-107(B)(1).

No. A-15-480: **State v. Pineda**. Appeal dismissed. See § 2-107(A)(2).

Nos. A-15-484 through A-15-486: **State v. Ree**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-15-489: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002).

No. A-15-491: **State v. Spatz**. Stipulation allowed; appeal dismissed.

No. A-15-495: **State v. Moore**. 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-15-498: **State v. Hutchison**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

No. A-15-499: **State on behalf of Nathaniel G. v. Jeffrey C**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-500: **Moore v. Babin**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-502: **State v. Privett**. 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-15-503: **State v. Furby**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-506: **State v. Shiflett**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-509: **Eichhorst v. Eichhorst**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-510: **Robinson v. Robinson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-513: **Moss v. Tyler**. Appeal dismissed. See, § 2-107(A)(2); *State v. Sims*, 291 Neb. 475, 865 N.W.2d 800 (2015); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

Nos. A-15-516, A-15-517: **State v. Haynes**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-519: **State v. Alsidez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-524: **Deremer v. Owens**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Chloe P.*, 21 Neb. App. 456, 840 N.W.2d 549 (2013).

No. A-15-525: **Lower Loup NRD v. Prokop**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-531: **Hamilton v. Department of Health & Human Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-532: **State v. Lammert-Steele**. 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-15-535: **State v. Ducksworth**. 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-15-537: **Koch v. Williams**. Appeal dismissed. See § 2-107(A)(2).

Nos. A-15-539, A-15-540: **State v. Paulsen**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-15-541: **State v. Bender**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-15-543: **State v. Kennedy**. 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).

Nos. A-15-547, A-15-549: **State v. Le**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-15-550: **State v. Seffron**. 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-15-551: **State v. Seffron**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-552: **State v. Seffron**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-556: **State v. Mumin**. Motion of appellee for summary dismissal granted for lack of a final, appealable order.

No. A-15-558: **State v. Harris**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-561: **State v. Marsh**. Affirmed. See § 2-107(A)(1).

No. A-15-563: **State v. Dercole**. 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-15-565: **State v. Gabir**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Esch*, 290 Neb. 88, 858 N.W.2d 219 (2015); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-566: **State v. Haynes**. 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).

Nos. A-15-567, A-15-568: **State v. Hall**. 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-15-571: **In re Interest of Leon S**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-583: **State v. Beyer**. 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-15-586: **State v. Haskell**. 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-15-588: **State v. Shadle**. 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-15-591: **Hernandez v. JBS USA**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-592: **Williams v. City of Omaha**. Appeal dismissed. See, § 2-107(A)(2); *Waite v. City of Omaha*, 263 Neb. 589, 641 N.W.2d 351 (2002).

No. A-15-595: **State on behalf of Rileigh M. v. Stefan M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-597: **State v. Kershaw**. 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-15-600: **State v. Smith**. Stipulation allowed; appeal dismissed.

No. A-15-602: **State v. Tealer**. Appeal dismissed. See, § 2-107(A)(2); *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Schlund*, 249 Neb. 173, 542 N.W.2d 421 (1996).

No. A-15-603: **State v. Snyder**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-605: **State v. O'Donnell**. 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); *State v. Trackwell*, 250 Neb. 46, 547 N.W.2d 471 (1996).

No. A-15-606: **Williams v. Williams**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-609: **Matias v. JBS Distribution**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-613: **State v. Assad**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Podrazo*, 21 Neb. App. 489, 840 N.W.2d 898 (2013).

No. A-15-614: **State v. Burger**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

No. A-15-615: **State v. Humphrey**. 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-15-619: **Castonguay v. Ertzer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-15-620: **State v. Wallace**. 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-15-621, A-15-623: **State v. Hudson**. 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-15-622: **State v. Palmer**. Stipulation allowed; appeal dismissed.

No. A-15-624: **Father Flanagan's Boys' Home v. Owens**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-15-628: **Steward v. Steward**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1301 (Reissue 2008).

No. A-15-629: **State v. Lopez**. Appellee's suggestion of remand granted.

No. A-15-631: **State v. Ross**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-632: **State v. Ross**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-636: **Cain v. Cano**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-638: **Orchards at Wildewood v. Sarpy Cty. Bd. of Equal**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-639: **Nelson v. Board of Parole**. Appeal dismissed. See, § 2-107(A)(2); *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998). See, also, *State v. Harig*, 192 Neb. 49, 218 N.W.2d 884 (1974).

No. A-15-640: **State v. Moniz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-15-641: **Caniglia v. Omaha Pub. Sch. Dist**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-15-649: **State v. Foksowicz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-654: **State v. Zemartis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-655: **State v. Trusler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-656: **State v. Potadle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Garcia*, 281 Neb. 1, 792 N.W.2d 882 (2011); *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

No. A-15-657: **State v. Higel**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-660: **State v. Voss**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-661: **In re Estate of Preyer**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-15-662, A-15-663: **Jimenez on behalf of Eastman v. Eastman**. Stipulations allowed; appeals dismissed.

No. A-15-667: **Landers v. EQlibrium Corp**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-15-669: **State v. Sayers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-670: **M & L AG, LLC v. Landen**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *State v. Hudson*, 273 Neb. 42, 727 N.W.2d 219 (2007).

No. A-15-671: **State v. Estevez**. Appellee's suggestion of remand sustained.

No. A-15-674: **In re Adoption of Cedric S**. Stipulation allowed; appeal dismissed.

No. A-15-680: **Norris v. Nebraska Supreme Court**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008).

No. A-15-681: **In re Guardianship of Daphne C**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-683: **Williams v. Warden of Douglas Cty. Corrections**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-685: **State v. Newton**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-686: **State v. Newton**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-690: **In re Interest of Janice G. & Joleah G**. Appeal dismissed. See, § 2-107(A)(2); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. A-15-691: **In re Interest of Asaunt G**. Appeal dismissed. See, § 2-107(A)(2); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. A-15-696: **Sherrod v. Frakes**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

No. A-15-699: **State v. Specht**. Stipulation allowed; appeal dismissed.

No. A-15-701: **King v. Gage**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-702: **Wills v. Carey Johnson Oil Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-704: **State v. Palma-Solano**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-15-705: **State v. Hallauer**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 29-1818 (Reissue 2008); *Schrum v. State*, 108 Neb. 186, 187 N.W. 801 (1922).

No. A-15-709: **State v. Nelson**. 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-15-710: **State v. Razo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-15-711: **State v. Perales**. Stipulation allowed; appeal dismissed.

No. A-15-713: **State v. Covarrubias**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-714: **State v. Ottens**. Stipulation allowed; appeal dismissed.

No. A-15-715: **State v. Walker**. Stipulation allowed; appeal dismissed.

No. A-15-716: **State v. Masters**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-15-718: **State v. Leija**. 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-15-721: **Merizalde v. Menard, Inc**. Stipulation allowed; appeal dismissed with prejudice.

No. A-15-726: **State v. Solorzano-Ramirez**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-727: **State v. Mavis**. 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-15-728: **El-Kasaby v. Reveiz**. Stipulation allowed; appeal dismissed.

No. A-15-732: **State v. O'Laughlin**. 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-15-733: **Moore v. Lancaster Cty. Dept. of Corrections**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-15-735: **Frost v. Frost**. Motion of appellee for summary dismissal sustained; appeal dismissed. See Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-736: **Manriquez v. Luevano**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-737: **Hall v. Frakes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012).

No. A-15-739: **State v. Seberger**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-15-740: **Sanchez v. JBS USA**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 48-185 (Cum. Supp. 2014).

Nos. A-15-741, A-15-744: **State v. Scott**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-15-746: **State v. Hoesing**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-747: **Huss v. Huss**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-749: **State v. Brown**. Appeal dismissed. See, § 2-107(A)(2); *State v. Rieger*, 8 Neb. App. 20, 588 N.W.2d 206 (1999).

No. A-15-753: **State v. Gruhn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999).

No. A-15-756: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-758: **State v. Bethel**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of K.D.B.*, 233 Neb. 371, 445 N.W.2d 620 (1989).

No. A-15-760: **State v. Blackstock**. 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-15-762: **State v. Ford**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-766: **U.S. Bank v. Stadler**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-768: **Lohrman v. Lohrman**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-769: **State v. Castonguay**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-15-770: **State v. Wells**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-771: **State v. Liner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-780: **Wilson v. Ascentia Real Estate Invest. Co**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. §§ 25-1902 and 25-1912 (Reissue 2008).

Nos. A-15-781, A-15-782: **State v. Hernandez**. 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).

No. A-15-783: **State v. Marshall**. 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-15-784: **State v. Olney**. 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-15-786: **McElroy v. Ghani**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1912(1) and 25-2301.01 (Reissue 2008).

No. A-15-787: **State v. Terry**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-15-793: **State v. Phillips**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-794: **Korbelik v. Theobald**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-795: **Father Flanagan's Boys' Home v. Owens**. Appeal dismissed. See, § 2-107(A)(2); *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989).

No. A-15-796: **State v. Mays**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-2204(2)(a) (Cum. Supp. 2014); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-799: **Puls v. Knoblauch**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-799: **Puls v. Knoblauch**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-15-802: **State v. Williams**. 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-15-803: **Keown v. Willms Enters**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-15-806: **In re Interest of Allyssa R. & Nina R**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-15-807: **State v. Brown**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-809: **State v. Riley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-810: **Morris v. Morris**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-15-812, A-15-813: **State v. Knight**. 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-15-815: **State v. Nicholson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-15-817: **Oak Hills Highlands Assn. v. Levasseur**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-820: **Mumin v. Travelers Ins. Co**. Appeal dismissed.

No. A-15-821: **State v. Robinson**, Appeal dismissed. See § 2-107(A)(2).

No. A-15-821: **State v. Robinson**. Appeal reinstated.

No. A-15-823: **Doty v. Cassling**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-15-824: **In re Interest of Codey L**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Cassandra B. & Moira B.*, 290 Neb. 619, 861 N.W.2d 398 (2015).

No. A-15-827: **State v. Smedley**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-829: **State v. Jalloh**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

No. A-15-830: **Morris Enters. v. Akins**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-831: **State v. Chastain**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-15-836: **City of Long Pine v. Voss**. Appeal dismissed. See, § 2-107(A)(2); *Friedman v. Friedman*, 20 Neb. App. 135, 819 N.W.2d 732 (2012).

No. A-15-838: **State on behalf of Michael A. v. Samar A**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-839: **Travelers Indemnity Co. v. Gridiron Mgmt. Group**. Motion of appellee for summary dismissal sustained; appeal dismissed.

No. A-15-842: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3001(4) (Cum. Supp. 2014).

No. A-15-847: **State v. Floyd**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-15-850: **Mengedoht v. Taylor**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 7-101 (Reissue 2012). See, also, *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 857 N.W.2d 816 (2015); *Back Acres Pure Trust v. Fahnlander*, 233 Neb. 28, 443 N.W.2d 604 (1989).

No. A-15-855: **State on behalf of Desirae M. v. Darrell S**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-856: **Morgan v. Yah**. Affirmed. See, § 2-107(A)(1); *Richards v. McClure*, 290 Neb. 124, 858 N.W.2d 841 (2015).

No. A-15-857: **Morgan v. Yah**. Affirmed. See, § 2-107(A)(1); *Richards v. McClure*, 290 Neb. 124, 858 N.W.2d 841 (2015).

CASES DISPOSED OF WITHOUT OPINION

No. A-15-863: **Ra v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Richmond v. Case*, 264 Neb. 319, 647 N.W.2d 90 (2002).

No. A-15-864: **Titus v. Titus**. Stipulation allowed; appeal dismissed.

No. A-15-865: **Cuda v. Department of Motor Vehicles**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-867: **Tompkin v. RTG Medical**. Appeal dismissed. See § 2-107(A)(2). See, also, *Jacobitz v. Aurora Co-op*, 287 Neb. 97, 841 N.W.2d 377 (2013); *Hamm v. Champion Manuf. Homes*, 11 Neb. App. 183, 645 N.W.2d 571 (2002).

No. A-15-868: **State v. Phillips**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-873: **State v. Meyer**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

No. A-15-874: **State v. Moten-Roddy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-15-876: **State v. Graham**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-877: **State v. Gardner**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-883: **State v. Wuor**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-884: **State v. Wuor**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-892: **State v. Hardeman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-893: **Swift v. Mockabee**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1912(1) and 25-2301.02 (Reissue 2008).

No. A-15-894: **Hassler v. Hassler**. Motion of appellee for summary dismissal sustained; appeal dismissed. See § 2-107(B)(1).

No. A-15-895: **Mengedoht v. Looby**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 7-101 (Reissue 2012). See, also, *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 857 N.W.2d 816 (2015); *Back Acres Pure Trust v. Fahnlander*, 233 Neb. 28, 443 N.W.2d 604 (1989).

No. A-15-896: **Anderson v. Anderson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-902: **Gray v. Gage**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012).

No. A-15-904: **Otte Fish Family Harvesting v. Stanko**. Appeal dismissed.

No. A-15-905: **State v. Ballard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-907: **State on behalf of Jeremy K. v. Stephen F**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-913: **State v. Gardner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

No. A-15-914: **State v. Perez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-918: **State v. Graves**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-920: **State v. Dyer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-15-926: **State v. Brinton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-15-929: **State v. Bethel**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008); *Metrejean v. Gunter*, 240 Neb. 166, 481 N.W.2d 176 (1992).

No. A-15-930: **Cavanaugh v. Cavanaugh**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-931: **Gutierrez v. Gutierrez**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-15-936: **State v. Moore**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-938: **Schulz v. Schulz**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-940: **State v. Mosqueda**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-941: **Nebraska Beef Packers v. Tax Equal. & Rev. Comm**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 77-5019(1) (Cum. Supp. 2014).

No. A-15-942: **Stanko v. Amateur Athletic Union of USA**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-950: **Swift on behalf of Swift v. Foxall**. Appeal dismissed. See, § 2-107(A)(2); *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-15-952: **State v. Jackson**. Stipulation allowed; appeal dismissed.

No. A-15-953: **State v. Reese**. Stipulation allowed; appeal dismissed.

No. A-15-954: **State v. Therien**. 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-15-955: **State v. Bloxton**. 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-15-957: **State v. Kalina**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-958: **Gobber v. Gobber**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-965: **State v. Aboyade-Cole**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-15-966: **State v. Collins**. 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-15-968: **In re Abbott Living Trust**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-969: **Longwell v. Haith**. Stipulation allowed; appeal dismissed.

No. A-15-972: **Last Pass Aviation v. Westco**. Appeal dismissed. See, § 2-107(A)(2); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005). See, also, Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-15-979: **State v. Bober**. 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-15-983, A-15-984: **State v. Williams**. 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-15-986: **State v. Sturm**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-989: **State v. Haynes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-990: **State v. Buchanan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-15-991: **State v. Relerford**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-993: **State v. Martinez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-15-997: **State v. Campbell**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-1000: **Koch v. City of Sargent**. Appeal dismissed. See, § 2-107(A)(2); *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989).

No. A-15-1004: **State v. Brookins**. 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-15-1005: **In re Interest of Cooper D. et al**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008); *Metrejean v. Gunter*, 240 Neb. 166, 481 N.W.2d 176 (1992).

No. A-15-1011: **Deremer v. Owens**. Appeal dismissed.

No. A-15-1012: **State v. Martinez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-15-1013: **VanDeWalle v. Hellbusch**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-15-1016: **In re Interest of Nathaniel M**. Appeal dismissed. See, § 2-107(A)(2); *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-15-1017: **In re Interest of Angel M**. Appeal dismissed. See, § 2-107(A)(2); *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-15-1019: **In re Interest of Arnaz G**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-1026: **State v. Mack**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-15-1028: **State v. Todd**. 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-15-1029: **Poole v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-1030: **State v. Philemon**. Appeal dismissed. See, § 2-107(A)(2); *State v. Wilson*, 15 Neb. App. 212, 724 N.W.2d 99 (2006).

No. A-15-1031: **State v. Peterson**. Reversed, vacated, and remanded with directions. See *State v. Heaton*, 225 Neb. 702, 407 N.W.2d 780 (1987).

No. A-15-1035: **State v. Tyler**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-1036: **Swift v. Sanders**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-1038: **State v. Martinez**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-1044: **Stelmaszek v. Omaha World Herald**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 84-901(3) and 84-917 (Reissue 2014). See, also, *Kerr v. Board of Regents*, 15 Neb. App. 907, 739 N.W.2d 224 (2007).

No. A-15-1045: **State v. Sherrod**. Appeal dismissed. See, § 2-107(A)(2); *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

No. A-15-1052: **State v. Tafoya**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-15-1054: **Esch v. Esch**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-1055: **Anderson v. Anderson**. Appeal dismissed. See, § 2-107(A)(2); *Herman Trust v. Brashear 711 Trust*, 22 Neb. App. 758, 860 N.W.2d 431 (2015).

No. A-15-1059: **State v. Love**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3001(4)(b), (c), and (d) (Cum. Supp. 2014).

Nos. A-15-1060, A-15-1061: **State v. Kula**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

Nos. A-15-1062, A-15-1065: **State v. Rempel**. 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-15-1064: **State v. Felix-Beltran**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-15-1066: **Lower Loup NRD v. Prokop**. Appeal dismissed. See § 2-107(A)(2).

Nos. A-15-1068, A-15-1069: **State v. Thomas**. 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-15-1072: **Schlotfeld v. Brown**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Reissue 2008).

No. A-15-1074: **Solberg v. Snyder**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-1075: **State v. Blauvelt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-1077: **Mayall v. City of Falls City**. Appeal dismissed. See, § 2-107(A)(2); *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

No. A-15-1078: **State v. Nelson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-15-1089: **State v. Wilkins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-1090: **Harriman v. Bahm**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-1092: **State v. Wood**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-1093: **Bohling v. Custom Countertop**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-1094: **Bohling v. Lincoln Police Dept**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1301 (Reissue 2008).

No. A-15-1096: **In re Estate of Dexter**. Stipulation allowed; appeal dismissed.

No. A-15-1098: **State v. Scott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-1101: **State v. Miller**. Stipulation allowed; appeal dismissed.

No. A-15-1103: **Aschoff v. State**. Appeal dismissed. See, § 2-107(A)(2); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-15-1105: **Raikar v. Khan**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-15-1116: **State v. Swift**. Stipulation allowed; appeal dismissed.

No. A-15-1117: **State v. Heiser**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-15-1119: **State v. Pacheco-Gutierrez**. Appeal dismissed for lack of jurisdiction. See *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-15-1120: **State v. Pacheco-Gutierrez**. Appeal dismissed for lack of jurisdiction. See *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

Nos. A-15-1121, A-15-1122: **State v. Gray**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-15-1123: **State v. Creative Community Promotions**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-1125: **Fraternal Order of Police v. Lincoln County**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-1127: **State v. Spike**. 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-15-1128: **State v. Demyanovskiy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-1129: **State v. Clang**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-1130: **Jones v. State**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-1131: **State v. Franklin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-15-1133: **State v. Frederickson**. Stipulation allowed; appeal dismissed.

No. A-15-1134: **State v. Frederickson**. Stipulation allowed; appeal dismissed.

Nos. A-15-1139, A-15-1140: **State v. Curry**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-1147: **Ducker v. Ducker**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-1149: **Ryan Family L.L.C. v. Ryan**. Stipulation allowed; appeal dismissed.

No. A-15-1150: **State v. Brown**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1912 (Reissue 2008); *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000).

No. A-15-1151: **State v. Carter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. A-15-1152: **State v. Supel**. Stipulation allowed; appeal dismissed.

No. A-15-1155: **Mutual of Omaha Bank v. Watson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-15-1159: **In re Interest of Darryn C**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-15-1159: **In re Interest of Darryn C**. Motion of appellant for rehearing sustained. Appeal reinstated.

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No. A-15-1162: **State v. Diaz-Martinez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-15-1169: **State v. Ayers**. Stipulation allowed; appeal dismissed.

No. A-15-1173: **State v. Swift**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-1178: **Brown v. Jacobsen Land & Cattle Co**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-15-1179: **Hendrickson v. Frakes**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-1181: **Fleming v. Fleming**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-1183: **State v. Pierce**. Stipulation allowed; appeal dismissed.

No. A-15-1190: **N.P. Dodge Mgmt. Co. v. Fellman**. Appeal dismissed. See, § 2-107(A)(2); *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009).

No. A-15-1191: **Moss v. Tyler**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Karlie D.*, 19 Neb. App. 135, 809 N.W.2d 510 (2011).

No. A-15-1192: **State v. Tucker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-1195: **State v. Green**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-15-1196: **State v. Turner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

No. A-15-1197: **Davis v. Davis**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-15-1198: **State v. Baker**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-1199: **State v. Killingsworth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3001(4) (Cum. Supp. 2014); *State v. Reichel*, 187 Neb. 464, 191 N.W.2d 826 (1971).

No. A-15-1202: **In re Estate of Akiens**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1301(1) (Reissue 2008).

CASES DISPOSED OF WITHOUT OPINION

No. A-15-1206: **State v. Magana**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-15-1209: **Moore v. Lancaster Cty. Dept. of Corrections**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

Nos. A-15-1216 through A-15-1220: **State v. Silvrants**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-15-1223: **Schriner v. Schriner**. Appeal dismissed. See § 2-107(A)(2).

No. A-15-1227: **Steele v. Allstate Fire & Cas. Ins. Co**. Appeal dismissed. See, § 2-107(A)(2); *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006).

No. A-15-1231: **Calhoun v. Nash Finch Co**. By order of the court, appeal dismissed for failure to file briefs.

No. A-15-1244: **In re Interest of Jonathan B**. By order of the court, appeal dismissed for failure to file briefs.

No. A-16-002: **Landers v. EQlibrium Corp**. Stipulation allowed; appeal dismissed.

No. A-16-005: **Jackson v. Frakes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-011: **State v. Vermillion**. Stipulation allowed; appeal dismissed.

No. A-16-015: **Santos v. Madsen**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-017: **State v. Simpson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

No. A-16-029: **Walters v. Sporer**. Appeal dismissed. See, § 2-107(A)(2); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-16-041: **Linder v. Crete Carrier Corp**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008); *Jacobitz v. Aurora Co-op*, 287 Neb. 97, 841 N.W.2d 377 (2013); *Behrens v. American Stores Packing Co.*, 234 Neb. 25, 449 N.W.2d 197 (1989).

No. A-16-042: **O'Neal v. Frakes**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-047: **Schlotfeld v. Brown**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-069: **State v. Hollins**. 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-16-072: **Nielsen v. Builders Supply Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-081: **State v. Hegwood**. Stipulation allowed; appeal dismissed.

No. A-16-082: **State v. Johnson**. Stipulation allowed; appeal dismissed.

No. A-16-084: **State v. Melville**. Stipulation allowed; appeal dismissed.

No. A-16-090: **State v. Johns**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-16-108: **McDermott v. McDermott**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-109: **Walters v. Colford**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-16-112: **In re Estate of Pluhacek**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008); *In re Estate of Peters*, 259 Neb. 154, 609 N.W.2d 23 (2000).

No. A-16-119: **State v. Wright**. Stipulation allowed; appeal dismissed.

No. A-16-149: **Santos v. Madsen**. Appeal dismissed as moot.

No. A-16-151: **Goddard v. Drywall Supply**. Appeal dismissed. See, § 2-107(A)(2); *Jacobitz v. Aurora Co-op*, 287 Neb. 97, 841 N.W.2d 377 (2013).

No. A-16-157: **In re Interest of Emani S**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-159: **Moser v. Lancaster Cty. Bd. of Equal**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 77-5019(2)(a) (Cum. Supp. 2014); *McLaughlin v. Jefferson Cty. Bd. of Equal.*, 5 Neb. App. 781, 567 N.W.2d 794 (1997).

No. A-16-162: **State v. Castonguay**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-164: **Blair v. State**. Stipulation allowed; appeal dismissed.

No. A-16-166: **Spence v. Bush**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-174: **Swift on behalf of Swift v. Sheriff**. Appeal dismissed. See § 2-107(A)(2).

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No. A-16-175: **State v. Graham**. Stipulation allowed; appeal dismissed.

No. A-16-182: **State v. Buttercase**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008); *State v. Jackson*, 291 Neb. 908, 870 N.W.2d 133 (2015); *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011).

No. A-16-185: **In re Interest of Izabel C. et al**. Affirmed. See § 2-107(A)(1). See, also, § 2-101(B)(1)(b).

No. A-16-186: **In re Guardianship & Conservatorship of Hunt**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-16-188: **Rivera v. Schreiber Foods**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 48-182 (Cum. Supp. 2014).

No. A-16-193: **Cooper v. Cooper**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Karlie D.*, 19 Neb. App. 135, 809 N.W.2d 510 (2011).

No. A-16-195: **State v. Reinke**. Stipulation allowed; appeal dismissed.

No. A-16-201: **State on behalf of Sydney C. v. Charlie B**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-203: **Onuachi v. Alliance Group**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1144.01 and 25-1912(1) (Reissue 2008).

No. A-16-204: **Onuachi v. Harry S. Peterson Co**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-16-206: **Young v. Zobrist**. Stipulation allowed; appeal dismissed.

No. A-16-216: **Tatum v. Labor Ready**. Appeal dismissed. See, § 2-107(A)(2); *Lopez v. IBP, inc.*, 264 Neb. 273, 646 N.W.2d 628 (2002).

No. A-16-228: **Swift v. Sheriff of Douglas Cty**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-239: **Jajoo v. State**. Stipulation allowed; appeal dismissed.

No. A-16-240: **Tatum v. Labor Ready**. Appeal dismissed. See, § 2-107(A)(2); *Lopez v. IBP, inc.*, 264 Neb. 273, 646 N.W.2d 628 (2002).

No. A-16-252: **State v. Carter**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-16-253: **State v. Carter**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-16-264: **In re Interest of Raelynn A**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. A-16-274: **State v. Stafford**. Appeal dismissed for lack of jurisdiction. See *State v. Murphy*, 15 Neb. App. 398, 727 N.W.2d 730 (2007). See, also, *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008).

No. A-16-294: **State v. Rice**. Appeal dismissed. See § 2-107(A)(2).

No. A-16-302: **State v. Hill**. Stipulation allowed; appeal dismissed.

No. A-16-333: **Gage v. Crete Carrier**. Appeal dismissed. See § 2-107(A)(2).

# LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-13-704: **6224 Fontenelle Blvd. v. Metropolitan Util. Dist.**, 22 Neb. App. 872 (2015). Petition of appellant for further review denied on July 20, 2015.

No. S-13-756: **State v. Determan**, 22 Neb. App. 683 (2015). Petition of appellee for further review sustained on September 10, 2015.

No. A-14-023: **State v. Flege**. Petition of appellant for further review denied on July 9, 2015.

No. A-14-057: **Schroeder v. Schroeder**, 22 Neb. App. 856 (2015). Petition of appellee for further review denied on July 13, 2015.

No. S-14-070: **State v. Mucia**, 22 Neb. App. 821 (2015). Petition of appellee for further review sustained on June 30, 2015.

No. A-14-076: **Vlach v. Vlach**, 22 Neb. App. 776 (2015). Petition of appellant for further review denied on July 13, 2015.

No. A-14-210: **Lagerstrom v. Neal**. Petition of appellant for further review denied on August 4, 2015.

No. A-14-261: **Echo Financial v. Peachtree Properties**, 22 Neb. App. 898 (2015). Petition of appellee for further review denied on August 26, 2015.

No. A-14-312: **Manhart v. Manhart**. Petition of appellant for further review denied on August 26, 2015.

No. A-14-359: **State v. Van Winkle**. Petition of appellant for further review denied on July 13, 2015.

No. A-14-360: **State v. Richter**. Petition of appellant for further review denied on August 3, 2015, as untimely filed.

No. A-14-371: **Schriner v. Schriner**. Petition of appellant for further review denied on October 14, 2015.

No. A-14-379: **State v. Rohde**, 22 Neb. App. 926 (2015). Petition of appellant for further review denied on July 15, 2015.

No. A-14-386: **State v. Ayala**. Petition of appellant for further review denied on July 20, 2015.

No. A-14-492: **Bohnet v. Bohnet**, 22 Neb. App. 846 (2015). Petition of appellant for further review denied on July 20, 2015.

No. A-14-500: **DeLaet v. Blue Creek Irr. Dist.**, 23 Neb. App. 106 (2015). Petition of appellant for further review denied on November 12, 2015.

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No. A-14-515: **In re Estate of Jurgens**. Petition of appellant for further review denied on August 13, 2015.

No. A-14-559: **Loomis v. Messersmith**. Petition of appellant for further review denied on August 7, 2015, as untimely.

No. A-14-569: **McCall v. Nebraska Methodist Health System**. Petition of appellant for further review denied on September 23, 2015.

No. S-14-573: **State v. Woldt**, 23 Neb. App. 42 (2015). Petition of appellee for further review sustained on December 9, 2015.

No. A-14-576: **In re Interest of Kathryn S. & Lauren S**. Petition of appellant for further review denied on July 13, 2015.

No. A-14-584: **State v. Burton**. Petition of appellant for further review denied on September 10, 2015.

No. S-14-592: **Stamm v. Fisher**. Petition of appellant for further review sustained on August 5, 2015.

No. A-14-616: **Buck's Inc. v. City of Omaha**. Petition of appellant for further review denied on August 4, 2015.

No. A-14-636: **State v. Bogenreif**. Petition of appellant for further review denied on June 30, 2015.

No. A-14-644: **In re Interest of Morgan C**. Petition of appellant for further review denied on August 4, 2015.

No. A-14-645: **In re Interest of Yue-Bo W. & Xin-Bo W**. Petition of appellant for further review denied on July 13, 2015.

No. A-14-654: **In re Interest of Nery V. et al.**, 22 Neb. App. 959 (2015). Petition of appellant for further review denied on August 26, 2015.

No. A-14-658: **Old Republic Nat. Title v. Kornegay**. Petition of appellant for further review denied on July 13, 2015.

No. A-14-662: **NRS Properties v. Agribusiness & Food Assocs**. Petition of appellee for further review denied on October 14, 2015.

No. A-14-670: **Kobza v. Bowers**, 23 Neb. App. 118 (2015). Petition of appellant for further review denied on October 14, 2015.

No. A-14-723: **State v. Alhakemi**. Petition of appellant for further review denied on November 12, 2015.

No. A-14-741: **Catlett v. Catlett**, 23 Neb. App. 136 (2015). Petition of appellant for further review denied on November 12, 2015.

No. A-14-759: **State v. Chol**. Petition of appellant for further review denied on August 4, 2015.

No. A-14-760: **Shemek v. Brown**. Petition of appellant for further review denied on November 12, 2015.

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No. A-14-766: **Bejmuk v. Bejmuk**. Petition of appellant for further review denied on September 16, 2015.

No. A-14-777: **State v. Schaetzle**. Petition of appellant for further review denied on August 17, 2015.

No. S-14-789: **Burns v. Burns**, 23 Neb. App. 420 (2015). Petition of appellee for further review sustained on March 9, 2016.

No. S-14-790: **Hopkins v. Hopkins**, 23 Neb. App. 174 (2015). Petition of appellant for further review sustained on November 25, 2015.

No. A-14-793: **McDaniel v. Western Sugar Co-op**, 23 Neb. App. 35 (2015). Petition of appellant for further review denied on October 14, 2015.

No. A-14-814: **Furstenfeld v. Pepin**, 23 Neb. App. 155 (2015). Petition of appellant for further review denied on November 25, 2015.

No. A-14-821: **Village of Union v. Bescheinen**. Petition of appellant for further review denied on November 25, 2015.

No. A-14-825: **State v. Galindo**. Petition of appellant for further review denied on February 4, 2016.

No. A-14-877: **Morehead v. Morehead**. Petition of appellant for further review denied on November 18, 2015.

No. A-14-882: **State v. Dowling**. Petition of appellant for further review denied on August 4, 2015.

No. A-14-914: **State v. Khalaf**. Petition of appellant for further review denied on July 22, 2015.

No. A-14-916: **Intervision Sys. Techs. v. InterCall**, 23 Neb. App. 360 (2015). Petition of appellee for further review denied on February 4, 2016.

No. A-14-929: **Welton v. Welton**. Petition of appellant for further review denied on December 9, 2015.

No. A-14-948: **Kemnitz v. Thalken**. Petition of appellant for further review denied on April 6, 2016.

No. A-14-949: **McBurnett v. Nebraskaland Tire**. Petition of appellant for further review denied on November 25, 2015.

No. A-14-952: **Ames v. Ames**. Petition of appellant for further review denied on September 10, 2015.

No. A-14-954: **State v. Jackson**. Petition and amended petition of appellant for further review denied on October 28, 2015.

No. A-14-967: **Ludtke v. Ludtke**. Petition of appellant for further review denied on April 6, 2016.

No. A-14-999: **In re Interest of Adalyn B**. Petition of appellant for further review denied on June 30, 2015.

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No. A-14-1017: **State v. Soto**. Petition of appellant for further review denied on August 5, 2015.

No. A-14-1026: **In re Interest of Jacob I**. Petition of appellant for further review denied on September 10, 2015.

No. A-14-1034: **Lanning v. Lanning**. Petition of appellant for further review denied on August 13, 2015.

No. A-14-1040: **State v. Ellis**. Petition of appellant for further review denied on July 17, 2015, for lack of jurisdiction.

No. A-14-1044: **State v. Rodriguez-Rojas**. Petition of appellant for further review denied on March 9, 2016.

No. A-14-1065: **Ross, Schroeder v. Artz**, 23 Neb. App. 545 (2016). Petition of appellants for further review denied on April 20, 2016.

No. A-14-1074: **In re Interest of Victoria W. & Lindsey W**. Petition of appellant for further review denied on August 7, 2015, as untimely.

No. A-14-1077: **State v. Clayborne**. Petition of appellant for further review denied on August 17, 2015.

No. A-14-1081: **State v. Bates**. Petition of appellant for further review denied on January 13, 2016.

No. A-14-1103: **Simmons v. Precast Haulers**. Petition of appellant for further review denied on October 14, 2015.

No. A-14-1114: **White v. George**. Petition of appellant for further review denied on April 6, 2016.

No. A-14-1121: **State v. Valverde**. Petition of appellant for further review denied on February 12, 2016, for failure to comply with § 2-102(F)(1).

No. A-14-1124: **In re Interest of Gavin S. & Jordan S.**, 23 Neb. App. 401 (2015). Petition of appellant for further review denied on February 4, 2016.

No. A-14-1124: **In re Interest of Gavin S. & Jordan S.**, 23 Neb. App. 401 (2015). Petition of appellee Daniel S. for further review denied on February 4, 2016.

No. A-14-1131: **State v. Stuart**. Petition of appellant for further review denied on November 18, 2015.

No. A-14-1136: **State v. Longwell**. Petition of appellant for further review denied on July 20, 2015.

No. A-14-1138: **City of Lincoln v. Dial Realty Development**. Petition of appellant for further review denied on January 5, 2016.

No. S-14-1160: **State v. Rothenberger**. Petition of appellant for further review sustained on February 18, 2016.

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No. A-14-1161: **Koch v. City of Sargent**. Petition of appellant for further review denied on January 21, 2016.

No. A-15-005: **State v. Summage**. Petition of appellant for further review denied on January 13, 2016.

No. A-15-017: **State v. Brooks**, 23 Neb. App. 560 (2016). Petition of appellant for further review denied on March 23, 2016.

No. A-15-029: **State v. Pedersen**. Petition of appellant for further review denied on September 10, 2015.

No. S-15-032: **In re Adoption of Madysen S. et al.**, 23 Neb. App. 351 (2015). Petition of appellees for further review sustained on February 4, 2016.

No. A-15-033: **State v. Hernandez**. Petition of appellant for further review denied on March 23, 2016.

No. A-15-043: **Geiger v. Besmer**. Petition of appellant for further review denied on December 23, 2015, as premature.

No. A-15-043: **Geiger v. Besmer**. Petition of appellant for further review denied on March 25, 2016, as untimely.

No. A-15-044: **State v. Aguilar**. Petition of appellant for further review denied on January 13, 2016.

No. A-15-048: **State v. Marks**. Petition of appellant for further review denied on June 30, 2015.

No. S-15-086: **State v. Mitchell**, 23 Neb. App. 657 (2016). Petition of appellant for further review sustained on April 13, 2016.

No. A-15-089: **State v. Jensen**. Petition of appellant for further review denied on January 21, 2016.

No. A-15-094: **State v. Shelby**. Petition of appellant for further review denied on November 18, 2015.

No. A-15-095: **State v. Ruegge**. Petition of appellant for further review denied on February 4, 2016.

No. A-15-108: **State v. Wells**. Petition of appellant for further review denied on February 18, 2016.

No. A-15-111: **State v. Hill**. Petition of appellant for further review denied on November 12, 2015.

No. A-15-115: **State v. Mumin**. Petition of appellant for further review denied on February 18, 2016.

No. A-15-132: **White v. State**. Petition of appellant for further review denied on August 4, 2015.

No. A-15-141: **Mott v. Tractor Supply Co**. Petition of appellant for further review denied on January 5, 2016.

No. S-15-142: **State v. Nguyen**. Petition of appellant for further review sustained on February 4, 2016.

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No. A-15-148: **State v. Baker**. Petition of appellant for further review denied on November 25, 2015.

Nos. A-15-150, A-15-152: **Sarah K. v. Jonathan K.**, 23 Neb. App. 471 (2015). Petitions of appellant for further review denied on January 29, 2016, as untimely. See § 2-102(F)(1).

No. A-15-156: **In re Interest of James S. et al**. Petition of appellant for further review denied on December 9, 2015.

No. A-15-162: **State v. Gonzales**. Petition of appellant for further review denied on November 12, 2015.

No. A-15-165: **State v. Swanson**. Petition of appellant for further review denied on December 9, 2015.

No. A-15-176: **In re Interest of Angeleah M. & Ava M.**, 23 Neb. App. 324 (2015). Petition of appellant for further review denied on December 23, 2015.

No. A-15-178: **Bruzzano v. Bruzzano**. Petition of appellant for further review denied on March 9, 2016.

No. A-15-182: **State v. Herman**. Petition of appellant for further review denied on November 18, 2015.

No. A-15-184: **State v. Matthews**. Petition of appellant for further review denied on September 23, 2015.

No. A-15-203: **State v. Schaefer**. Petition of appellant for further review denied on October 14, 2015.

No. A-15-208: **State v. Harrod**. Petition of appellant for further review denied on March 16, 2016.

No. A-15-212: **State v. Naney**. Petition of appellant for further review denied on August 5, 2015.

No. A-15-220: **Jason K. v. Michaela K**. Petition of appellant for further review denied on February 10, 2016.

No. A-15-245: **In re Interest of Branden S**. Petition of appellant for further review denied on February 12, 2016, as untimely. See § 2-102(F)(1).

No. A-15-246: **In re Interest of Dana H**. Petition of appellant for further review denied on January 21, 2016.

No. A-15-248: **Mumin v. Flowers**. Petition of appellant for further review denied on February 12, 2016, as untimely. See § 2-102(F)(1).

No. A-15-259: **State v. Contreras**. Petition of appellant for further review denied on February 4, 2016.

No. A-15-284: **In re Interest of Demarcus O**. Petition of appellee Cody O. for further review denied on December 16, 2015.

No. A-15-288: **In re Interest of Destiny H. et al**. Petition of appellant for further review denied on February 18, 2016.

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No. A-15-288: **In re Interest of Destiny H. et al**. Petition of appellee Teresa H. for further review denied on February 18, 2016.

Nos. A-15-294, A-15-297, A-15-298: **State v. Wulbern**. Petitions of appellant for further review denied on August 26, 2015.

No. A-15-295: **State v. Sullivan**. Petition of appellant for further review denied on April 6, 2016.

No. A-15-304: **State v. Parson**. Petition of appellant for further review denied on March 23, 2016.

No. A-15-306: **State v. Parson**. Petition of appellant for further review denied on March 23, 2016.

No. A-15-308: **In re Interest of Jay Maree C**. Petition of appellant pro se for further review denied on November 18, 2015.

No. A-15-333: **State v. Haynes**. Petition of appellant for further review denied on March 4, 2016, as untimely filed.

No. A-15-354: **Concannon v. Fuentes**. Petition of appellant for further review denied on March 9, 2016.

No. A-15-378: **Wildman v. George Witt Serv**. Petition of appellees for further review denied on February 4, 2016.

No. S-15-382: **Doe v. Piske**. Petition of appellant for further review sustained on August 26, 2015.

No. A-15-386: **Ewers v. Saunders County**. Petition of appellant for further review denied on August 26, 2015.

No. A-15-395: **State v. Gatson**. Petition of appellant for further review denied on November 25, 2015.

No. A-15-397: **Robert L. v. Robin L**. Petition of appellant for further review denied on January 13, 2016.

Nos. A-15-417, A-15-694: **In re Interest of Miah T. & DeKandyce H.**, 23 Neb. App. 592 (2016). Petitions of appellant for further review denied on April 6, 2016.

No. A-15-427: **State v. Thayer**. Petition of appellant for further review denied on January 7, 2015.

No. A-15-432: **State v. Tyler**. Petition of appellant for further review denied on January 13, 2016.

No. A-15-440: **State v. Sinnard**. Petition of appellant for further review denied on December 23, 2015, as untimely filed.

No. A-15-441: **State v. Cramer**. Petition of appellant for further review denied on March 16, 2016.

No. A-15-461: **In re Interest of Shayla H. et al**. Petition of appellant for further review denied on April 20, 2016.

No. A-15-461: **In re Interest of Shayla H. et al**. Petition of appellee David H. for further review denied on April 20, 2016.

PETITIONS FOR FURTHER REVIEW

No. A-15-468: **State v. Wesner**. Petition of appellant for further review denied on October 14, 2015.

No. A-15-473: **State v. Rice**. Petition of appellant for further review denied on August 3, 2015, for failure to file brief in support. See § 2-102(F)(1).

No. A-15-479: **In re Interest of Shelby H**. Petition of appellant for further review denied on March 11, 2016, for failure to file brief in support. See § 2-102(F)(1).

No. A-15-495: **State v. Moore**. Petition of appellant for further review denied on March 16, 2016.

No. A-15-537: **Koch v. Williams**. Petition of appellant for further review denied on November 12, 2015, for lack of jurisdiction.

No. A-15-558: **State v. Harris**. Petition of appellant for further review denied on September 10, 2015.

No. A-15-561: **State v. Marsh**. Petition of appellant for further review denied on March 21, 2016, for failure to file brief in support. See § 2-102(F)(1).

No. A-15-607: **In re Interest of Dante S**. Petition of appellant for further review denied on March 16, 2016.

No. A-15-614: **State v. Burger**. Petition of appellant for further review denied on March 9, 2016.

No. A-15-616: **State v. Wise**. Petition of appellant for further review denied on March 9, 2016.

No. A-15-619: **Castonguay v. Ertzer**. Petition of appellant for further review denied on January 21, 2016.

No. A-15-625: **State v. O'Connor**. Petition of appellant for further review denied on April 6, 2016.

No. A-15-647: **State v. Gutierrez**. Petition of appellant for further review denied on April 13, 2016.

No. A-15-664: **In re Interest of Santiago T**. Petition of appellant for further review denied on March 9, 2016.

No. A-15-716: **State v. Masters**. Petition of appellant for further review denied on January 13, 2016.

No. A-15-735: **Frost v. Frost**. Petition of appellant for further review denied on November 2, 2015, as prematurely filed.

No. A-15-735: **Frost v. Frost**. Petition of appellant for further review denied on February 10, 2016.

No. A-15-737: **Hall v. Frakes**. Petition of appellant for further review denied on February 4, 2016.

No. A-15-759: **In re Interest of Brandon H. et al**. Petition of appellant for further review denied on April 6, 2016.

PETITIONS FOR FURTHER REVIEW

No. A-15-760: **State v. Blackstock**. Petition of appellant for further review denied on February 4, 2016.

No. A-15-764: **State v. Moore**. Petition of appellant for further review denied on April 6, 2016.

No. A-15-769: **State v. Castonguay**. Petition of appellant for further review denied on December 16, 2015.

No. A-15-770: **State v. Wells**. Petition of appellant for further review denied on November 12, 2015.

No. A-15-783: **State v. Marshall**. Petition of appellant for further review denied on February 24, 2016.

No. A-15-786: **McElroy v. Ghani**. Petition of appellant for further review denied on December 9, 2015.

No. A-15-787: **State v. Terry**. Petition of appellant for further review denied on April 6, 2016.

No. A-15-820: **Mumin v. Travelers Ins. Co**. Petition of appellant for further review denied on November 18, 2015.

No. A-15-823: **Doty v. Cassling**. Petition of appellant for further review denied on January 5, 2016.

No. A-15-836: **City of Long Pine v. Voss**. Petition of appellant for further review denied on November 24, 2015, for failure to file brief in support. See § 2-102(F)(1).

No. A-15-873: **State v. Meyer**. Petition of appellant for further review denied on January 5, 2016.

No. A-15-895: **Mengedoht v. Looby**. Petition of appellants for further review denied on April 20, 2016.

No. A-15-902: **Gray v. Gage**. Petition of appellant for further review denied on March 23, 2016.

No. A-15-926: **State v. Brinton**. Petition of appellant for further review denied on April 6, 2016.

No. A-15-929: **State v. Bethel**. Petition of appellant for further review denied on March 11, 2016, for failure to file brief in support. See § 2-102(F)(1).

No. A-15-936: **State v. Moore**. Petition of appellant for further review denied on March 23, 2016.

No. A-15-940: **State v. Mosqueda**. Petition of appellant for further review denied on April 6, 2016.

No. A-15-1004: **State v. Brookins**. Petition of appellant for further review denied on April 13, 2016.

No. A-15-1026: **State v. Mack**. Petition of appellant for further review denied on April 13, 2016.

PETITIONS FOR FURTHER REVIEW

No. A-15-1035: **State v. Tyler**. Petition of appellant for further review denied on March 4, 2016, for failure to file brief in support. See § 2-102(F)(1).

No. A-15-1045: **State v. Sherrod**. Petition of appellant for further review denied on March 9, 2016.

No. A-15-1066: **Lower Loup NRD v. Prokop**. Petition of appellant for further review denied on April 12, 2016, as filed out of time. See § 2-102(F)(1).

No. A-15-1173: **State v. Swift**. Petition of appellant for further review denied on March 7, 2016, for failure to file brief in support. See § 2-102(F)(1).

No. A-15-1181: **Fleming v. Fleming**. Petition of appellant for further review denied on March 11, 2016, for failure to pay filing fee.

No. A-16-041: **Linder v. Crete Carrier Corp**. Petition of appellant for further review denied on March 23, 2016.

23 Nebraska Appellate Reports
JAMIE N. v. KENNETH M.
Cite as 23 Neb. App. 1

**Nebraska Court of Appeals**
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Jamie N., on behalf of Madison N., appellant, v. Kenneth M., defendant and third-party plaintiff, appellee, and Eric C., third-party defendant, appellee.

867 N.W.2d 290

Filed July 7, 2015. No. A-14-535.

1. **Rules of the Supreme Court: Records: Appeal and Error.** Neb. Ct. R. App. P. § 2-109(D)(1)(f) and (g) (rev. 2012) requires that factual recitations be annotated to the record, whether they appear in the statement of facts or the argument section of a brief.
2. ____: ____: ____. The failure to annotate factual recitations in a brief to the record may result in an appellate court's overlooking a fact or otherwise treating the matter under review as if the represented fact does not exist.
3. **Res Judicata: Collateral Estoppel: Appeal and Error.** The applicability of the doctrine of res judicata and the applicability of claim preclusion are questions of law, as to which appellate courts are obligated to reach a conclusion independent of the determination reached by the court below.
4. **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 (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
5. **Dismissal and Nonsuit: Limitations of Actions: Words and Phrases.** A dismissal without prejudice means that another petition may be filed against the same parties upon the same facts as long as it is filed within the applicable statute of limitations.
6. **Res Judicata: Judgments: Words and Phrases.** For purposes of res judicata, the definition of a judgment on the merits is one which is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction, or form.

7. **Res Judicata: Judgments: Collateral Attack.** Res judicata will not preclude a second suit between the same parties if the forum in which the first action was brought did not have jurisdiction to adjudicate the action; stated another way, judgments entered by a court without jurisdiction are void and subject to collateral attack.
8. **Dismissal and Nonsuit: Judgments.** As a general rule, a dismissal with prejudice is an adjudication on the merits.
9. **Res Judicata: Dismissal and Nonsuit: Jurisdiction.** If a court did not have jurisdiction over a matter it dismissed with prejudice, res judicata would not preclude a second suit between the same parties.
10. **Paternity: Rescission: Time.** Under Neb. Rev. Stat. § 43-1409 (Reissue 2008), a signed, notarized acknowledgment of paternity may be rescinded within the earlier of (1) 60 days or (2) the date of an administrative or judicial proceeding relating to the child.
11. **Paternity.** After the rescission period contained in Neb. Rev. Stat. § 43-1409 (Reissue 2008) ends, a notarized acknowledgment is considered a legal finding and legally establishes paternity in the person named in the acknowledgment as the father.
12. ____. A finding that an individual is not a biological father is not the equivalent of a finding that an individual is not the legal father.
13. **Parties: Jurisdiction: Waiver.** The presence of necessary parties is jurisdictional and cannot be waived by the parties.
14. **Parties: Jurisdiction.** If necessary parties to a proceeding are absent, the district court has no jurisdiction to determine the controversy.
15. **Parties: Words and Phrases.** An indispensable party 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.
16. **Dismissal and Nonsuit: Parties.** A dismissal based upon a failure to join a necessary party is a dismissal of the action without prejudice.
17. **Parent and Child: Due Process.** Both parents and their children have cognizable substantive due process rights to the parent-child relationship, which rights protect the parent's right to the companionship, care, custody, and management of his or her child, and they also protect the child's reciprocal right to be raised and nurtured by a biological or adoptive parent.
18. **Child Support: Public Policy.** The public policy of this state provides that parents have a duty to support their minor children until they reach majority or are emancipated.

19. **Parent and Child: Child Support.** The obligation of support is a duty of a legally determined parent.
20. **Paternity: Child Support: Parties.** The legal father of a child is a necessary or indispensable party to an action to determine paternity and place support obligations on another man.
21. **Judgments: Collateral Estoppel.** Issue preclusion bars the relitigation of a finally determined issue that a party had a prior opportunity to fully and fairly litigate.
22. ____: ____. Issue preclusion applies where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom the doctrine is to be applied was a party or was 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.
23. **Collateral Estoppel.** Issue preclusion applies only to issues actually litigated.
24. ____. Issue preclusion protects litigants from relitigating an identical issue with a party or his privy and promotes judicial economy by preventing needless litigation.
25. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Sarpy County: William B. Zastera, Judge. Reversed and remanded for further proceedings.

David J. Reed, of Jorgenson & Reed, L.L.C., and, on brief, W. Gregory Lake for appellant.

Charles L. Grimes, of Vacanti Shattuck, for appellee Eric C.

Inbody, Pirtle, and Bishop, Judges.

Bishop, Judge.

Jamie N. filed the present action on behalf of her minor child, Madison N., born in July 2011, against Kenneth M. and Eric C. in Sarpy County District Court, seeking to rescind Kenneth's acknowledgment of paternity of Madison and to establish Eric's paternity of Madison (genetic testing established that Eric is Madison's biological father). Kenneth moved for summary judgment, seeking that the district court

rescind his acknowledgment of paternity; the district court granted his motion and rescinded his acknowledgment. In a subsequent order, the district court granted Eric's motion for summary judgment, concluding that Jamie's action to establish his paternity was barred by res judicata and issue preclusion because both the State and Jamie had previously filed complaints against Eric, to establish his paternity, that had been dismissed. Jamie appeals from the order of summary judgment in favor of Eric.

## FACTUAL BACKGROUND

Jamie and Kenneth were involved in an intimate relationship between September and November 2010. According to Kenneth, he did not date or have a relationship with anyone else during this time and it was his understanding that Jamie also was not in a relationship with anyone else at that time. Kenneth averred that Jamie informed him she was pregnant in the fall of 2010 and told him he was the father and that he had no reason to disbelieve her.

Jamie gave birth to Madison in July 2011. Two days after Madison's birth, Kenneth signed a notarized acknowledgment of paternity. Kenneth claimed that he would not have signed the acknowledgment of paternity had he known it was possible he was not the father.

In November 2011, Kenneth and Jamie obtained a DNA test demonstrating that he was not the father of Madison.

According to Jamie, at the time Madison was conceived, Jamie was involved in sexual relationships with both Kenneth and Eric, but believed Kenneth had a better chance of being the father than Eric and "mistakenly" told Kenneth he was the father. After Jamie learned she had "made a mistake" in determining that Kenneth was Madison's father, she contacted the State of Nebraska to initiate an action on behalf of Madison against Eric. Before the State commenced the action, Eric submitted to a DNA test, which found a 99-percent probability that he was the father of Madison.

Jamie claimed that neither Kenneth nor Eric has had any substantial contact with Madison during her life; Kenneth had seen her twice, and Eric had seen her once. Madison has numerous health issues, and Jamie believed that establishing Eric as Madison's father would help ensure Madison receives proper medical treatment, because doctors would know her full family medical history.

## PROCEDURAL BACKGROUND

*First Action.*

On September 19, 2012, the State of Nebraska filed a paternity complaint on behalf of Madison against Eric in Sarpy County District Court (first action), pursuant to its authority contained in Neb. Rev. Stat. §§ 43-512.03 (Cum. Supp. 2014) and 43-512.04 (Reissue 2008). Jamie was named as a third-party defendant to the action. Kenneth was not a party to the action. According to the complaint, the State alleged that "[a]nother individual is on the birth certificate, but was excluded by private genetic testing," and that genetic testing showed that Eric had at least a 99-percent probability of paternity. The complaint sought to establish paternity as to Eric and sought child support.

On December 18, 2012, the Sarpy County District Court entered a "Child Support Journal Entry"; the entry states, "This matter came on for hearing" before the district court referee on December 13. The order stated that neither Jamie nor Eric appeared at the hearing before the referee, nor did their counsel. The State appeared at the hearing before the referee and, without specifying why, made an "oral motion to dismiss the paternity action," which the referee sustained; the referee then dismissed the matter "with prejudice." The district court found the referee's recommendations were proper and approved and adopted them by its December 18 order. No appeal was taken from this order.

*Second Action.*

[1,2] Both the district court and Eric refer to another paternity action filed by Jamie against Eric, in Douglas County.

Eric represents in his brief that Jamie filed this complaint in January 2013 and that such complaint was dismissed without prejudice on April 1, 2013, as it was determined that none of the parties resided in Douglas County. However, we note that the pleadings and dismissal from the Douglas County action are not in our record. Neb. Ct. R. App. P. § 2-109(D)(1)(f) and (g) (rev. 2012) requires that factual recitations be annotated to the record, whether they appear in the statement of facts or the argument section of a brief. The failure to do so may result in an appellate court's overlooking a fact or otherwise treating the matter under review as if the represented fact does not exist. *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008). The absence of these documents from our record is addressed further in our analysis.

*Third Action.*

Jamie filed a "Complaint to Establish Paternity, Custody & Support" against Eric in Sarpy County District Court on March 5, 2013. Kenneth was not a party to the action. Eric filed a motion to dismiss on March 15, alleging that a previous paternity action in Sarpy County had been dismissed with prejudice, that a person not party to the action had signed an acknowledgment of paternity, and that another paternity action was pending against Eric by Jamie in Douglas County. On March 29, the district court for Sarpy County dismissed the complaint because "an action . . . filed in the District Court [for] Sarpy County containing the same parties and the same request for relief has been dismissed with prejudice."

*Current Action.*

On August 20, 2013, Jamie filed a "Complaint to Rescind Notarized Acknowledgement of Paternity and Complaint to Establish Paternity" against both Kenneth and Eric in Sarpy County District Court. According to this complaint, she brought the action "to rescind the notarize[d] acknowledgment of paternity signed by . . . Kenneth . . . , pursuant to Neb.

Rev[.] Stat. §43-1409 [(Reissue 2008)], and to establish custody and support against . . . Eric."

Jamie alleged two causes of action. Her first cause of action alleged that "[d]ue to a material mistake of fact . . . , Kenneth . . . signed a notarized acknowledgment of paternity at the birth of [Madison]," and that the time period for rescission had ended. Jamie also alleged a second cause of action, seeking to establish Eric's paternity as well as custody and child support. Jamie prayed that the court enter an order rescinding Kenneth's notarized acknowledgment of paternity, establish Eric as the father of Madison, and determine custody and support.

Eric filed a motion to dismiss on September 26, 2013, based upon the prior dismissals of the two other paternity actions initiated in Sarpy County and the third action, initiated in Douglas County. A hearing on Eric's motion to dismiss was held on October 21, and the court took the matter under advisement. Although our record does not reveal the court's specific ruling on this motion, it is a moot issue in light of the court's later decision to dismiss Jamie's claims against Eric pursuant to his motion for summary judgment.

Jamie filed an amended complaint on October 28, 2013, containing the same two causes of action as her initial complaint, and added a third cause of action, alleging that "pursuant to . . . §43-1409 and [Neb. Rev. Stat.] §43-1412.01 [(Reissue 2008)] the State of Nebraska is discriminating against individuals who have children born in wedlock and out of wedlock, thus violating [Jamie's] equal protection rights under the United States Constitution."

On November 26, 2013, Eric filed a motion for summary judgment, alleging that Jamie's complaint "must be dismissed with prejudice as res judicata." On December 5, Kenneth filed a motion for summary judgment. (Kenneth's answer is not in our record, but apparently both he and Jamie agreed that his acknowledgment was a mistake and sought its rescission.) A hearing on both motions was held on December 30.

On January 29, 2014, the court entered an opinion and order. In that order, the court found that Kenneth met his burden to establish he signed the acknowledgment based on fraud, duress, or material mistake of fact and that a DNA test confirmed that Kenneth was not Madison's biological father, and the court granted his motion for summary judgment. The court ordered that the acknowledgment of paternity signed by Kenneth be rescinded.

The court next found that Eric did not meet his burden to show he was entitled to summary judgment, because the first action was a paternity action dismissed on the State's motion and the second was an action brought by Jamie in her own name, while the present action was brought by Jamie on behalf of Madison. The court also found there were genuine issues of material fact precluding judgment as a matter of law.

On April 1, 2014, Eric again filed a motion for summary judgment. Jamie filed an objection to this motion on April 8, because Eric "already had his Motion for Summary Judgment heard and denied."

A hearing on Eric's motion was held on April 11, 2014. The court received into evidence Eric's affidavit and certified copies of the complaints and orders of dismissal from the first action and third action, mentioned above.

The court entered an opinion and order on May 21, 2014, granting Eric's motion for summary judgment. The court found that the instant case against Eric was barred both by res judicata and by issue preclusion, because "[t]he issue of paternity was previously brought in two Sarpy County cases and a Douglas County case," the allegations contained in those cases were the same as in the instant case, and "[t]he previous cases were all dismissed and the Sarpy [C]ounty actions were dismissed with prejudice, a final judgment on the merits."

Jamie timely filed an appeal from the May 21, 2014, order.

## ASSIGNMENTS OF ERROR

Jamie assigns as error on appeal, summarized and restated, that the district court erred (1) in granting Eric's motion for summary judgment and (2) in failing to hear her constitutional claim of discrimination under the Equal Protection Clause.

## STANDARD OF REVIEW

[3] The applicability of the doctrine of res judicata and the applicability of claim preclusion are questions of law, as to which we are obligated to reach a conclusion independent of the determination reached by the court below. See *Millennium Laboratories v. Ward*, 289 Neb. 718, 857 N.W.2d 304 (2014).

## ANALYSIS

The problem in the instant case arose as a result of the September 19, 2012, paternity action filed by the State on behalf of Madison against Eric—despite Kenneth's status as Madison's legal father—which action was dismissed "with prejudice" pursuant to the State's oral motion to dismiss (without explanation or request that such dismissal be with prejudice). As a result of that dismissal and the court's use of the words "with prejudice," Eric contends that all subsequent actions against him to establish his paternity of Madison are forever barred by res judicata; the district court agreed, dismissing the instant action on the grounds of res judicata and issue preclusion. We begin by examining general res judicata principles and whether the dismissal in the paternity action filed by the State was actually an adjudication on the merits by a court of competent jurisdiction.

[4] 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 (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. *Young v. Govier & Milone*, 286 Neb. 224, 835 N.W.2d 684 (2013).

There is no question that the same parties and privies were involved in the current action and the previous two actions filed in Sarpy County, by the State on behalf of Madison against Jamie and Eric in 2012 and by Jamie on behalf of Madison against Eric in March 2013. Both prior Sarpy County actions sought to establish the paternity and support of Madison as to Eric, as did the instant action. Those two prior actions were final judgments, as both cases were dismissed by the district court in which they were filed.

[5] To the extent that the district court and Eric took note of another paternity action filed by Jamie against Eric in Douglas County that was dismissed "without prejudice," brief for appellant at 7, our record contains no evidence of those court proceedings. However, a dismissal "without prejudice" would not have been a judgment on the merits for purposes of res judicata. A dismissal without prejudice means that another petition may be filed against the same parties upon the same facts as long as it is filed within the applicable statute of limitations. See *Dworak v. Farmers Ins. Exch.*, 269 Neb. 386, 693 N.W.2d 522 (2005). Accordingly, the Douglas County action has no bearing on our res judicata analysis and we focus instead only on the two prior Sarpy County actions.

[6,7] We begin by considering whether the State's 2012 action and Jamie's March 2013 action were dismissed "on the merits" by a court of competent jurisdiction. For purposes of res judicata, the definition of a judgment on the merits is one which is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction, or form. See *Kerndt v. Ronan*, 236 Neb. 26, 458 N.W.2d 466 (1990). Res judicata will not preclude a second suit between the same parties if the forum in which the first action was brought did not have jurisdiction to adjudicate the action; stated another way, judgments entered by a court without jurisdiction are void and subject to collateral attack. *Young, supra.*

[8,9] In the first action, filed by the State, the State orally moved that the referee dismiss its complaint. There is no indication as to why the State moved to dismiss or that it sought

dismissal with prejudice. Nevertheless, the Sarpy County District Court adopted the referee's grant of the State's motion to dismiss—with prejudice. As a general rule, a dismissal with prejudice is an adjudication on the merits. See *Simpson v. City of North Platte*, 215 Neb. 351, 338 N.W.2d 450 (1983). However, if the court did not have jurisdiction over the matter, res judicata would not preclude a second suit between the same parties. See, *Young, supra*; *Simpson, supra*.

[10-12] Both the State's action in 2012 and Jamie's action in March 2013 against Eric sought to establish his paternity and support of Madison. However, glaringly absent from both actions was the joinder of Kenneth as a party, who at the time both of those actions were filed was the legal father of Madison. Kenneth had signed a notarized acknowledgment of paternity of Madison 2 days after her birth. A signed, notarized acknowledgment of paternity may be rescinded within the earlier of (1) 60 days or (2) the date of an administrative or judicial proceeding relating to the child. See Neb. Rev. Stat. § 43-1409 (Reissue 2008). After this rescission period ends, a notarized acknowledgment "is considered a *legal finding*." See *id*. (emphasis supplied). The Nebraska Supreme Court has interpreted this statutory section to mean that an acknowledgment that has not been rescinded during one of the time periods mentioned above "legally establishes paternity in the person named in the acknowledgment as the father." *Cesar C. v. Alicia L.*, 281 Neb. 979, 986, 800 N.W.2d 249, 255 (2011). There was no indication in this case that either Jamie or Kenneth rescinded the acknowledgment within the statutory rescission period, and no proceeding relating to Madison was noted during the rescission period. Thus, at the times the State initiated its proceedings against Eric in September 2012 and Jamie initiated her proceedings against Eric in March 2013, Kenneth's notarized acknowledgment had already legally established his paternity as to Madison. In other words, the State and Jamie were attempting to establish paternity against another individual, without notice to or inclusion of Madison's legal father. Although the State filed

its initial complaint to establish paternity against Eric after genetic testing demonstrated that he was the biological father and that Kenneth was not the biological father, "a finding that an individual is not a biological father is not the equivalent of a finding that an individual is not the legal father." *State on behalf of B.M. v. Brian F.*, 288 Neb. 106, 122, 846 N.W.2d 257, 268 (2014). Apparently, both the State and Jamie were operating under an assumption that genetic testing alone was sufficient to file a complaint for paternity against Eric—but all the while, Kenneth was legally determined to be the father of the child at issue. Kenneth's status as Madison's legal father remained in full force and effect until the district court in the instant case granted the acknowledgment's rescission on January 29, 2014.

[13-16] At no point prior to the instant case was Kenneth made a party to any of the prior proceedings. The presence of necessary parties is jurisdictional and cannot be waived by the parties. See *Pestal v. Malone*, 275 Neb. 891, 750 N.W.2d 350 (2008). If necessary parties to a proceeding are absent, the district court has no jurisdiction to determine the controversy. *Id.* An indispensable party 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. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999). See, also, Neb. Rev. Stat. § 25-323 (Reissue 2008). "[I]t is clear that a dismissal based upon a failure to join a necessary party is a dismissal of the action without prejudice." *Carlson v. Allianz Versicherungs-AG*, 287 Neb. 628, 639, 844 N.W.2d 264, 272 (2014), *cert. denied* 574 U.S. 974, 135 S. Ct. 437, 190 L. Ed. 2d 328. Thus, if Kenneth, as Madison's legal father, was a necessary party to the prior actions filed by the State and Jamie against Eric, the dismissals in those cases would not have been on the merits, but,

rather, for the reason that those courts did not have jurisdiction over the actions. And, as stated above, res judicata will not preclude a second suit between the same parties if the forum in which the first action was brought did not have jurisdiction to adjudicate the action. See *Young v. Govier & Milone*, 286 Neb. 224, 835 N.W.2d 684 (2013).

[17-19] Both parents and their children have cognizable substantive due process rights to the parent-child relationship. *Stacy M. v. Jason M.*, 290 Neb. 141, 858 N.W.2d 852 (2015). These rights protect the parent's right to the companionship, care, custody, and management of his or her child, and they also protect the child's reciprocal right to be raised and nurtured by a biological or adoptive parent. *Id*. The public policy of this state provides that parents have a duty to support their minor children until they reach majority or are emancipated. See *id.* The obligation of support is a duty of a legally determined parent. *Id.* Kenneth, so long as he was established as Madison's legal father by virtue of his unrescinded acknowledgment, had a right to the care, custody, and management of Madison and also had a duty of support. See *id*. Any action attempting to establish another person as Madison's father certainly would have impacted Kenneth's rights and duties as Madison's legal father.

Other jurisdictions have held that the legal father of a child is a necessary party to an action to determine paternity and place support obligations on another man. For example, in a case with strikingly similar facts to the instant case's, *In re Paternity of K.L.O.*, 816 N.E.2d 906 (Ind. App. 2004), a mother and her boyfriend executed a paternity affidavit when the child was born, which execution legally established the boyfriend as the child's father. Later, the mother asked a second man to take a paternity test, the results of which revealed a probability of over 99 percent that he was the child's biological father. The mother then filed a paternity action against the biological father, but the trial court dismissed the action because the boyfriend had not been joined as a party. The mother filed a second paternity petition, alleging that the

boyfriend was the child's father, in an attempt to disestablish the boyfriend's paternity. The trial court dismissed the second petition after a DNA test revealed that the boyfriend was not the child's biological father. The mother then filed a third petition to establish paternity, alleging for a second time that the biological father was the child's father. The biological father filed a motion to dismiss the petition because the boyfriend was a necessary party that had not been joined in the action, which motion the trial court denied. However, on appeal, the Indiana Court of Appeals reversed, concluding that the boyfriend was still the child's legal father, because the paternity affidavit had not been rescinded or set aside. Thus, the boyfriend at all times remained the legal father of the child and, as such, should have been joined as a necessary party to the biological father's paternity action. Following that precedent, in *In re Paternity of N.R.R.L.*, 846 N.E.2d 1094 (Ind. App. 2006), the Indiana Court of Appeals held that a child's legal father (by virtue of execution of a paternity affidavit at the child's birth) was a necessary party to a paternity action filed by the child's biological father. The biological father had not named the legal father as a party to the action; nor had he shown that the legal father's paternity affidavit had been set aside or rescinded.

The Florida Supreme Court also has held that the legal father of a child is an indispensable party to a paternity action against another man. See *Florida Dept. of Revenue v. Cummings*, 930 So. 2d 604 (Fla. 2006). In that case, the State of Florida filed an action against the biological father of a child without joining the child's legal father (by virtue of being married to the child's mother at the time of the child's birth). The Florida Supreme Court reasoned that such a paternity action would "'certainly' impact the legal father's ability to assert his right to a host of interests that lie at the heart of the parent-child relationship"; it would affect the legal father's rights to the care, custody, and control of the child and would remove his name from the child's birth certificate. *Id.* at 608. The court therefore concluded that a legal father's

material interests were necessarily impacted by the paternity action filed by the State and that thus, he was an indispensable party.

[20] In the instant case, two Sarpy County paternity actions were previously filed against Eric, one by the State and one by Jamie, neither of which joined Kenneth as a party. There was no way the trial court in either of those cases could have decided the issue of Eric's paternity and support as to Madison without affecting the interests of Kenneth as Madison's legal father. As such, Kenneth was a necessary or indispensable party to those actions. The presence of necessary parties is jurisdictional and cannot be waived by the parties. See *Pestal v. Malone*, 275 Neb. 891, 750 N.W.2d 350 (2008). If necessary parties to a proceeding are absent, the district court has no jurisdiction to determine the controversy. *Id.* Because Kenneth was a necessary party who was not joined to the previous actions, the court in both prior actions did not have jurisdiction over the actions. Res judicata will not preclude a second suit between the same parties if the forum in which the first action was brought did not have jurisdiction to adjudicate the action. See *Young v. Govier & Milone*, 286 Neb. 224, 835 N.W.2d 684 (2013). As such, the instant action against Eric was not barred by res judicata and the district court erred in dismissing Jamie's complaint for paternity against Eric.

[21-24] The district court also concluded that the instant action was barred by issue preclusion. Issue preclusion bars the relitigation of a finally determined issue that a party had a prior opportunity to fully and fairly litigate. *Hara v. Reichert*, 287 Neb. 577, 843 N.W.2d 812 (2014). Issue preclusion applies where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom the doctrine is to be applied was a party or was 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. *Id.* Issue preclusion applies only to issues actually litigated. *Id.* Issue preclusion protects

litigants from relitigating an identical issue with a party or his privy and promotes judicial economy by preventing needless litigation. *Id*. As discussed above, because Kenneth was not joined as a party to any of the prior actions to establish Eric's paternity and because Kenneth's acknowledgment of paternity had not been rescinded, there was not an opportunity to fully and fairly litigate the issue of Eric's paternity in the prior actions. We thus conclude the instant action against Eric is not barred by issue preclusion.

[25] In light of our conclusions that the district court erred in granting summary judgment in favor of Eric and that the cause must be remanded for further proceedings, we need not address Jamie's remaining assignment of error regarding the court's failure to address her constitutional claim. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Papillion Rural Fire Prot. Dist. v. City of Bellevue*, 274 Neb. 214, 739 N.W.2d 162 (2007).

## CONCLUSION

Because Kenneth was previously established as Madison's legal father but was not joined in any of the prior paternity actions filed against Eric, the dismissals in those cases were not on the merits by a court of competent jurisdiction, and thus, res judicata and issue preclusion did not bar the current action to establish paternity of Madison as to Eric once Kenneth's acknowledgment was rescinded. We therefore reverse the court's entry of summary judgment and remand the cause for further proceedings against Eric. Eric's motion for attorney fees on appeal is overruled.

Reversed and remanded for
further proceedings.

**Nebraska Court of Appeals**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# D.M., appellant, v. State of Nebraska et al., appellees.

867 N.W.2d 622

Filed July 14, 2015. No. A-14-376.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.
3. **Tort Claims Act.** Whether the allegations made by a plaintiff present a claim that is precluded by exemptions set forth in the State Tort Claims Act is a question of law.
4. **Tort Claims Act: Appeal and Error.** An appellate court has an obligation to reach its conclusion on whether a claim is precluded by exemptions set forth in the State Tort Claims Act independent from the conclusion reached by the trial court.
5. **Constitutional Law: States: Immunity.** The immunity of states from suit is a fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution and which they retain today.
6. **Actions: Immunity.** A suit against a state agency is a suit against the State and is subject to sovereign immunity.
7. ____: ____. A suit generally may not be maintained directly against an agency or department of the State, unless the State has waived its sovereign immunity.
8. **Statutes: Immunity.** Statutes authorizing suits against the State are to be strictly construed because such statutes are in derogation of the State's sovereign immunity.
9. **Immunity: Waiver.** Waiver of sovereign immunity will be found only where stated by the most express language or by such overwhelming

implications from the text as will leave no room for any other reasonable construction.

10. **Immunity: Waiver: Presumptions.** There is a presumption against waiver of sovereign immunity.
11. **Public Officers and Employees: Immunity.** Sovereign immunity has potential applicability to suits brought against state officials in their official capacities.
12. **Actions: Public Officers and Employees: Pleadings.** Official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent.
13. **Actions: Parties: Public Officers and Employees: Liability: Damages.** In an action for the recovery of money, the State is the real party in interest because a judgment against a public servant in his official capacity imposes liability on the entity that he represents.
14. **Actions: Public Officers and Employees: Immunity: Waiver: Damages.** Unless waived, sovereign immunity bars a claim for money even if the plaintiff has named individual state officials as nominal defendants.
15. **Tort Claims Act: Immunity: Waiver.** The State Tort Claims Act waives the State's sovereign immunity with respect to certain, but not all, types of tort actions.
16. **Tort Claims Act: Public Officers and Employees: Immunity.** The State Tort Claims Act allows lawsuits against the State and public officials for certain tortious conduct, but not all.
17. **Actions: Immunity: Waiver.** In the absence of a waiver, sovereign immunity bars all suits against the State and state agencies, regardless of the relief sought.
18. **Tort Claims Act: Immunity: Waiver: Public Officers and Employees.** Although a state employee or officer may be allegedly sued individually, if he or she is acting within the scope of employment or office, the State Tort Claims Act still applies and provides immunity, unless such has been waived.
19. **Tort Claims Act: Immunity: Negligence: Liability: Waiver.** The State Tort Claims Act waives the State's sovereign immunity for tort claims against the State for money only on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the state, while acting within the scope of his or her office or employment, under circumstances in which the State, if a private person, would be liable to the claimant for such damage, loss, injury, or death.
20. **Tort Claims Act: Immunity: Waiver.** Among the claims for which the State has not waived its sovereign immunity are claims arising out of

assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, commonly referred to as the intentional tort exception.

21. **Public Officers and Employees: Immunity: Negligence.** To determine whether a claim arises from an intentional assault or battery and is therefore barred by sovereign immunity pursuant to the intentional tort exception, a court must ascertain whether the alleged negligence was the breach of a duty to select or supervise the employee-tort-feasor or the breach of some separate duty independent from the employment relation.
22. ____: ____: ____. If the allegation is that the government was negligent in the supervision or selection of the employee and that the intentional tort occurred as a result, the intentional tort exception bars the claim; otherwise, litigants could avoid the substance of the exception because it is likely that many, if not all, intentional torts of government employees plausibly could be ascribed to the negligence of the tort-feasor's supervisors and would frustrate the purposes of the exception.
23. **Statutes: Immunity: Waiver.** A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.
24. **Public Officers and Employees: Immunity.** A plaintiff cannot avoid the reach of the intentional tort exception by framing his or her complaint in terms of negligent failure to prevent the assault and battery. The exception does not merely bar claims for assault or battery; in sweeping language it excludes any claim arising out of assault or battery.
25. **Tort Claims Act: Immunity: Waiver: Pleadings: Proof.** Exceptions found in Neb. Rev. Stat. § 81-8,219 (Supp. 2011) to the general waiver of tort immunity are matters of defense which must be pled and proved by the State.
26. **Actions: Immunity: Waiver.** Nebraska has not waived its sovereign immunity with regard to 42 U.S.C. § 1983 (2012) suits brought against it.
27. **Constitutional Law: Immunity: Public Officers and Employees.** The enactment of 42 U.S.C. § 1983 (2012) did not abrogate the State's 11th Amendment immunity by creating a remedy against the State.
28. **Statutes: Constitutional Law: Immunity: Waiver.** Neb. Rev. Stat. § 20-148 (Reissue 2012) is a procedural statute designed to allow plaintiffs to bypass administrative procedures in discrimination actions against private employers; it does not operate to waive sovereign immunity.

29. **Public Officers and Employees: Immunity.** Sovereign immunity does not apply when state officials are sued in their individual capacities—that is, when a suit seeks to hold state officials personally liable.
30. **Actions: Parties: Public Officers and Employees: Waiver.** Sovereign immunity does not apply even when state officials are sued in their individual capacities for acts taken within the scope of their duties and authority as state officials.
31. **Public Officers and Employees: Liability.** Personal-capacity suits seek to impose individual liability upon a government officer for actions taken under color of state law.
32. **Limitations of Actions: Dismissal and Nonsuit.** Neb. Rev. Stat. § 25-217 (Reissue 2008) provides that a plaintiff has 6 months from the date the complaint was filed to serve the defendants, at which point the complaint shall be dismissed without prejudice.
33. **Immunity.** Qualified immunity is an affirmative defense which must be affirmatively pleaded.
34. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
35. **Constitutional Law: Public Officers and Employees: Liability.** The standard by which a supervisor is held liable under 42 U.S.C. § 1983 (2012) in his or her individual capacity for the actions of a subordinate is extremely rigorous.
36. **Constitutional Law: Public Officers and Employees: Liability: Proof.** To hold a supervisor liable under 42 U.S.C. § 1983 (2012), the plaintiff must establish that the supervisor personally participated in the unconstitutional conduct or was otherwise the moving force of the violation by authorizing, approving, or knowingly acquiescing in the unconstitutional conduct.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Julie A. Jorgensen, of Morrow, Willnauer, Klosterman & Church, L.L.C., for appellant.

Jon Bruning, Attorney General, and David A. Lopez for appellee.

Irwin, Riedmann, and Bishop, Judges.

Bishop, Judge.

## INTRODUCTION

D.M., previously an inmate at the Omaha Correctional Center (OCC), filed a complaint against the State of Nebraska and the Nebraska Department of Correctional Services (DCS) and against Robert P. Houston, the director of the DCS; John Doe #1 (Doe), an investigator for the DCS; Jim Brown, a unit manager at the OCC; and Anthony Hansen, a prison guard at the OCC, all in their individual and official capacities. D.M. alleged that he was sexually assaulted by Hansen while D.M. was incarcerated at the OCC and that when D.M. reported the sexual assault, he was placed in disciplinary segregation for over 30 days. D.M.'s complaint contained several tort and constitutional violation claims against the above-named defendants; pursuant to a motion to dismiss filed by the State, the Douglas County District Court dismissed D.M.'s entire complaint with prejudice, concluding that all of his claims were barred by sovereign immunity. We affirm in part, and in part reverse and remand for further proceedings.

## BACKGROUND

D.M. filed a complaint on December 10, 2013, alleging the following facts:

D.M. was admitted as an inmate to the OCC in December 2011, with an expectation of parole in February 2012. On December 10, 2011, Hansen approached D.M. in the cafeteria with the proposition to meet in the chapel to engage in sexual activity. D.M. attempted to avoid and deflect Hansen's sexual advances. Hansen later approached D.M. and advised that there were cameras in the chapel so they should meet in the commons area of the OCC. After D.M. again attempted to deflect Hansen's sexual advances, Hansen spoke to D.M. regarding his parole date, which D.M. took as a threat to his future release based on previous encounters with Hansen where he had advised D.M. that if he did not comply with Hansen's sexual requests, Hansen would cause D.M.

or his friends to lose "good time" or be placed in disciplinary segregation.

D.M. reluctantly met with Hansen in the commons area based on his threats, at which point Hansen shoved D.M. into a wall and forcibly kissed him, pushed him down to his knees, and ejaculated into D.M.'s mouth. D.M. preserved Hansen's bodily fluids in a napkin. D.M. then orally reported the incident to Brown, D.M.'s unit manager. D.M. also filled out a formal complaint and requested a grievance form.

D.M. alleged that immediately after the incident and as a result of his reporting Hansen's sexual assault, he was placed in disciplinary segregation, where he had limited telephone privileges and no contact with other inmates. Prison guards were instructed not to converse with him while he was in segregation, and D.M. was instructed by representatives of the defendants not to speak to anyone about the sexual assault. D.M. was subjected to disciplinary segregation for over 30 days while the investigation was conducted. D.M. requested that he be "transferred to another medium security facility, but was told there was no room at any other facility."

D.M. alleged that Doe visited D.M. on numerous occasions, advising him that he would get more jail time for lying and that he was "ruining" Hansen's life. During the investigation, Hansen was permitted to work for a period of time and subsequently was given paid leave while D.M. remained in solitary confinement.

DNA testing confirmed that the bodily fluids collected by D.M. were Hansen's; Hansen subsequently pled guilty to sexual assault. When the investigation was complete, D.M. alleges he was "transferred from a minimum security facility to a maximum security facility." (We note that D.M.'s complaint is inconsistent as to whether he was in a minimum or medium security facility at the time of the assault.)

During the investigation, D.M. repeatedly requested counseling services; after "numerous" requests, and at the conclusion of the investigation, D.M. was given two therapy sessions after his transfer. D.M. continued to see a therapist

subsequent to his release; suffers from intimacy issues, depression, severe anxiety, and severe emotional distress; has been prescribed medication; and is expected to need therapy and psychiatric treatment.

D.M. alleged nine causes of action arising out of the above facts: (1) negligent hiring/supervising of Hansen, (2) failure to protect, (3) retaliation, (4) respondeat superior, (5) denial of equal protection, (6) cruel and unusual punishment, (7) intentional infliction of emotional distress as to Hansen, (8) intentional infliction of emotional distress as to all the defendants, and (9) negligent infliction of emotional distress as to all the defendants. D.M. sought damages, reasonable attorney fees, permission to assert a claim for punitive damages, and further relief as may be ordered. D.M. invoked jurisdiction pursuant to the State Tort Claims Act (STCA), Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2008, Cum. Supp. 2010 & Supp. 2011); Neb. Rev. Stat. § 20-148 (Reissue 2012); the civil rights laws of the United States, including 42 U.S.C. § 1983 (2012); and the Nebraska Constitution.

On January 30, 2014, Houston, in both his official and individual capacities; the State; the DCS; and Doe, Brown, and Hansen, in their official capacities only, filed a motion to dismiss pursuant to Neb. Ct. R. of Pldg. § 6-1112(b)(6) for failure to state a claim, and also that "the Defendants are protected by sovereign immunity."

A hearing on the motion was held on February 25, 2014. Our record does not contain the bill of exceptions from this hearing. The court entered an order on March 31. The court found:

> [T]he alleged rape of [D.M.] by . . . Hanson [sic] was an assault as [are] all of the causes of action set forth in his complaint and, thus, the intentional tort exception of [§] 81-8,219(4) applies and bars [D.M.'s] action against the Defendants. The Court further finds that the complaint cannot be amended to state a cause of action and, therefore, that [D.M.'s] complaint should be dismissed with prejudice.

D.M. filed a "Motion for Reconsideration" on April 11, 2014. He requested that the court reconsider its dismissal of all causes of action against all the defendants because several of his claims were based on retaliation for reporting the assault and because several claims were brought against "State actors" in their individual capacities under Nebraska's civil rights statute and 42 U.S.C. § 1983. He further argued that his claims under § 1983 should not be affected by state law immunity because it is preempted by federal law. The court overruled D.M.'s motion on April 29.

D.M. timely filed this appeal.

## ASSIGNMENTS OF ERROR

D.M. assigns seven errors on appeal, which we summarize as follows: The district court erred in dismissing his entire complaint with prejudice, without leave to amend, based on its conclusion that all of his claims were barred by sovereign immunity.

## STANDARD OF REVIEW

[1,2] A district court's grant of a motion to dismiss is reviewed de novo. *Brothers v. Kimball Cty. Hosp.*, 289 Neb. 879, 857 N.W.2d 789 (2015). When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion. *Id*.

[3,4] Whether the allegations made by a plaintiff present a claim that is precluded by exemptions set forth in the STCA is a question of law. *Hall v. County of Lancaster*, 287 Neb. 969, 846 N.W.2d 107 (2014). An appellate court has an obligation to reach its conclusion on whether a claim is precluded by exemptions set forth in the STCA independent from the conclusion reached by the trial court. See *Hall v. County of Lancaster, supra*.

## ANALYSIS

D.M. filed tort and constitutional claims against the State and the DCS and against Houston, Doe, Brown, and Hansen, in their individual and official capacities, seeking monetary damages. The district court dismissed D.M.'s claims against all the defendants on the basis of sovereign immunity, concluding that all his asserted claims arose from the sexual assault and that sovereign immunity is not waived for claims arising out of such an intentional tort. However, D.M.'s complaint asserted two distinct set of facts: (1) the assault and (2) D.M.'s reporting of the assault and the retaliatory conduct of various defendants in response to his report. Additionally, besides the various tort claims alleged by D.M., he also asserted constitutional and civil rights claims, including First Amendment retaliation, denial of equal protection based upon his disciplinary segregation upon reporting, and Eighth Amendment claims related to the assault and his treatment after reporting.

[5-10] We begin by reviewing the general principles of sovereign immunity upon which the district court relied to dismiss all claims against all the defendants. The immunity of states from suit is a fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution and which they retain today. *SID No. 1 v. Adamy*, 289 Neb. 913, 858 N.W.2d 168 (2015). A suit against a state agency is a suit against the State and is subject to sovereign immunity. *Anthony K. v. Nebraska Dept. of Health & Human Servs.*, 289 Neb. 540, 855 N.W.2d 788 (2014) (*Anthony II*). A suit generally may not be maintained directly against an agency or department of the State, unless the State has waived its sovereign immunity. *Id*. Statutes authorizing suits against the State are to be strictly construed because such statutes are in derogation of the State's sovereign immunity. *SID No. 1 v. Adamy, supra.* Waiver of sovereign immunity will be found only where stated by the most express language or by such overwhelming implications from the text as will leave no

room for any other reasonable construction. *Id*. This principle has been said to create a presumption against waiver. *Dean v. State*, 288 Neb. 530, 849 N.W.2d 138 (2014).

[11-14] Sovereign immunity has potential applicability to suits brought against state officials in their official capacities. See *Anthony II, supra*. Official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent. *Id.* In an action for the recovery of money, the State is the real party in interest because a judgment against a public servant in his official capacity imposes liability on the entity that he represents. See *id*. Unless waived, sovereign immunity bars a claim for money even if the plaintiff has named individual state officials as nominal defendants. See *id*.

[15,16] The STCA waives the State's sovereign immunity with respect to certain, but not all, types of tort actions. See *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005). In other words, the STCA allows lawsuits against the State and public officials for certain tortious conduct, but not all. We first consider D.M.'s tort claims against the various defendants, followed by a review of his constitutional claims.

## Tort Claims Against State, DCS, and Named Individuals

[17,18] In the absence of a waiver, sovereign immunity bars all suits against the State and state agencies, regardless of the relief sought. See *Anthony K. v. State*, 289 Neb. 523, 855 N.W.2d 802 (2014) (*Anthony I*). The DCS is a state agency. See *Perryman v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 66, 568 N.W.2d 241 (1997), *disapproved on other grounds, Johnson v. Clarke*, 258 Neb. 316, 603 N.W.2d 373 (1999). Sovereign immunity also has potential applicability to suits brought against state officials in their official capacities; official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent. See *Anthony II, supra*. In an action for the recovery of money, the State is the real party in interest

because a judgment against a public servant in his official capacity imposes liability on the entity that he represents. See *id*. Unless waived, sovereign immunity bars a claim for money even if the plaintiff has named individual state officials as nominal defendants. See *id*. Further, although a state employee or officer may be allegedly sued individually, if he or she is acting within the scope of employment or office, the STCA still applies and provides immunity, unless such has been waived. *Bojanski v. Foley*, 18 Neb. App. 929, 798 N.W.2d 134 (2011).

D.M.'s complaint contains tort claims against Houston, Doe, and Brown, in both their official and individual capacities. However, while D.M. purports to have brought his tort claims against those individuals in their individual capacities, in looking at D.M.'s complaint, it is clear that his tort allegations on the part of Houston, Doe, and Brown occurred while they were acting within the scope of their employment with the DCS, and therefore, the tort claims against those defendants all fall within the STCA. See *Bojanski v. Foley, supra*.

[19,20] As previously noted, the STCA waives the State's sovereign immunity with respect to certain, but not all, types of tort actions. *Johnson v. State, supra*. The STCA waives the State's sovereign immunity for tort claims against the State for money only on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the state, while acting within the scope of his or her office or employment, under circumstances in which the State, if a private person, would be liable to the claimant for such damage, loss, injury, or death. See § 81-8,210(4). However, the State's sovereign immunity is not waived with respect to the types of claims listed in § 81-8,219. *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005). Among the claims for which sovereign immunity is not waived are claims "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

§ 81-8,219(4). This subsection is commonly referred to as the "intentional tort exception." See *Britton v. City of Crawford*, 282 Neb. 374, 803 N.W.2d 508 (2011). The district court in the instant case concluded that all of D.M.'s claims were barred by this exception.

[21-23] To determine whether a claim arises from an intentional assault or battery and is therefore barred by sovereign immunity pursuant to the intentional tort exception, a court must ascertain whether the alleged negligence was the breach of a duty to select or supervise the employee-tort-feasor or the breach of some separate duty independent from the employment relation. *Johnson v. State, supra* (quoting *Sheridan v. United States*, 487 U.S. 392, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988) (Kennedy, J., concurring in judgment)). If the allegation is that the government was negligent in the supervision or selection of the employee and that the intentional tort occurred as a result, the intentional tort exception bars the claim. *Id.* Otherwise, litigants could avoid the substance of the exception because it is likely that many, if not all, intentional torts of government employees plausibly could be ascribed to the negligence of the tort-feasor's supervisors. *Id.* To allow such claims would frustrate the purposes of the exception. *Id.* A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction. *Stick v. City of Omaha*, 289 Neb. 752, 857 N.W.2d 561 (2015).

In *Johnson v. State, supra*, a female inmate at the OCC alleged that she was sexually assaulted by an employee of the DCS assigned to work at the OCC. She filed suit against the State, the DCS, and the OCC, alleging two theories of recovery: negligence and intentional infliction of emotional distress. With respect to her negligence claims, the female inmate alleged the defendants were negligent in violating state jail standards with respect to the housing of female inmates, failing to properly hire and supervise its employees, and failing to properly discipline the employee who perpetrated the

sexual assault. Our Supreme Court concluded that each of the above causes of action was based upon the employment relationship between her alleged assailant and the defendants and that thus, the intentional tort exception of § 81-8,219(4) applied to bar all her causes of action.

[24] D.M. does not dispute that his claims for negligent hiring/supervising and respondeat superior are barred by sovereign immunity, because both tort claims arise out of the intentional sexual assault, for which the State has not waived its sovereign immunity. See § 81-8,219(4). See, also, *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005). D.M.'s cause of action for failure to protect alleges that the "Defendants" breached their duty to protect him from the sexual assault; however, such a tort claim, although framed as an allegation of negligence, nevertheless is a claim "arising out of assault [or] battery." § 81-8,219(4). Our Supreme Court has stated:

> "'[A plaintiff] cannot avoid the reach of [the intentional tort exception] by framing [his or] her complaint in terms of negligent failure to prevent the assault and battery. [The exception] does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery. . . .'"

*Britton v. City of Crawford*, 282 Neb. 374, 384-85, 803 N.W.2d 508, 517 (2011) (emphasis in original) (quoting *Johnson v. State, supra*). This provision covers claims that sound in negligence but stem from a battery committed by a government employee. See *Britton v. City of Crawford, supra*. Accordingly, D.M.'s tort claims for negligent hiring/supervising, respondeat superior, and failure to protect were properly dismissed against the State and the DCS; Houston, Doe, and Brown; and Hansen, in his official capacity, on the basis of sovereign immunity because such claims arose from the sexual assault.

[25] However, D.M.'s claims for intentional and negligent infliction of emotional distress differ from the above claims in that they are not based on claims of emotional distress resulting from or arising out of the sexual assault; rather, D.M.

bases these two claims on his allegations that he was punished and retaliated against by different OCC employees for reporting the assault and that he was placed in solitary confinement and subjected to threats of legal action or prosecution for perjury for making his report. D.M.'s claims in this regard therefore do not arise from the assault, but, rather, from his reporting of the assault and the resulting retaliatory conduct by OCC employees, which conduct was separate and distinct from Hansen's assault of D.M. We therefore conclude that the district court erred in dismissing D.M.'s claims for intentional and negligent infliction of emotional distress on the basis of sovereign immunity, since these claims arose from D.M.'s reporting of the assault rather than the assault itself. As our record does not reflect that the State raised or argued any other exception contained in § 81-8,219 in the district court below, our review is limited solely to whether D.M.'s claims are barred by the intentional tort exception to the STCA. See *Sherrod v. State*, 251 Neb. 355, 557 N.W.2d 634 (1997) (holding that exceptions found in § 81-8,219 to general waiver of tort immunity are matters of defense which must be pled and proved by State).

Finally, D.M. alleged a separate cause of action against Hansen for intentional infliction of emotional distress as a result of his sexual assault of D.M. Such a claim against Hansen in his individual capacity would clearly not be governed by the STCA, as sexual assault would not fall within the scope of Hansen's employment with the DCS. The district court therefore erred in dismissing this claim against Hansen in his individual capacity as barred by sovereign immunity.

In sum, we affirm the district court's dismissal of D.M.'s tort claims for negligent hiring/supervising, failure to protect, and respondeat superior against the State and the DCS; Houston, Doe, and Brown, in both their individual and official capacities; and Hansen, in his official capacity, on the basis that such claims arose out of Hansen's sexual assault and were therefore barred by sovereign immunity. See § 81-8,219(4).

We further conclude that the district court erred in dismissing D.M.'s claim against Hansen in his individual capacity for intentional infliction of emotional distress. Finally, we conclude that D.M.'s tort claims for intentional and negligent infliction of emotional distress were based on separate wrongful conduct subsequent to D.M.'s report, which conduct did not arise out of Hansen's sexual assault within the meaning of § 81-8,219(4), and that the district court therefore erred in dismissing those two claims against the above defendants on that basis.

### Constitutional Claims Against State, DCS, and Named Individuals in Their Official Capacities

D.M.'s complaint contains three constitutional claims for which he seeks monetary damages under 42 U.S.C. § 1983 and § 20-148: 1st Amendment retaliation, 5th and 14th Amendment equal protection and due process, and 8th Amendment cruel and unusual punishment. We conclude that all of his constitutional claims are barred by sovereign immunity against the State, the DCS, and the named individuals in their official capacities.

[26-28] Nebraska has not waived its sovereign immunity with regard to § 1983 suits brought against it. *Anthony I*. Neither did the enactment of § 1983 abrogate the State's 11th Amendment immunity by creating a remedy against the State. *Anthony I*. Likewise, § 20-148 is a procedural statute designed to allow plaintiffs to bypass administrative procedures in discrimination actions against private employers; it does not operate to waive sovereign immunity. See *Potter v. Board of Regents*, 287 Neb. 732, 844 N.W.2d 741 (2014). As such, there is no waiver of sovereign immunity by the State with respect to D.M.'s constitutional violation claims against the State, the DCS, or the named individuals in their official capacities, and the district court therefore properly dismissed those claims on the basis of sovereign immunity.

### Constitutional Claims Against Named Individuals in Their Individual Capacities

[29-31] The district court dismissed all of D.M.'s constitutional claims under 42 U.S.C. § 1983 against the named individuals—Houston, Doe, Brown, and Hansen—in their individual capacities on the basis that such claims were barred by sovereign immunity. However, sovereign immunity does not apply when state officials are sued in their individual capacities—that is, when a suit seeks to hold state officials personally liable. *Anthony II*. This is true even when state officials are sued in their individual capacities for acts taken within the scope of their duties and authority as state officials. *Id.* Personal-capacity suits seek to impose individual liability upon a government officer for actions taken under color of state law. *Id.* As such, the district court erred when it dismissed D.M.'s constitutional claims against the named defendants in their individual capacities on the basis of sovereign immunity.

[32] The State claims that this court should nevertheless affirm the dismissal of D.M.'s claims against Doe and Brown in their individual capacities because "[D.M.] served only Houston and Hansen individually." Brief for appellees at 15. At oral argument to this court, the State argued that there was "never a live suit" against Brown or Doe in their individual capacities, because D.M. did not serve them individually. D.M. filed his complaint on December 10, 2013, and the district court dismissed all of his claims, with prejudice, including his claims against all named individuals in their individual capacities, on March 31, 2014, approximately 3½ months after D.M. filed his complaint. Pursuant to Neb. Rev. Stat. § 25-217 (Reissue 2008), a plaintiff has 6 months from the date the complaint was filed to serve the defendants, at which point the complaint shall be dismissed without prejudice. If D.M. had not properly served the named defendants individually

as the State claims on appeal, pursuant to § 25-217, D.M. still had 2½ months to effectuate such service. Moreover, our record does not reflect the manner in which D.M.'s complaint was served, and as such, our record is insufficient to review the State's claimed deficient service.

[33,34] The State also contends that although the trial court may have mistakenly dismissed D.M.'s claims under § 1983 against Houston in his individual capacity upon a finding that sovereign immunity barred the claims, this court should nevertheless affirm the district court's dismissal because Houston is shielded by qualified immunity. Qualified immunity is an affirmative defense which must be affirmatively pleaded. See *Fuhrman v. State*, 265 Neb. 176, 655 N.W.2d 866 (2003). It is a longstanding rule that we will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Linscott v. Shasteen*, 288 Neb. 276, 847 N.W.2d 283 (2014). Because the affirmative defense of qualified immunity was not raised in any of the pleadings below and was not presented to or passed upon by the trial court, we decline to do so for the first time on appeal.

[35,36] However, we do agree with the State that D.M. has failed to state a constitutional claim pursuant to § 1983 with respect to Houston in his individual capacity. The standard by which a supervisor is held liable under § 1983 in his or her individual capacity for the actions of a subordinate is extremely rigorous. See *Potter v. Board of Regents*, 287 Neb. 732, 844 N.W.2d 741 (2014). The plaintiff must establish that the supervisor personally participated in the unconstitutional conduct or was otherwise the moving force of the violation by authorizing, approving, or knowingly acquiescing in the unconstitutional conduct. *Id*. D.M. has alleged no facts in his complaint sufficient to establish Houston's personal liability under § 1983, and therefore, the district court did not err in dismissing D.M.'s constitutional claims against Houston individually.

## CONCLUSION

In summary, as to the tort claims, we affirm the district court's dismissal of D.M.'s tort claims for negligent hiring/supervising, failure to protect, and respondeat superior against the State and the DCS; Houston, Doe, and Brown, in both their individual and official capacities; and Hansen, in his official capacity. We reverse, and remand for further proceedings D.M.'s tort claims for intentional and negligent infliction of emotional distress against the State and the DCS and against Houston, Doe, and Brown, because those claims are alleged to have arisen out of D.M.'s reporting of the sexual assault and not the assault itself. We reverse, and remand for further proceedings D.M.'s claim for intentional infliction of emotional distress against Hansen.

As to the constitutional claims, we affirm the dismissal of D.M.'s constitutional claims against the State, the DCS, and the named individuals in their official capacities, and against Houston in both his official and individual capacity. We reverse, and remand for further proceedings D.M.'s remaining constitutional claims against Brown, Doe, and Hansen in their individual capacities.

Affirmed in part, and in part reversed and remanded for further proceedings.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Phillip McDaniel, appellant, v. Western Sugar Cooperative and The Phoenix Insurance Company, Inc., appellees.

867 N.W.2d 302

Filed July 14, 2015. No. A-14-793.

1. **Workers' Compensation: Appeal and Error.** Under Neb. Rev. Stat. § 48-185 (Cum. Supp. 2014), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. On appellate review, the findings of fact made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Workers' Compensation: Evidence: Appeal and Error.** If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court.
4. **Workers' Compensation: Proof.** For benefits to be recovered under the Nebraska Workers' Compensation Act, the claimant must prove that the employee suffered injuries because of an accident arising out of and in the course of his or her employment.
5. **Workers' Compensation: Words and Phrases.** The phrase "arising out of the employment" is used to describe the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising from within the scope or sphere of the employee's job.
6. ____: ____. All risks causing injury to an employee can be placed within three categories: (1) risks distinctly associated with the employment, (2) risks personal to the claimant, and (3) "neutral" risks—i.e., risks having no particular employment or personal character.

7. **Workers' Compensation: Assault: Words and Phrases.** In order for an assault for personal reasons to be brought within the sphere of "arising out of the employment," the employment must somehow exacerbate the animosity or dispute or facilitate an assault which would not otherwise be made.
8. **Workers' Compensation.** The determination of whether the employment creates a situation wherein an assailant will commit a crime that he or she would not otherwise commit is a difficult question of fact.
9. **Workers' Compensation: Assault.** When assessing risk in workers' compensation cases involving assaults, the focus is on the motivation for the assault.
10. ____: ____. The general rule is that assaults motivated by personal reasons, although occurring at work, are not compensable under workers' compensation law.

Appeal from the Workers' Compensation Court: Michael K. High, Judge. Affirmed.

Rolf Edward Shasteen, of Shasteen & Morris, P.C., L.L.O., for appellant.

Patrick B. Donahue and Dennis R. Riekenberg, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

Moore, Chief Judge, and Irwin and Riedmann, Judges.

Riedmann, Judge.

## INTRODUCTION

Phillip McDaniel appeals from the order of the workers' compensation court dismissing his petition with prejudice. On appeal, he argues that the compensation court erred in finding that an assault on him by a coworker did not arise out of his employment. Because we find that the compensation court's factual finding is not clearly wrong, we affirm.

## BACKGROUND

McDaniel was employed by Western Sugar Cooperative (Western Sugar), performing tasks such as monitoring machinery and ensuring work areas were clean. On February 15, 2013, McDaniel was scheduled to work from 8 p.m. until 8 a.m. Around 8:30 p.m., while performing his work duties,

he encountered his coworker Jason Bates. The two men walked together and talked at first. Bates then began assaulting McDaniel with a brass hammer. Bates called McDaniel an "f'ing chimo," which is "short for child molester," because he discovered on the Internet that McDaniel is a registered sex offender. McDaniel suffered injuries to his nose, clavicle, and left shoulder. Because Western Sugar has a zero-tolerance policy relating to workplace violence, Bates' employment was immediately terminated.

Although McDaniel and Bates lived approximately three blocks away from each other in the same small town, they did not know each other outside of work. On occasion, Bates would ask McDaniel work-related questions and McDaniel would assist him. Once, McDaniel and his wife gave Bates a ride home from work upon a request from McDaniel's boss. The men had never previously exchanged angry words, however, or had any sort of prior altercations.

After the incident, McDaniel filed a petition in the workers' compensation court alleging that the assault arose out of and in the course of his employment. Trial was held, and the compensation court subsequently entered an order finding that the injury did not arise out of McDaniel's employment. The court determined that McDaniel was assaulted for reasons personal to Bates, namely McDaniel's being a registered sex offender, and that nothing in the workplace precipitated the assault. Accordingly, it held that McDaniel was not entitled to workers' compensation benefits and his petition was dismissed. McDaniel timely appeals to this court.

## ASSIGNMENTS OF ERROR

McDaniel assigns that the workers' compensation court erred in finding that the assault on him by Bates, his coworker, did not arise out of his employment and in dismissing his petition with prejudice.

## STANDARD OF REVIEW

[1-3] Under Neb. Rev. Stat. § 48-185 (Cum. Supp. 2014), an appellate court may modify, reverse, or set aside a Workers'

Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 775 N.W.2d 179 (2009). On appellate review, the findings of fact made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id*. If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court. *Id*.

## ANALYSIS

[4,5] The sole issue in this case is whether the assault of McDaniel arose out of his employment. For benefits to be recovered under the Nebraska Workers' Compensation Act, the claimant must prove that the employee suffered injuries because of an accident arising out of and in the course of his or her employment. *Monahan v. United States Check Book Co.*, 4 Neb. App. 227, 540 N.W.2d 380 (1995). The phrase "arising out of the employment" is used to describe the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising from within the scope or sphere of the employee's job. *Id*.

[6,7] All risks causing injury to an employee can be placed within three categories: (1) risks distinctly associated with the employment, (2) risks personal to the claimant, and (3) "neutral" risks—i.e., risks having no particular employment or personal character. *Id*. In order for an assault for personal reasons to be brought within the sphere of "arising out of the employment," the employment must somehow exacerbate the animosity or dispute or facilitate an assault which would not otherwise be made. *Id*. McDaniel argues that but for his

shared employment with Bates, the two men would have never encountered each other and Bates would have never known about McDaniel's criminal history. Thus, he asserts that the employment facilitated the assault and he should be entitled to compensation. We disagree with McDaniel's argument and find that the compensation court's factual finding is not clearly wrong.

[8] The determination of whether the employment creates a situation wherein an assailant will commit a crime that he or she would not otherwise commit is a difficult question of fact. *Id*. The *Monahan* court noted that this standard of review was precisely the reason it could not reverse, set aside, or modify the trial court's ruling in that case. In *Monahan*, a woman shot and killed her estranged, abusive husband at their mutual workplace. This court upheld the denial of workers' compensation benefits because the evidence supported the trial court's factual determination that the shooting was motivated by purely personal reasons, not anything concerning their employment. See *id*.

[9] We recognize the factual distinctions pointed out by McDaniel between the instant case and *Monahan*. Here, McDaniel and Bates did not have a relationship outside of their employment. The husband and wife in *Monahan* had a personal and volatile history. However, our case law indicates that when assessing risk in these types of cases, the focus is on the motivation for the assault. See *id.* See, also, *P.A.M. v. Quad L. Assocs.*, 221 Neb. 642, 380 N.W.2d 243 (1986); *Myszkowski v. Wilson and Company, Inc.*, 155 Neb. 714, 53 N.W.2d 203 (1952). In *Myszkowski*, the Nebraska Supreme Court observed that practically all authority holds that an assault by one employee upon another for personal reasons, not growing out of the relation as fellow employees, or out of acts in the performance of their work, cannot be held to arise out of the employment. In both *P.A.M.* and *Myszkowski*, however, the court ultimately decided that the assault in question was not the result of purely personal animosity, but, rather, was a dispute over some element of the employment.

There is no evidence in the present case of any employment dispute between McDaniel and Bates or any animosity over work performance. Although the sole relationship between the men was as coworkers, the motivation for the assault was Bates' personal feelings toward discovering that McDaniel is a sex offender.

[10] McDaniel contends that even if the motivation for the assault was purely personal, he is still entitled to compensation because the employment facilitated the assault. To resolve this issue, we look again to *Monahan v. United States Check Book Co.*, 4 Neb. App. 227, 232, 540 N.W.2d 380, 384 (1995), where we stated:

> As the Nebraska Supreme Court mentioned in *P.A.M.* and *Myszkowski*, the general rule is that assaults motivated by personal reasons, although occurring at work, are not compensable under workers' compensation law. See 1 [Arthur] Larson & [Lex K.] Larson, [The Law of Workmen's Compensation] § 11.00 at 3-178 [(1995)] ("[a]ssaults for private reasons do not arise out of the employment unless, by facilitating an assault which would not otherwise be made, the employment becomes a contributing factor"). See, also, *id.*, § 11.21(a) at 3-274 ("[w]hen the animosity or dispute that culminates in an assault is imported into the employment from claimant's domestic or private life, and is not exacerbated by the employment, the assault does not arise out of the employment under any test"); 82 Am. Jur. 2d *Workers' Compensation* § 358 at 393 (1992) ("where an employee is assaulted and injury is inflicted upon him through animosity and ill will arising from some cause wholly disconnected with the employer's business or the employment, the employee cannot recover compensation simply because he is assaulted when he is in the discharge of his duties").

In the present case, Bates' motivation for assaulting McDaniel was McDaniel's criminal history. Bates may not have had the opportunity to encounter McDaniel or learn

of his status as a sex offender but for their mutual employment; however, the assault did not stem from their relation as coworkers or out of a dispute related to the performance of their work. The cause of the assault was wholly disconnected from Western Sugar's business and the employment of McDaniel and Bates.

Moreover, even though Western Sugar provided an environment and opportunity for Bates to carry out the assault, we cannot find that the trial court's factual finding is clearly wrong. Reiterating our standard of review for factual findings in workers' compensation cases in *Monahan, supra*, we noted that it is indeed plausible that the wife in that case would not have assaulted and murdered her husband but for the fact that he worked alone at night. Yet, we concluded that it is equally plausible that she would in fact have assaulted and murdered him anywhere on the night in question. Similarly here, it is plausible that but for their shared employment, Bates would have never met McDaniel, learned of his criminal history, or had the opportunity for the assault. However, it is equally plausible, as Western Sugar suggests, that as the men lived near to each other in a town of 1,500 people, they would have encountered each other and Bates would have had the ability and opportunity to carry out his assault elsewhere.

Because there is evidence in the record to support the trial court's factual finding that the assault on McDaniel did not arise out of his employment, we cannot find that the court's denial of workers' compensation benefits was clearly wrong.

## CONCLUSION

For the reasons stated above, we affirm.

Affirmed.

Nebraska Court of Appeals
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# State of Nebraska, appellee, v. Adam T. Woldt, appellant.

867 N.W.2d 637

Filed July 21, 2015. No. A-14-573.

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. **Trial: Investigative Stops: Warrantless Searches: Appeal and Error.** The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
3. **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 by the government.
4. ____: ____. A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.
5. **Constitutional Law: Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Search and Seizure.** Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment.
6. **Constitutional Law: Investigative Stops: Warrantless Searches: Probable Cause: Police Officers and Sheriffs.** Police can constitutionally stop and briefly detain a person for investigative purposes if

the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the Fourth Amendment.

7. **Constitutional Law: Search and Seizure: Motor Vehicles.** A motorist has a reasonable expectation of privacy which is not subject to arbitrary invasions solely at the unfettered discretion of police officers in the field.
8. **Constitutional Law: Highways: Motor Vehicles: Investigative Stops: Search and Seizure.** A vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment.
9. **Highways: Investigative Stops.** A highway checkpoint must be both authorized by an approved plan and conducted in a manner that complies with the plan and the policy established by the authority at the policymaking level.
10. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
11. **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 Cuming County, James G. Kube, Judge, on appeal thereto from the County Court for Cuming County, Michael L. Long, Judge. Judgment of District Court reversed, and cause remanded with directions.

Thomas B. Donner for appellant.

Jon Bruning, Attorney General, and Austin N. Relph for appellee.

Moore, Chief Judge, and Irwin and Riedmann, Judges.

Moore, Chief Judge.

## INTRODUCTION

Adam T. Woldt appeals from the order of the district court for Cuming County which affirmed his conviction in the county court for driving under the influence (DUI). The sole issue presented to us in this appeal is whether the stop of Woldt's vehicle for the purpose of gathering information about a third party's possible criminal activity violated

Woldt's constitutional right to be free from an unreasonable search and seizure. We conclude that the stop was unlawful and that Woldt's motion to suppress should have been sustained.

## BACKGROUND

On September 26, 2013, the State filed a complaint in the county court, charging Woldt with first-offense DUI in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010), a Class W misdemeanor.

Woldt filed a motion to suppress, which was heard by the county court on November 5, 2013. The State presented testimony from police officers involved in the investigations on the evening in question. Woldt testified and also presented testimony from the other individual who was investigated on the evening in question.

The evidence at the hearing showed generally that on September 13, 2013, Officer Randy Davie of the Wisner Police Department received a call from dispatch about a report that someone driving a white Chevrolet pickup was knocking over traffic cones on the highway that is the main street of Wisner, Nebraska. At the scene, Davie observed 38 cones knocked down along both sides of the highway.

While picking up the cones, Davie heard squealing tires north of his location. After picking up the cones, he drove north on a side street. Davie was driving without lights because he "was going to see who was squealing their tires." He then observed a white Chevrolet pickup followed within a car length or less by a dark-colored pickup proceeding toward him south on the side street.

When the white pickup neared Davie's location, Davie turned on his patrol car's headlights and extended his arm straight out of the patrol car's window indicating that the white pickup should stop. Davie did not turn on his patrol car's overhead lights or sirens during the stop of the white pickup. The driver of the white pickup, whom Davie recognized as Jacob Biggerstaff, pulled over and stopped south of

Davie's patrol car by about four to five car lengths. Davie stopped the white pickup because he thought that it might have been involved in knocking over the traffic cones on the highway. Davie exited his patrol car, left its door open, and walked over to contact Biggerstaff. Upon contacting Biggerstaff, Davie smelled the odor of alcohol, and at that point, he began a DUI investigation of Biggerstaff. Davie did not ask Biggerstaff about the traffic cone incident but asked him to step out of the pickup. When Biggerstaff complied, Davie took him to the patrol car. Davie remained outside of the patrol car, and Biggerstaff seated himself in the passenger side of the patrol car without Davie's assistance.

While this was happening, the driver of the dark-colored pickup, whom Davie recognized as Woldt and whom Davie knew to be a city employee, had parked his pickup across from Davie's patrol car on the west side of the side street near an intersection. Davie testified that the front of his patrol car was about even with the intersection and that Woldt's pickup was parked with the rear 3 to 4 feet extending into the intersection. Woldt testified that he was in the process of making the turn south onto the side street when he saw Davie motion to stop Biggerstaff. Woldt pulled over and parked behind another parked car. According to Woldt, he was unable to proceed south down the street because his line of travel was blocked by Davie's open car door and he could not continue closer to the curb because of the parked car in front of him. Woldt remained in his pickup with the window rolled down. As Davie and Biggerstaff were approaching the patrol car, Woldt began to reverse his pickup.

Davie then held up his hand and gestured for Woldt to approach. Woldt testified that Davie said something to him at that point, but he could not remember exactly what was said. Davie also could not remember whether he said anything to Woldt. Davie testified that it was his intent to speak with Woldt about whether he had seen Biggerstaff do anything and to ask why he was following Biggerstaff. Davie did not observe anything about the operation of Woldt's pickup that

led him to believe Woldt had violated any rules of the road or any other state laws or city ordinances. Davie testified that he was concerned with the white pickup, and if Woldt had not stopped initially, he would not have stopped him because he "had no reason to stop him." During redirect examination by the State, Davie agreed that he probably could have cited Woldt for following Biggerstaff too closely.

Upon approaching Woldt's pickup, Davie smelled the odor of alcohol and began a second DUI investigation. He asked Woldt whether he had been drinking, and at that point, Woldt "just put his head down." Davie asked Woldt if he was drunk, and Woldt responded by shutting off his pickup and handing the keys to Davie. Davie contacted another officer for assistance. Woldt was then given a field sobriety test and preliminary breath test and was arrested for DUI.

On December 3, 2013, the county court entered an order overruling Woldt's motion to suppress. In analyzing the stop of Woldt, the court utilized the three-part balancing test outlined in *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979), which balances the gravity of the public concern served by the seizure and the degree the seizure advances the public interest against the severity of the interference with the seized person's individual liberty.

The county court found Davie's actions were reasonable. The court reasoned that even though the possible offenses Davie was investigating were most likely misdemeanors, the matter did involve operation of a motor vehicle on the four-lane public highway that passes through Wisner. The court concluded that the acts committed in Wisner during the night of September 13, 2013, posed a significant threat to the safety of citizens driving the public roads in and through Wisner. The court found it was also reasonable for Davie to conclude that the driver of the dark-colored pickup that was following Biggerstaff would have been an eyewitness to Biggerstaff's driving. The court stated, "This eyewitness evidence of . . . Biggerstaff's driving would be essential to proving the element of whether . . . Biggerstaff was 'under the influence of

alcohol' at a jury trial on this charge." The court found that the degree of interference with Woldt's liberty in this case was outweighed by the other two elements of the balancing test outlined in *Brown v. Texas, supra*. The court observed that Woldt had voluntarily stopped and remained stopped on the street during the entire time Davie had contact with Biggerstaff and that Woldt's pickup was stopped in the street with the back part of it partially in the intersection. The court stated, "It appears that . . . Davie intended to speak to . . . Woldt momentarily before continuing his investigation of . . . Biggerstaff." The court concluded that Davie's interference with Woldt's liberty was slight and reiterated its finding that the stop of Woldt was reasonable.

On February 4, 2014, a bench trial on stipulated facts was held before the county court. At trial, Woldt renewed the objections raised in his motion to suppress and made at the suppression hearing. The court overruled Woldt's objections. The court received into evidence the transcription of the suppression hearing, including the exhibits received at the hearing, as well as the parties' stipulation. The stipulation included the fact that if called to testify, witnesses would testify that on September 13, 2013, upon Woldt's completion of field sobriety tests, a law enforcement officer had reasonable grounds to believe Woldt was driving or was in actual physical control of a motor vehicle while under the influence of alcohol. The stipulation also provided that a chemical test of Woldt's breath showed that he had a concentration of .08 of 1 gram or more by weight of alcohol per 210 liters of his breath, with the specific result being .148. The court found Woldt guilty of first-offense DUI and sentenced him to probation for a period of 6 months, ordered him to pay a fine of $500 and all costs of prosecution, and revoked his operator's license for 60 days.

Woldt appealed his conviction and sentence to the district court, and in his statement of errors, he asserted that the county court erred in overruling his motion to suppress,

admitting evidence obtained after the stop of his pickup, and finding sufficient evidence to convict him.

Following a hearing, the district court entered an order on June 17, 2014, affirming Woldt's conviction and sentence. On appeal, Woldt did not dispute the appropriateness of the county court's use of the balancing test from *Brown v. Texas*, 433 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979), even though this case is not one involving a checkpoint stop, but he argued that the county court did not place the appropriate weight on the factors of the test.

With respect to the gravity of the public concern served, the district court noted that in addition to the knocked-over traffic cones, Davie was investigating the possibility that Biggerstaff had been driving while under the influence. The court considered this to be significant and did not consider this crime to be less severe than those addressed in cases cited by Woldt.

Next, the district court addressed Woldt's argument that without a sufficient nexus between the alleged criminal act and the need to stop a potential witness, the public interest could not be served sufficiently to allow for his seizure. Woldt agreed that an investigation into Biggerstaff's commission of a crime had begun, but he argued that Davie had obtained insufficient information in order to stop Woldt and ask what he knew. The court noted Davie's observation of Woldt's following Biggerstaff closely as they approached Davie's patrol car and of Woldt's sitting in his parked pickup with its lights on and the window down as if he might want to say something to Davie. The court found it reasonable to believe that Woldt had some information which might have assisted in the investigation of Biggerstaff and considered this a sufficient nexus to support Davie's actions on the night in question.

Finally, the district court considered Woldt's argument that the interference with his liberty interest was severe and outweighed the other two factors. The court noted that although there was conflicting evidence about whether Woldt could

have driven past Davie and Biggerstaff, he did not do so. The court found no evidence of any command being made by Davie as neither Davie nor Woldt could remember what, if anything, was said. The court found that although Davie could not have been absolutely certain Woldt had any information about Biggerstaff, considering the totality of the circumstances, it was reasonable for Davie to perceive either that Woldt wanted to convey some information or that he might possess information helpful to the investigation. The court concluded that the degree of interference with Woldt's liberty interest on the night in question was outweighed by the gravity of the public concern served by the seizure along with the degree to which the seizure advanced the public interest in this case. Accordingly, the district court affirmed the county court's decision with regard to Woldt's motion to suppress in its entirety. Woldt subsequently perfected his appeal to this court.

## ASSIGNMENTS OF ERROR

Woldt asserts, consolidated and restated, that the district court erred in affirming the county court's (1) overruling of his motion to suppress and (2) finding of sufficient evidence to convict him. However, Woldt does not argue his sufficiency of the evidence assignment of error. Accordingly, we only address his arguments with respect to the motion to suppress. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court. *State v. Turner*, 288 Neb. 249, 847 N.W.2d 69 (2014).

## STANDARD OF REVIEW

[1,2] 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. *State v. Piper*, 289 Neb. 364, 855 N.W.2d 1 (2014). 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. Piper, supra*. The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Dalland*, 287 Neb. 231, 842 N.W.2d 92 (2014).

## ANALYSIS

[3-6] At issue in this case is whether Davie's suspicionless stop of Woldt to gather information about Biggerstaff's possible criminal activity violated Woldt's Fourth Amendment rights. The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government. *State v. Piper, supra*. A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. *State v. Avey*, 288 Neb. 233, 846 N.W.2d 662 (2014). Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008). Police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the Fourth Amendment. *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).

There is no dispute in this case that a seizure of Woldt occurred when he was stopped by Davie. In determining whether the seizure violated Woldt's Fourth Amendment rights, both the county court and the district court applied the three-part balancing test outlined in *Brown v. Texas*, 443 U.S.

47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979), which recognizes that seizures without reasonable suspicion may be reasonable under certain circumstances. In that case, police officers stopped the defendant who was walking in an area with a high rate of drug traffic. The officers did not suspect him of criminal activity but wanted to determine his identity under a state law requiring a lawfully stopped individual to identify himself or herself. The Court found that the defendant had been seized in violation of the Fourth Amendment to the U.S. Constitution and stated:

> The reasonableness of seizures that are less intrusive than a traditional arrest . . . depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." . . . Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. . . .
>
> A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. . . . To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.

*Brown v. Texas*, 443 U.S. at 50-51 (citations omitted).

The U.S. Supreme Court also applied the balancing test from *Brown v. Texas, supra*, in *Illinois v. Lidster*, 540 U.S. 419, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004). The *Lidster* Court addressed the reasonableness of a suspicionless checkpoint stop to gather information regarding a fatal hit-and-run accident that occurred 1 week prior at that location. In that

case, police set up a checkpoint 1 week after a hit-and-run accident at the same location where the accident occurred. Officers briefly stopped each vehicle, asked whether the occupants had seen anything the week before, and gave each driver a flyer with relevant information. When the defendant approached, he swerved and almost hit an officer, and upon contact, the officer smelled alcohol on his breath. Following a sobriety test, the defendant was arrested and convicted of driving while under the influence of alcohol.

In *Lidster*, the U.S. Supreme Court distinguished *Indianapolis v. Edmond*, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000), a case relied on by the Illinois Supreme Court in its decision below. The primary purpose of the checkpoint at issue in *Edmond* was to determine whether the vehicle's occupants were committing a crime, and the Court found that type of checkpoint violated the Fourth Amendment. In distinguishing *Edmond*, the *Lidster* Court stated:

> [I]nformation-seeking highway stops are less likely to provoke anxiety or to prove intrusive [than the type of stop in *Edmond*]. The stops are likely brief. The police are not likely to ask questions designed to elicit self-incriminating information. And citizens will often react positively when police simply ask for their help . . . .

540 U.S. at 425. The *Lidster* Court stated further:

> [T]he law ordinarily permits police to seek the voluntary cooperation of members of the public in the investigation of a crime. "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen." . . . That, in part, is because voluntary requests play a vital role in police investigatory work. . . .
>
> The importance of soliciting the public's assistance is offset to some degree by the need to stop a motorist to obtain that help—a need less likely present where a pedestrian, not a motorist, is involved. The difference

> is significant in light of our determinations that such an involuntary stop amounts to a "seizure" in Fourth Amendment terms. . . . That difference, however, is not important enough to justify an *Edmond*-type rule here. After all, as we have said, the motorist stop will likely be brief. Any accompanying traffic delay should prove no more onerous than many that typically accompany normal traffic congestion. And the resulting voluntary questioning of a motorist is as likely to prove important for police investigation as is the questioning of a pedestrian. Given these considerations, it would seem anomalous were the law (1) ordinarily to allow police freely to seek the voluntary cooperation of pedestrians but (2) ordinarily to forbid police to seek similar voluntary cooperation from motorists.

540 U.S. at 425-26.

The *Lidster* Court then applied the balancing test from *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979), finding the relevant public concern at issue, investigation of a fatal traffic accident, to be grave, noting that the police objective was to seek help in finding the perpetrator of a specific and known crime. The Court also found that the checkpoint stops significantly advanced the grave public concern as they were appropriately tailored to meet law enforcement's criminal investigatory needs. Specifically, the checkpoint was set up 1 week later near the accident location, and at about the same time of night, and it sought information from drivers who might have been in the area when the crime occurred. Finally, the Court found that the interference with drivers' liberty interest was minimal. The police systematically and briefly stopped all vehicles at the checkpoint, asked if they had information, and handed out flyers. Accordingly, the Court concluded that the checkpoint was constitutional.

[7] The Nebraska Supreme Court has also addressed the constitutionality of checkpoint stops. In *State v. Crom*, 222 Neb. 273, 383 N.W.2d 461 (1986), Nebraska adopted the

unfettered discretion standard of *Brown v. Texas, supra*. In the *Crom* case, several low-ranking police officers decided to set up transitory checkpoints and stop every fourth vehicle to check the operator's license and vehicle registration, although the real purpose of the stops was to detect alcohol use. The checkpoints were not subject to any standards, guidelines, or procedures established by the police department, and the officers were free to move the checkpoints from place to place at various times as they saw fit. The court cited *Brown* and found that a motorist has a reasonable expectation of privacy which is not subject to arbitrary invasions solely at the unfettered discretion of police officers in the field. *State v. Crom, supra*. The court found the checkpoints at issue unconstitutional because there was no plan made at the policymaking level of the police department or elsewhere, leaving the officers free to determine everything about the checkpoints and subjecting stopped motorists to arbitrary invasion at the officers' unfettered discretion.

[8,9] More recently, in *State v. Piper*, 289 Neb. 364, 855 N.W.2d 1 (2014), the Nebraska Supreme Court applied *Brown v. Texas, supra*, and cited *Illinois v. Lidster*, 540 U.S. 419, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004), in determining that a stop of the defendant's vehicle at a highway checkpoint conducted by the Nebraska State Patrol was reasonable. When the defendant in *Piper* stopped at the checkpoint, the officer observed that her eyes were bloodshot and watery and that the odor of alcohol emanated from the vehicle. Following the administration of field sobriety tests and a preliminary breath test, the defendant was arrested and subsequently convicted of DUI. On appeal, the court observed that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment. *State v. Piper, supra*. The court, citing *Indianapolis v. Edmond*, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000), observed that the public interest served by a checkpoint is assessed according to the primary purpose of the checkpoint, that checkpoints with the primary purpose of uncovering evidence of ordinary wrongdoing

violate the Fourth Amendment. The court also noted that in *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990), the U.S. Supreme Court approved the use of sobriety checkpoints intended to prevent drunk driving. The *Piper* court considered the purpose of the checkpoint, the degree of intrusion, and the discretion of the officers. The court found permissible the purpose of the checkpoint, which was called a vehicle check but was funded by an alcohol enforcement grant and intended to target alcohol violations. The degree of intrusion was minimal as, absent signs of criminal activity, drivers were allowed to proceed after a brief check of their condition, license, vehicle registration, insurance, and certain aspects of the vehicle condition. In considering the officers' discretion, the court noted that a highway checkpoint must be both authorized by an approved plan and conducted in a manner that complies with the plan and the policy established by the authority at the policymaking level. *State v. Piper, supra*. The court analyzed various aspects of the plan approving the checkpoint and of the officers' application of the plan at the checkpoint, and it found that the plan complied with State Patrol policy and did not allow the officers to exercise unfettered discretion in administering the checkpoint. Accordingly, the court affirmed the defendant's conviction and sentence.

The present case, while involving an information gathering stop by law enforcement, did not involve a stop at a checkpoint or roadblock and thus was not subject to the policy protections that were present with respect to the plan for the checkpoint in *Piper*. Accordingly, we turn to cases that have construed and applied *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979), and *Illinois v. Lidster, supra*, in other situations where vehicles have been detained by law enforcement for the purpose of gathering information. We have found no such cases in Nebraska. However, we do note the case of *State v. Ryland*, 241 Neb. 74, 486 N.W.2d 210 (1992), wherein the Nebraska Supreme Court found the stop of the defendant violated Fourth Amendment principles. In that case,

the officer located and stopped the defendant to get a statement from him about an accident that he witnessed the week before. When the officer made contact, he noticed signs of alcohol impairment by the defendant, and a DUI investigation, arrest, and conviction followed. The officer acknowledged that there was not an emergency situation. The court found that there was no probable cause or reasonable suspicion of criminal activity involved in the stop of the defendant.

In *State v. Garrison*, 911 So. 2d 346 (La. App. 2005), the Louisiana Court of Appeals held that a university police officer who heard a disturbance in the university's offsite campus parking lot had reasonable grounds to stop the defendant. The officer was on patrol in a marked car and was driving near campus when he heard the sound of tires squealing from the offsite parking lot. The officer observed a driver approaching the area. The officer did not know if a crime had been committed, but he tried to get the driver's attention so he could tell him to be careful. The officer felt the driver did not notice him, so he activated his car's emergency lights and pulled the driver over. The officer asked the driver whether he had squealed his tires, and the driver denied having done so. Because the officer smelled alcohol, he initiated a driving while intoxicated investigation, which led to the arrest and conviction of the defendant. In finding the stop reasonable, the Louisiana court noted that the officer's action in getting the defendant to stop was the only means available in getting his attention long enough to request information. The court also observed that it was not a checkpoint stop, that the officer was investigating a disturbance of public concern, and that the officer stopped a vehicle leaving the area to inquire about what its occupants might have seen or heard. The majority found the intrusion under those circumstances to be minimal. We note that the dissenting opinion in *Garrison* advocated that the investigation of the incident in question was not a disturbance of public concern.

In *Gipson v. State*, 268 S.W.3d 185 (Tex. App. 2008), police were dispatched to investigate a robbery at a retail

store parking lot and were given a description of the suspect. Upon arrival at the scene, an officer entered the parking lot with his vehicle's lights and siren activated in the area where the suspect had been seen fleeing. He observed a car with several occupants preparing to exit the parking lot and positioned his vehicle to stop the car. He felt the car's occupants might be potential suspects or witnesses to the robbery. As the officer exited his vehicle and approached, the driver stated he had witnessed the robbery. The officer then detained and questioned the occupants, one of which was the defendant. As he was doing so, another officer approached and based on the defendant's demeanor initiated a pat-down search of all of the occupants. As a result of the pat-down search of the defendant, credit cards belonging to the robbery victim were recovered, and the defendant was arrested. In applying the reasoning employed in *Illinois v. Lidster*, 540 U.S. 419, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004), the Texas Court of Appeals found that the occupants were lawfully detained. The court reasoned that the officer was investigating a specific and known crime, which was of grave public concern. The court determined that the stop advanced that concern as it was used to seek information from possible witnesses who were in the vicinity at the time of the crime in the area where the suspect was last seen. The court also found the liberty intrusion minimal as the officer had only blocked the car and started walking toward it, when the driver announced he was a witness. Accordingly, further detention of the car was a result of the need to question an actual witness, rather than a potential one.

Another case applying *Illinois v. Lidster, supra*, to a non-checkpoint stop and finding the stop reasonable was *U.S. v. Brewer*, 561 F.3d 676 (7th Cir. 2009). In that case, a police officer was responding at 2:30 a.m. to a dispatch report of a fight at an apartment complex when he heard what sounded like gunshots. As he approached the complex on the only access street, he was passed by a white sport utility vehicle (SUV) going the other way. No other vehicles were on the

road. He alerted other officers to watch for the SUV and proceeded into the apartment complex where bystanders told him the shots had come from a white SUV. The officer passed the information along to dispatch, but by that point, the SUV had already been stopped by a second officer. Upon inquiry by the second officer, the driver admitted he had two guns. Those guns, as well as additional weapons, were found in the SUV.

On appeal, the Seventh Circuit Court of Appeals observed that it was likely that whoever had fired the shots had left the complex. The court further observed that the fact the SUV was driving away from it on the only access street at a time when few vehicles were on the road reinforced the suspicion that even if the driver was not the gunman, he may well have information important for police safety. The court noted the analysis in *Illinois v. Lidster, supra*, and other roadblock cases and observed that this was not a case of random unconstrained conduct by the first officer in deciding that the first vehicle he encountered leaving the complex should be stopped. The court reasoned that, as in *Lidster*, officers had a compelling safety-related reason to question the driver of the first vehicle spotted leaving the complex where shots had been fired, and asking about a gun was the natural first question. The court concluded that the police acted reasonably given the dangerousness of the crime, the brief time between when the shots were fired and when the SUV was observed leaving the complex, the minimal intrusion on the SUV's occupants, the need for police safety upon entering the complex, and the need to stop potential fleeing suspects.

Woldt urges us to find this case similar to *State v. LaPlante*, 26 A.3d 337 (Me. 2011). In that case, the Maine Supreme Court considered the constitutionality of a state trooper's stop of a vehicle solely to seek information about another vehicle the trooper observed speeding. As the trooper was turning around to pursue, a motorcycle passed him. The trooper was unable to locate the car but did reencounter the motorcycle. The trooper activated his vehicle's lights and stopped the

motorcycle on the chance that the driver had seen what direction the car had gone. There was no independent reason for the trooper to stop the motorcycle. The motorcycle operator was able to identify where the car had turned. While the trooper was speaking to him, he noticed signs that the motorcycle operator might have been drinking and began an investigation that led to the operator's arrest for DUI.

On appeal, the Maine Supreme Court cited *Illinois v. Lidster*, 540 U.S. 419, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004), and relevant state precedent and then applied the balancing test from *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979). The court noted other cases in which the investigation of serious crimes had been deemed sufficiently important to outweigh the liberty interests of stopped motorists but concluded that the investigation of a noncriminal speeding offense was not a matter of grave public concern. With respect to the second factor of the balancing test, the court discussed precedent, including *Lidster*, where courts have recognized that motorist stops may significantly advance the investigation of serious crimes when the stops take place in the vicinity of the crime and shortly after its occurrence. The Maine court reasoned that unlike witnesses to a hit-and-run accident or a robbery, motorists were unlikely to take much notice of speeding. The court reasoned further that the likelihood of motorists being able to assist law enforcement with a speeding investigation was not great. The court concluded that even though this particular defendant had provided information, stopping motorists as potential witnesses to speeding violations would not usually significantly advance such investigations. Finally, in examining the liberty interest intrusion, the court noted that cases upholding roadblock stops have found the degree of intrusion lessened when the stops are brief, unlikely to cause anxiety, and planned so as to minimize officer discretion. The court found none of those elements present in the stop of the motorcycle. The court found that the unplanned stop resulted solely from the officer's discretion and was more likely to

cause alarm because the motorcycle operator had no basis to know the reason for or the likely length of the stop. Because there were no formal restrictions on the trooper's discretion and the circumstances of the stop had significant potential to cause alarm and anxiety, the court found a significant interference with the operator's liberty interest. See, also, *State v. Whitney*, 54 A.3d 1284 (Me. 2012) (random stop of motorist to seek information about single vehicle accident ruled invalid where officer was investigating crime of failure to report accident).

We now turn our attention to application of the balancing test from *Brown v. Texas, supra*, to the facts of the present case. The State argues that the stop of Woldt was reasonable because he was a potential witness to several possible crimes in this case, including criminal mischief, reckless driving, and DUI. We disagree and conclude that the matters under investigation under the circumstances of this case were not of grave public concern. Davie was investigating the report of a specific incident that had left traffic cones scattered along both sides of the highway, initially creating a potential hazard for other drivers. He was dispatched to investigate the involvement of a white pickup in the incident and was in the process of picking up the traffic cones when he heard squealing tires in the vicinity. Davie finished picking up the traffic cones, removing the hazard, before locating a white pickup nearby and making contact with its driver. Because Davie observed Woldt closely following Biggerstaff before the stop and because Woldt also stopped and waited with his pickup's window down while Davie made contact with Biggerstaff, it was reasonable for Davie to believe that Woldt was a potential witness to any crimes by Biggerstaff and might have information for Davie that would advance his investigation of those crimes. However, Davie recognized Woldt, knew where he worked, and could have contacted Woldt at a later date if necessary. This was not a situation where Davie was investigating an ongoing threat to public safety committed by an unknown individual. Nor was it a situation where Davie was

faced with an unknown and mobile potential witness, whose help he needed to end an ongoing threat. By the time Davie stopped Woldt, he had already apprehended and detained Biggerstaff. While Davie did not know at that point whether Biggerstaff was the person responsible for knocking down the traffic cones, the degree of any public concern had certainly lessened by the time that he stopped Woldt. Further, while questioning Woldt may have advanced the investigation of any crimes committed by Biggerstaff, the evidence does not show that stopping and questioning Woldt at that time would have advanced the investigation to a greater degree than contacting him the following day at his workplace would have. Finally, although the degree of intrusion on Woldt's liberty interest was not great, under the circumstances, we cannot say that it was outweighed by the degree of public concern and the extent to which questioning Woldt at that time advanced any investigation of Biggerstaff. Accordingly, the district court erred in affirming the county court's overruling of Woldt's motion to suppress on that basis.

[10] We note the State also argues that the stop was reasonable because there were objective bases for the stop, making Davie's subjective motivation for the stop irrelevant. Specifically, the State argues that Davie could have stopped Woldt because he was following Biggerstaff too closely and because he parked his pickup so that it extended into the intersection. See *State v. Sanders*, 289 Neb. 335, 855 N.W.2d 350 (2014) (traffic violation, no matter how minor, creates probable cause for officer to stop driver; if officer has probable cause to stop violator, stop is objectively reasonable and ulterior motivation is irrelevant). Davie testified that had Woldt not stopped initially, he would not have stopped him because he had no reason to do so. Upon redirect examination, Davie agreed that he probably could have cited Woldt for following Biggerstaff too closely. Neither the county court nor the district court addressed the issue of whether the stop of Woldt was reasonable on this basis. Accordingly, we do not address the issue further. An appellate court will not consider

an issue on appeal that was not presented to or passed upon by the trial court. *State v. Huston*, 285 Neb. 11, 824 N.W.2d 724 (2013).

[11] Although we have concluded that Woldt's motion to suppress should have been sustained, this determination does not preclude a new trial under the concepts of double jeopardy. 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. See *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011).

## CONCLUSION

The district court erred in affirming the county court's overruling of Woldt's motion to suppress. Accordingly, we remand to the district court with directions to reverse Woldt's conviction and to remand the cause to the county court with directions to sustain the motion to suppress and for further proceedings consistent with this opinion.

Reversed and remanded with directions.

**Nebraska Court of Appeals**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# Christine A. Wilson, appellant, v. Terry P. Wilson, appellee.

867 N.W.2d 651

Filed July 28, 2015. No. A-14-081.

1. **Constitutional Law: Rules of the Supreme Court.** The Nebraska Constitution provides that the Supreme Court may promulgate rules of practice and procedure for the effectual administration of justice and the prompt disposition of judicial proceedings.
2. **Rules of the Supreme Court: Appeal and Error.** The rules of practice and procedure adopted by the Supreme Court address, among other topics, the procedure for appealing decisions of the district court and for properly presenting errors allegedly committed by the district court to the appellate court for review and disposition.
3. ____: ____. Parties who wish to secure appellate review of their claims must abide by the rules of the Nebraska Supreme Court. Any party who fails to properly identify and present its claim does so at its own peril.
4. ____: ____. Neb. Ct. R. App. P. § 2-109(D)(1)(d), (e), and (f) (rev. 2012) requires a separate section for assignments of error, designated as such by a heading, and also requires that the section be located after a statement of the case and before a list of controlling propositions of law.
5. ____: ____. Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2012) requires that the assignments of error section include a separate and concise statement of each error the party contends was made by the trial court.
6. ____: ____. 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.
7. ____: ____. Where a party fails to comply with the court rules requiring a separate section setting forth the assignments of error, an appellate court may proceed as though the party failed to file a brief entirely or, alternatively, may examine the proceedings for plain error.
8. **Appeal and Error.** The decision to proceed on plain error is at the discretion of the appellate court.

9. ____. 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. **Rules of the Supreme Court: Appeal and Error.** Assignments of error consisting of headings or subparts of the argument section do not comply with the mandate of Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2012).
11. **Appeal and Error.** Plain error exists where there is error, plainly evident from the record but not complained of at trial, that 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. ____. Where an issue is raised and complained of at trial, it cannot be the basis of a finding of plain error on appeal.

Appeal from the District Court for Douglas County: Thomas A. Otepka, Judge. Affirmed.

Catherine Dunn Whittinghill, of Welch Law Firm, P.C., for appellant.

Adam E. Astley, of Slowiaczek, Albers & Astley, P.C., L.L.O., for appellee.

Moore, Chief Judge, and Irwin and Bishop, Judges.

Irwin, Judge.

## I. INTRODUCTION

Christine A. Wilson appeals from an order of the district court for Douglas County, Nebraska, modifying the court's prior decree dissolving her marriage to Terry P. Wilson. On appeal, Christine argues that the court erred in modifying the decree, but she has not presented any assignments of error as clearly required by Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2012). As a result, we review only for plain error and, finding none, we affirm.

## II. BACKGROUND

This is the third appearance of this case before this court. On June 25, 2010, we dismissed one appeal, case No. A-10-490,

for lack of jurisdiction. Then, in *Wilson v. Wilson*, 19 Neb. App. 103, 803 N.W.2d 520 (2011), we reversed an order of the district court in which the court effectively modified the dissolution decree without following the appropriate procedures for bringing and resolving an application to modify the decree.

As we noted in our opinion in *Wilson*, the dissolution decree entered by the district court included division of, among other items, an "'Oppenheimer'" fund, a "'SEP/IRA'" fund, and equity in the parties' marital home and another parcel of real property; provided that each party was to receive one-half of the value of the Oppenheimer fund, that each party was to receive one-half of the SEP/IRA fund, and that Christine was to receive 40 percent of the net equity in the marital home and a share of the equity in the other parcel of real property; and ordered Christine to pay certain marital debt. 19 Neb. App. at 104, 803 N.W.2d at 522. The court also ordered Christine to vacate the marital home by October 31, 2009, or whenever the property was sold, whichever occurred first. There was no appeal from the decree.

Christine failed to vacate the marital home by October 31, 2009, as ordered in the decree. In February 2010, Terry filed a motion requesting the court to determine amounts due under the decree and asserting that he had been required to make additional mortgage payments as a result of Christine's failure to vacate. At a hearing on Terry's motion, Terry presented the district court with an exhibit in which he calculated what Christine had been awarded in the decree and proposed subtracting from that award amounts he had allegedly incurred as a result of Christine's failure to vacate the marital home as ordered in the decree, as well as various temporary support payments he had made to Christine. Terry's calculations would have resulted in Christine's receiving nearly $30,000 less than she had been awarded in the decree.

The district court sustained Terry's motion to determine amounts due and found Christine in contempt for her failure to vacate the marital home as ordered in the decree. In *Wilson,*

*supra*, we agreed with Christine that the district court's order amounted to a modification of the dissolution decree without following the proper procedures for a modification proceeding, and we reversed, and remanded.

After the matter was remanded to the district court, Terry filed a complaint to modify the decree of dissolution. Terry alleged a material change of circumstances had occurred "[s]ince the time of trial." Terry alleged that the material change of circumstances included a delay in the entry of the court's decree that resulted in Terry's being obligated under a temporary order longer than the trial court had intended, Christine's failure to vacate the marital home, Christine's failure to cooperate in the sale of the marital home, Christine's neglect or deliberate damage to the marital home that resulted in diminution of the value received in sale, and Terry's continued payment of the mortgage on the marital home and distribution of funds to Christine out of the Oppenheimer fund.

A trial was held on Terry's complaint for modification. After the trial, the district court entered an order modifying the decree. In its order, the district court found that this court's opinion in *Wilson v. Wilson*, 19 Neb. App. 103, 803 N.W.2d 520 (2011), "did not question the substance of the relief granted" by the district court's prior sustaining of Terry's motion to determine amounts due, "but the procedure used by [Terry's] prior counsel" to gain that relief.

The district court concluded that this court's opinion in *Wilson, supra*, "indicated that the allegations raised by [Terry in the motion to determine amounts due] constituted a material change in circumstances" and concluded that this was "a final Appellate Order" which was "both mandatory *Vertical Stare Decisis,* and the *Law of the Case* in this case and . . . binding on [the district court]." The district court held that this court's opinion in *Wilson, supra*, "in referring to this case as one of a change of circumstances is *Res Judicata*, as [Christine] elected not to pursue a Petition for Further Review by the Nebraska Supreme Court."

The district court further held that Terry's complaint for modification of the decree "does allege a change in circumstances, and that predicated upon that new pleading, the Decree should be modified in accordance with that change in circumstances." The court concluded that not modifying the decree to take into account ongoing payments under the temporary order pending entry of the decree and Christine's failure to vacate the marital home as ordered in the decree would result in a significant windfall to her, and the court modified the decree.

Christine has now appealed.

## III. ASSIGNMENTS OF ERROR

As noted above, Christine has not presented any assignments of error in her brief on appeal.

## IV. ANALYSIS

### 1. Lack of Assigned Errors

Christine failed to comply with the clear and straightforward directives of the Nebraska Supreme Court's rules of appellate practice governing the manner of presenting alleged errors to the appellate court. Christine's brief contains no assignments of error and, instead, contains arguments with headings that allege that the trial court erred in various ways. As has been repeatedly noted by the appellate courts of this state for at least the past decade, this is not sufficient.

[1,2] The Nebraska Constitution provides that the Supreme Court may promulgate rules of practice and procedure "'[f]or the effectual administration of justice and the prompt disposition of judicial proceedings . . . .'" *City of Gordon v. Montana Feeders, Corp.*, 273 Neb. 402, 402-03, 730 N.W.2d 387, 389 (2007), quoting Neb. Const. art. V, § 25. The rules adopted by the Supreme Court address, among other topics, the procedure for appealing decisions of the district court and for properly presenting errors allegedly committed by the district court to the appellate court for review and disposition. See *City of Gordon, supra*.

[3] Parties who wish to secure appellate review of their claims must abide by the rules of the Nebraska Supreme Court. *Steffy v. Steffy*, 287 Neb. 529, 843 N.W.2d 655 (2014). Any party who fails to properly identify and present its claim does so at its own peril. *Id.*; *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006). See, also, *State v. Rouse*, 13 Neb. App. 90, 688 N.W.2d 889 (2004) (cautioning litigants to comply with court rules).

[4-6] Section 2-109(D)(1)(d), (e), and (f) requires a separate section for assignments of error, designated as such by a heading, and also requires that the section be located after a statement of the case and before a list of controlling propositions of law. *Steffy, supra*; *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011). The rule requires the assignments of error section include a separate and concise statement of each error the party contends was made by the trial court. *In re Interest of Samantha L. & Jasmine L.*, 286 Neb. 778, 839 N.W.2d 265 (2013); *In re Interest of Laticia S.*, 21 Neb. App. 921, 844 N.W.2d 841 (2014). 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. *City of Gordon, supra*.

[7-9] Where a party fails to comply with the court rules requiring a separate section setting forth the assignments of error, an appellate court may proceed as though the party failed to file a brief entirely or, alternatively, may examine the proceedings for plain error. See, *In re Interest of Justine J. & Sylissa J.*, 288 Neb. 607, 849 N.W.2d 509 (2014); *Steffy, supra*; *In re Interest of Samantha L. & Jasmine L., supra*; *In re Interest of Jamyia M., supra*; *In re Interest of Laticia S., supra*. See, also, *City of Gordon, supra*; *In re Estate of Lorenz*, 22 Neb. App. 548, 858 N.W.2d 230 (2014). The decision to proceed on plain error is at the discretion of the appellate court. *Steffy, 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. *In re Interest of Samantha L. &*

*Jasmine L., supra*; *In re Interest of Jamyia M., supra*; *In re Interest of Laticia S., supra*.

In her reply brief, Christine acknowledges that she failed to comply with the court rules and failed to include a separate assignments of error section. She urges us to ignore this deficiency, however, and argues that "[a]lthough [she] failed to include in her brief a separate section for assignment of errors, the headings contained in the argument section of her brief clearly state each assignment of error." She further argues that her "mistake is one of form[,] not substance," and that "[a]s such, this Court should apply a de novo review of the record for abuse of judicial discretion." Reply brief for appellant at 1.

[10] Christine's argument in this regard, like her disregard for the court rule requiring a separate section for assignments of error, disregards that the Nebraska Supreme Court has repeatedly rejected the assertion that assignments of error presented in argument headings, rather than a separate section, should suffice. The Nebraska Supreme Court has repeatedly held that assignments of error consisting of headings or subparts of the argument section do not comply with the mandate of § 2-109(D)(1)(e). *Steffy, supra*; *In re Interest of Jamyia M., supra*. See, also, *In re Interest of Samantha L. & Jasmine L., supra*; *Gilbert & Martha Hitchcock Found. v. Kountze*, 275 Neb. 978, 751 N.W.2d 129 (2008); *In re Interest of Laticia S., supra*. Consistent with the Nebraska Supreme Court's treatment of this issue, we enforce the court rules and reject Christine's assertion that her argument headings suffice to present her alleged assigned errors.

In numerous cases over the last several years, including those cited above, the appellate courts of this state have consistently emphasized that compliance with the basic requirements of § 2-109(D)(1)(e) concerning presentation of assignments of error is necessary and that failure to so comply will result in the appellate court not addressing the alleged errors. As such, we decline to address the issues Christine has raised on appeal.

### 2. Plain Error

As noted above, at our discretion, we may review the record for plain error. In this case, we decline to find plain error.

We initially note that we do disagree with the district court's reading of our opinion in *Wilson v. Wilson*, 19 Neb. App. 103, 803 N.W.2d 520 (2011). In *Wilson*, the district court had been presented with a motion to determine amounts due under the decree, filed several months after entry of the decree and after no direct appeal had been taken, in which Terry alleged that Christine's failure to vacate the marital home within the time ordered in the decree had resulted in Terry's being required to make additional mortgage payments on the marital home. In that case, Terry requested the district court determine the amounts due under the decree and modify the amount of the property settlement award that Christine was entitled to under the decree because of her conduct in not vacating the marital home.

In *Wilson, supra*, the issue presented to us was whether it was appropriate for the district court to grant the motion to determine amounts due and modify the terms of the decree based on Christine's postdecree actions. We reversed the district court's determination and explained that a motion to determine amounts due was not the proper procedural posture for Terry to seek relief because the decree had not been ambiguous or unclear and because the amounts due under the decree were easily ascertainable. Thus, the substance of Terry's motion to determine amounts due did not justify the relief granted.

We continued, in dicta, to note that Terry's motion appeared to be alleging a material change in circumstances that had occurred after the entry of the decree and appeared to be seeking to modify the decree as a result of such material change in circumstances, but that the case had not procedurally proceeded consistent with a modification proceeding. We concluded that "[m]odifying the amounts awarded to Christine in the decree, without following the appropriate procedures for bringing and resolving an application to modify the decree,

was not appropriate in this action to determine amounts due." *Wilson*, 19 Neb. App. at 109, 803 N.W.2d at 525. We did not indicate that a material change of circumstances existed or that a material change of circumstances would be a proper basis for modification absent a showing of fraud; those issues were not properly before us for resolution.

On remand, Terry filed a complaint to modify the decree and specifically alleged that "there has been a significant and material change in circumstances not anticipated by the parties or by the Court that, had such been known at the time of trial, would have caused the Court to order a different division of property and support scheme." In its order granting Terry's complaint, the district court concluded that our opinion in *Wilson* was "a departure from the general rule that property divisions are not modifiable," but concluded that "it is a final Appellate Order" and was "both mandatory *Vertical Stare Decisis,* and the *Law of the Case* in this case and the holding is binding on [the district court]."

Our opinion in *Wilson v. Wilson*, 19 Neb. App. 103, 803 N.W.2d 520 (2011), was not intended to suggest property awards are generally modifiable in any way inconsistent with existing Nebraska jurisprudence, and to the extent any of our language in *Wilson* suggests otherwise, we specifically disapprove of it. The law in Nebraska remains that property awards generally will not be modified in the absence of fraud or gross inequity. See, *Davis v. Davis*, 265 Neb. 790, 660 N.W.2d 162 (2003); *Gruber v. Gruber*, 261 Neb. 914, 626 N.W.2d 582 (2001); *Bokelman v. Bokelman*, 202 Neb. 17, 272 N.W.2d 916 (1979). Our opinion in *Wilson* merely recognized that Terry appeared to be attempting to modify the terms of the decree, appeared to be attempting to do so by seeking a determination of amounts due as a result of a change in circumstances, and was not entitled to have the terms of the decree modified as a result of the procedure followed.

In the present case, Terry argues on appeal that the district court's decision modifying the decree was appropriate because the evidence did demonstrate that failing to modify

the decree would result in gross inequity. We decline to specifically address the merits of this argument, except to conclude that we do not find any plain error in the district court's ultimate modification in this case.

[11,12] Plain error exists where there is error, plainly evident from the record but not complained of at trial, that 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. *State v. Kays*, 289 Neb. 260, 854 N.W.2d 783 (2014). Where an issue is raised and complained of at trial, it cannot be the basis of a finding of plain error on appeal. See *In re Estate of Morse*, 248 Neb. 896, 540 N.W.2d 131 (1995).

In this case, the primary issue argued between the parties on remand was whether it was appropriate for the district court to modify the property award. The district court made a specific finding that not modifying the property award would result in a "windfall" to Christine. On appeal, Christine's arguments are primarily based on her assertion that the trial court reached the wrong conclusion when she complained at trial about the property award not being modifiable in the absence of a showing of fraud or gross inequity.

We decline to conclude that the district court erred in modifying the decree in this case, and even if such modification was error, the matter was complained of at trial. In her appeal about how the court ruled when she complained of this issue at trial, Christine simply failed to comply with the clear requirements of the court rules and repeated appellate decisions governing the proper presentation of assigned errors. Thus, we find no plain error in this case.

The dissent disagrees with our conclusion that plain error is error plainly evident from the record *and* not complained of at trial. The dissent appears to disagree that the alleged error not being complained of at trial is part of what defines the error as "plain error," and instead, it suggests that the alleged error not being complained of at trial is a basis for looking

for plain error. The plain wording of the Supreme Court, however, suggests that the fact that the error was not complained of at trial is part of the definition of what makes it plain error that can be remedied. We *have* reviewed for plain error in this case, and we conclude that because the issue was raised and was the focal issue at trial, it does not constitute plain error as that has been defined by the Supreme Court. As recently as October of last year, the Nebraska Supreme Court specifically iterated that plain error is error not complained of at trial. See *Kays, supra*. The Supreme Court similarly has included that requirement in its statement of the basic requirements for what constitutes plain error several times in *Kuhnel v. BNSF Railway Co.*, 287 Neb. 541, 844 N.W.2d 251 (2014); *State v. Ramirez*, 287 Neb. 356, 842 N.W.2d 694 (2014); *State v. Trice*, 286 Neb. 183, 835 N.W.2d 667 (2013); *United States Cold Storage v. City of La Vista*, 285 Neb. 579, 831 N.W.2d 23 (2013); *State v. Reinpold*, 284 Neb. 950, 824 N.W.2d 713 (2013); and *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012), to cite cases only from the last 3 years.

A very clear example of this principle is found in *In re Estate of Morse*, 248 Neb. 896, 540 N.W.2d 131 (1995). In that case, the Supreme Court reviewed an estate action wherein the personal representative had offset a promissory note against one heir's distributive share. The heir appealed the county court's and district court's upholding of this offset, arguing on appeal that the district court had committed plain error in failing to apply a statutory provision relevant to the issue. On appeal, the Supreme Court set forth the basic requirements of plain error that we have noted above, including that plain error must be something that was not complained of at trial. The court then specifically held that the heir

> asks [the Supreme Court] to find plain error on an issue that was raised at trial. [The heir] raised the [issue], and it was rejected by the trial court. Plain error is error plainly evident from the record and not complained of at trial. [Citation omitted.] The [issue] was complained of at trial; therefore, plain error does not exist.

*In re Estate of Morse*, 248 Neb. at 899, 540 N.W.2d at 133. The Supreme Court specifically concluded that the alleged error could not be considered plain error because it was raised and complained of at trial.

The dissent, rather than explaining how this court can disregard the Supreme Court's repeated iteration that plain error is error not complained of at trial, cites to cases wherein the appellate court's expression of plain error did not include the language "not complained of at trial" and cases wherein the appellate court has discussed matters raised below, although concluding that they did not amount to error. A review of the cases cited by the dissent, however, reveals that they do not support the notion that issues complained of at trial can amount to plain error. Indeed, although the appellate courts have sometimes not included the language "not complained of at trial" in the expression of plain error, and have sometimes reviewed whether the alleged matter complained of below could be considered error at all, in the cases cited by the dissent, the court did not find plain error at all. The court specifically concluded that there was no plain error and affirmed the trial court's order. The dissent has not cited a single case wherein something that was complained of at trial was held to constitute plain error. The cases cited by the majority opinion and the cases cited by the dissent, read as a whole body of case law, demonstrate that the appellate courts have found that alleged errors are not "plain error" sometimes because they were raised at trial and sometimes because they were not error at all, but do not reveal any instance in which plain error was actually found without something being both erroneous *and* not complained of at trial.

## V. CONCLUSION

Christine failed to comply with the court rules necessary for presenting her allegations of error to this court. We decline to address her assertions, find no plain error, and affirm.

Affirmed.

Bishop, Judge, dissenting.

I do not see how we can avoid finding plain error in this case. Because of misleading language from this court in *Wilson v. Wilson*, 19 Neb. App. 103, 803 N.W.2d 520 (2011), which suggested that property awards could be modified upon a showing of a material change in circumstances, the district court did just that. The district court entered an order modifying the parties' property award based on a change in circumstances and ended up with the exact same result this court reversed in *Wilson, supra*. The majority states that "we do disagree with the district court's reading of our opinion in *Wilson*," that the "material change in circumstances" language was in dicta, and that

> [o]ur opinion in *Wilson* . . . was not intended to suggest property awards are generally modifiable in any way inconsistent with existing Nebraska jurisprudence, and to the extent any of our language in *Wilson* suggests otherwise, we specifically disapprove of it. The law in Nebraska remains that property awards generally will not be modified in the absence of fraud or gross inequity.

I agree with the majority that Nebraska law provides that property awards generally will not be modified in the absence of fraud or gross inequity, and further agree with disapproving any language in *Wilson, supra*, suggesting otherwise. However, the majority, despite acknowledging its disagreement with the district court's reading of *Wilson*, and further disapproving the language in *Wilson* upon which the district court relied in modifying the property award, nevertheless concludes such errors do not rise to plain error because

> even if such modification was error, the matter was complained of at trial. In her appeal about how the court ruled when she complained of this issue at trial, Christine simply failed to comply with the clear requirements of the court rules and repeated appellate decisions governing the proper presentation of assigned errors. Thus, we find no plain error . . . .

The majority later states, "We *have* reviewed for plain error in this case, and we conclude that because the issue was raised and was the focal issue at trial, it does not constitute plain error as that has been defined by the Supreme Court." Apparently, the majority interprets our plain error jurisprudence to mean that any matter raised or complained about at trial can never form the basis of a plain error review on appeal. I cannot agree with that interpretation. Rather, my view of the plain error standard of review is supported by this court's and our Supreme Court's application of plain error review when, as in this case, the impetus for conducting such a plain error review stems from an appellant's failure to comply with appellate court briefing rules rather than something "not complained of at trial." There is precedent for a plain error review in both circumstances.

The majority focuses on appellate plain error jurisprudence stemming from cases where errors occurred but were not complained of at trial. There is no question that plain error can occur in such cases. However, the majority fails to consider those appellate cases wherein a plain error review was conducted, including a review of matters raised at trial, when an appellant's brief failed to comply with appellate briefing rules. The majority cites to a group of cases to support its view of plain error that involved errors not complained of at trial, such as the failure to object to a jury instruction, *Kuhnel v. BNSF Railway Co.*, 287 Neb. 541, 844 N.W.2d 251 (2014), or the failure to raise a constitutional challenge at the trial level, *United States Cold Storage v. City of La Vista*, 285 Neb. 579, 831 N.W.2d 23 (2013). Because of such omissions at the trial level, appellate review of such matters was limited to plain error. Plain error may be asserted for the first time on appeal. *State v. Reinpold*, 284 Neb. 950, 824 N.W.2d 713 (2013). In the case separately addressed by the majority, *In re Estate of Morse*, 248 Neb. 896, 540 N.W.2d 131 (1995), in appealing from probate court to the district court, the appellant failed to make any assignments of error to the district court, which resulted in a plain error review by the district

court. The district court affirmed the probate court "because no statement of errors and issues on appeal had been filed, and the court found no plain error on the record." *Id*. at 898, 540 N.W.2d at 132. On review by the Supreme Court, it noted that the statute of limitations defense had been raised at trial, and was rejected by the trial court, and that therefore, plain error did not exist. *In re Estate of Morse, supra*. However, neither *In re Estate of Morse* nor any of the cases cited to by the majority involved a plain error review resulting from noncompliance with appellate briefing rules. Both our Supreme Court and this court have conducted a plain error review of the primary issue raised at trial when an appellate brief failed to comply with appellate briefing rules.

A recent example of plain error review being invoked by both this court and our Supreme Court due to noncompliance with appellate briefing rules and involving appellate review of the primary matter complained of at trial can be found in *Steffy v. Steffy*, 287 Neb. 529, 843 N.W.2d 655 (2014). In that appeal involving the request of a custodial parent, the father, to remove a child from Nebraska to Texas, this court's plain error review and decision was subsequently reversed by our Supreme Court on a plain error review. In both courts, the primary issue raised at trial—removal of the child from Nebraska to Texas—was considered under a plain error review on appeal. Importantly, neither this court nor the Supreme Court refused to review the record for plain error due to the removal issue having been raised or complained about at the trial level. The *Steffy* court stated:

> The Court of Appeals found that [the father's] appellate brief did not comply with Neb. Ct. R. App. P. § 2-109(D)(1) (rev. 2008). The Court of Appeals, under a plain error standard of review, reevaluated all the evidence of the record and concluded that the district court had plainly erred in its determinations that [the father] did not have a legitimate reason and that the move to Texas was not in [the child's] best interests. . . .

> Finding that there was a legitimate reason for removal and that the removal was in [the child's] best interests, the Court of Appeals held that the district court's decision deprived [the father] of a just result and was, therefore, plain error.

287 Neb. at 535-36, 843 N.W.2d at 661-62.

At issue in *Steffy* was the father's request to remove the child from Nebraska to Texas. The child's mother resisted the move, and the district court denied the removal request based upon its finding that the father failed to meet his burden to show that there was a legitimate reason to relocate and that the relocation was in the child's best interests. As did this court, the Supreme Court noted that the father's appellate brief failed to comply with appellate briefing rules. The Supreme Court stated, "In this situation, an appellate court may proceed as though [the father] had failed to file a brief or, alternatively, may examine the proceedings for plain error. The decision to proceed on plain error is at the discretion of the appellate court." *Steffy*, 287 Neb. at 537, 843 N.W.2d at 662. And, "As did the Court of Appeals, we choose to review the record for plain 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." *Id*. Notably, the plain error proposition of law did not include the phrase "not complained of at trial." The Supreme Court then went through key components of the removal analysis set forth in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), and concluded that the district court did not plainly err in its determination that the move was not in the child's best interests. The Supreme Court discussed details from the record that supported the district court's findings, specifically noting:

> Both quality of life and impact on the noncustodial parent weigh against relocation, while the motives of each party are equally balanced. It is not our role as an appellate court under a plain error standard of review to substitute our opinion for an opinion of a district court that

> is reasonably supported by the record. Furthermore, we cannot conclude from the record that the factual findings of the district court were so unsubstantiated that any purported errors were injurious to the integrity, reputation, or fairness of the judicial process as to justify reversal on appeal under the plain error doctrine.

*Steffy v. Steffy*, 287 Neb. 529, 540, 843 N.W.2d 655, 664-65 (2014). Notably, this court in *Steffy*, and on further review, the Supreme Court, conducted a plain error analysis that involved reviewing the removal issue—the very issue that was clearly raised and the focal point of the trial.

In another recent case involving a plain error review due to a noncompliant brief, *In re Interest of Justine J. & Sylissa J.*, 288 Neb. 607, 849 N.W.2d 509 (2014), a juvenile court found that the State had not shown by clear and convincing evidence that parental termination was in the children's best interests. When the State appealed, our Supreme Court conducted a plain error review because the State's brief did not contain a separate section for assignments of error. The Supreme Court reviewed the evidence regarding best interests to determine whether clear and convincing evidence was produced; this was clearly a review of what was primarily at issue in the proceeding below. The Supreme Court again set forth the proposition that "[p]lain 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.* at 609, 849 N.W.2d at 511. And again, the phrase "not complained of at trial" is not contained in the plain error proposition of law when applied to a plain error review resulting from a noncompliant brief.

In yet another case where noncompliant briefing caused a plain error review on appeal as to issues directly addressed at trial, *In re Interest of Samantha L. & Jasmine L.*, 286 Neb. 778, 839 N.W.2d 265 (2013), a juvenile court found that no further reasonable efforts were required in support of reunification between the minor children at issue and their parents. On appeal, the parents failed to include a separate section

assigning errors with regard to the juvenile court's order from which they appealed. Our Supreme Court stated that "where a brief of a party fails to comply with the mandate of § 2-109(D)(1)(e), we may proceed as though the party failed to file a brief or, alternatively, may examine the proceedings for plain error." *In re Interest of Samantha L. & Jasmine L.*, 286 Neb. at 783, 839 N.W.2d at 270. The Supreme Court pointed out the juvenile court's order found that reasonable efforts in support of reunification were no longer required and that the primary permanency objective for one child was to be independent living, and for the other child, guardianship with a concurrent plan for adoption. The Supreme Court then stated, "Because both [parents] failed to include a separate section assigning error in their briefs on appeal, we will review each of the above findings for plain error." *Id*. at 784, 839 N.W.2d at 270. The Supreme Court then evaluated the evidence showing that the parents had failed to utilize reunification services, and it stated, "Based upon the substantial evidence before the court of [the parents'] unwillingness to utilize these services, we find that the court did not commit plain error in no longer requiring [the Department of Health and Human Services] to provide reasonable efforts in support of reunification." *Id*. at 785, 839 N.W.2d at 271. The Supreme Court then discussed the evidence regarding the primary permanency objectives, and it concluded that the juvenile court did not commit plain error in modifying the children's primary permanency objectives. These issues addressed under a plain error review were the very issues raised in the juvenile court proceeding and were the basis for the appeal from the juvenile court's order. So while complained about at trial, our Supreme Court nevertheless proceeded to conduct a detailed review of the evidence for plain error.

In *Logan v. Logan*, 22 Neb. App. 667, 859 N.W.2d 886 (2015), a marriage dissolution appeal, this court noted that the wife's brief on cross-appeal failed to contain a separate section setting forth assignments of error. "Rather, her brief includes in headings within the 'Argument' section of the brief

assertions that the district court committed error concerning the valuation of the business and denial of her request for attorney fees." *Id*. at 682, 859 N.W.2d at 899. Citing to *In re Interest of Samantha L. & Jasmine L., supra*, and *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011), this court stated that failure to set forth the separate assignments of error section may result in the court's examining the proceedings for plain error and that "[p]lain 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." *Logan*, 22 Neb. App. at 682, 859 N.W.2d at 899. Notably, the plain error proposition did not include the phrase "not complained of at trial." This court then stated, "After reviewing the relevant parts of the record, we find no plain error." *Id*. This court did not say it was prevented from reviewing the wife's claimed errors because they had already been raised at trial; instead, this court noted that it reviewed "relevant parts of the record" and concluded there was no plain error.

I agree with the majority that plain error has generally been applied in situations where the error is plainly evident from the record and was not complained of at trial. Such use of a plain error review is particularly important when the law has not been correctly applied at the trial level, and in particular, when a trial judge is applying the law as it is understood to be at the time but may be subsequently changed or clarified. For example, contained in the majority's group of cases cited is *State v. Trice*, 286 Neb. 183, 835 N.W.2d 667 (2013). In that case, the defendant was convicted of second degree murder. The trial court gave the jury a step instruction regarding second degree murder and manslaughter. Our Supreme Court stated, "Although the instruction was correct when it was given, our subsequent holding in *State v. Smith*[, 282 Neb. 720, 806 N.W.2d 383 (2011),] rendered the instruction an incorrect statement of the law." *Trice*, 286 Neb. at 184, 835 N.W.2d at 669. Accordingly, our Supreme Court found plain error and reversed for a new trial. The *Trice* case, and the

other cases in the group cited to by the majority, do stand for the proposition that plain error generally arises from a matter not complained of at trial. However, where we appear to disagree is that a plain error review may still be conducted for issues that were raised or complained of at trial but which cannot be reviewed for specific assigned errors pursuant to the standard of review typically applied to such errors because of noncompliance with appellate briefing rules, as in the case before us.

The key to a plain error review on appeal—whether it stems from an error not complained about at trial or from noncompliant briefing—is to determine whether leaving an evident error uncorrected would clearly result in damage to the integrity, reputation, and fairness of the judicial process. In the appeal before us, the majority acknowledges that this court set forth misleading language in *Wilson v. Wilson*, 19 Neb. App. 103, 803 N.W.2d 520 (2011), upon which the district court relied to modify a property award based on a change in circumstances rather than a finding of fraud or gross inequity. The majority can see that the language in *Wilson* was misleading (hence, its disapproval), acknowledges that the district court relied upon the now disapproved language, and yet refuses to provide relief to Christine. The district court's error was the result of this court's error; I do not see how we can refuse to correct the problem this court inadvertently created. In my opinion, when errors are this evident, this is precisely when a plain error review allows us to make corrections so that we may preserve the integrity, reputation, and fairness of the judicial process. I would reverse the district court's order and thus once again restore the property award to its initial terms.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Mirab Lasu, appellee, v. Hussein Issak, appellant.

868 N.W.2d 79

Filed July 28, 2015. No. A-14-478.

1. **Appeal and Error.** In order 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.
2. **Affidavits: Appeal and Error.** A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court.
3. **Child Custody: Property Division: Child Support: Alimony.** Domestic matters such as child custody, division of property, child support, and alimony are entrusted to the discretion of trial courts.
4. **Appeal and Error.** A trial court's determinations on domestic matters are reviewed de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
5. **Judgments: Appeal and Error.** In reviewing orders on domestic matters, an appellate court conducts its own appraisal of the record to determine whether the trial court's judgments are untenable such as to have denied justice.
6. **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.
7. **Fees: Time: Appeal and Error.** After the district court denies a request to proceed in forma pauperis, the appellant has 30 days to appeal the ruling or proceed by paying the docket fee.
8. **Child Support: Rules of the Supreme Court: Presumptions.** In general, child support payments should be set according to the

Nebraska Child Support Guidelines, which are applied as a rebuttable presumption.

9. ____: ____: ____. All orders for child support obligations shall be established in accordance with the provisions of the Nebraska Child Support Guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied.
10. **Child Support: Rules of the Supreme Court.** The trial court may deviate from the Nebraska Child Support Guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate.
11. ____: ____. 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.
12. ____: ____. Absent a clearly articulated justification, any deviation from the Nebraska Child Support Guidelines is an abuse of discretion.
13. ____: ____. If the district court fails to indicate that a deviation from Neb. Ct. R. § 4-218 (rev. 2014) is warranted, it abuses its discretion if its child support order drives the obligor's income below the poverty line set forth in § 4-218.
14. **Child Support.** There is no precise mathematical formula for calculating child support when subsequent children are involved.
15. ____. Calculation of child support when subsequent children are involved is left to the discretion of the court as long as the court considered the obligations to both families and the income of the other parent of the subsequent children.
16. **Child Support: Rules of the Supreme Court.** When a deviation from the Nebraska Child Support Guidelines is appropriate, the trial court should consider both parents' support obligations to all children involved in the relationships.
17. **Child Support.** In considering the obligation to subsequent children, the trial court should take into consideration the income of the other parent of these children as well as any other equitable considerations.
18. ____. The specific formula for making calculations for the obligation to subsequent children is left to the discretion of the trial court, as long as the basic principle that both families are treated as fairly as possible is adhered to.
19. ____. In ordering child support, a trial court has discretion to choose if and how to calculate the deviation, but must do so in a manner that does not benefit one family at the expense of the other.

20. **Child Support: Rules of the Supreme Court.** A parent's support, childcare, and health care obligation shall not reduce his or her net income below the minimum net monthly obligation for one person, or the poverty guidelines updated annually in the Federal Register by the U.S. Department of Health and Human Services under authority of 42 U.S.C. § 9902(2), except minimum support may be ordered as defined in Neb. Ct. R. § 4-209.
21. ____: ____. Under Neb. Ct. R. § 4-218 (rev. 2014), the minimum net monthly child support obligation for one person is derived from the Federal Register poverty guidelines.
22. **Child Support.** When dealing with a situation where a parent's household is not a one-person household, the poverty guidelines as updated annually in the Federal Register should be used as the resource for determining the basic subsistence level for that household.
23. ____. To determine an obligor's net income for calculating support obligations, a court subtracts the following annualized deductions from the obligor's gross income: taxes, FICA, allowable retirement contributions, previous court-ordered child support to other children, and allowable voluntary support payments to other children.
24. **Child Support: Rules of the Supreme Court.** Under the Nebraska Child Support Guidelines, to determine if the obligor's income exceeds the minimum subsistence level, a court deducts the obligor's support obligations that are specified in the guidelines from the obligor's net income.
25. ____: ____. When an obligor's combined household income is below the poverty guidelines as updated annually in the Federal Register, the district court should order minimum support pursuant to Neb. Ct. R. § 4-209 or otherwise set forth specific reasons for deviating from the basic subsistence requirement.
26. ____: ____. Under the Nebraska Child Support Guidelines, it is recommended that in very low income cases, a minimum support of $50 or 10 percent of the obligor's net income, whichever is greater, per month be set.
27. **Child Support.** When determining child support in a complex multifamily situation, trial courts should be careful not to order a disproportionate amount of a child support obligor's net income to go to the children at issue and the goal must be for fairness for all the children for whom a parent must provide support.

Appeal from the District Court for Douglas County: Thomas A. Otepka, Judge. Reversed and remanded with directions.

Patrick McCormick for appellant.

Brandie M. Fowler and Kyle C. Allen, of Higgins Law, for appellee.

Inbody, Pirtle, and Bishop, Judges.

Bishop, Judge.

Hussein Issak appeals from a decree of paternity entered by the Douglas County District Court, which established his paternity of two minor children he had with Mirab Lasu and ordered him to pay child support in the amount of $613 per month. On appeal, Issak argues that the district court did not properly consider the federal poverty guidelines when establishing his support obligation; namely, he argues the district court failed to take into consideration that he is the head of a 10-person household where the combined income is below the federal poverty guidelines.

This case requires us to address language contained at Neb. Ct. R. § 4-218 (rev. 2014) which has evaded consideration by our appellate courts to date. In 2014 (the year applicable to this appeal), § 4-218 set forth a basic subsistence limitation based upon a "minimum of $973 net monthly *for one person, or the poverty guidelines updated annually in the Federal Register*." (Emphasis supplied.) We conclude that the italicized language requires looking at the poverty guideline table found in the Federal Register when an obligor's household consists of more than one person. Since § 4-218 was not properly considered by the district court in determining child support in this case, we reverse, and remand with directions.

## FACTUAL BACKGROUND

Issak was married in Kenya before he and his wife moved to the United States. Issak and his wife have a total of eight children together, three born in Kenya (in 1999, 2000, and 2002) and five born in Douglas County, Nebraska (in 2006, 2008, 2010, 2012, and 2013). At all times during the district

court proceedings below, Issak and his wife remained married and lived together.

While still married to his wife, Issak also had two children with Lasu: Samuel Lasu, born in 2010, and Daniel Lasu, born in 2012. Lasu also has six children from a previous marriage; two reside with her.

## PROCEDURAL BACKGROUND

On April 10, 2012, Lasu filed a complaint for paternity, custody, and support against Issak, alleging that he was the biological father of her minor child, Samuel. According to a motion filed by Lasu on July 3, the parties had entered into an agreement resolving all issues in her complaint, and on July 16, the district court entered a decree of paternity and support, ordering Issak to pay $500.54 per month for Samuel's support.

On July 25, 2012, Issak filed a motion to vacate the paternity decree (through newly retained counsel), alleging that he did not know or understand the contents of the decree and that his support obligation brought him below the poverty line for his household (including Issak, his wife, and their seven children at the time of the motion). Following a hearing, the court entered an order on August 1, granting Issak's motion to vacate.

On August 23, 2012, without leave of court, Lasu filed an amended complaint against Issak for paternity, custody, and support seeking to establish paternity and support for a second minor child, Daniel, born subsequent to her initial complaint for paternity. Upon Issak's request, the court treated this amended complaint as the operative complaint and permitted Issak to file an answer to the amended complaint on August 29.

No action was taken in the case for several months, and in February 2013, Lasu's attorney was permitted to withdraw.

On May 3, 2013, through newly retained counsel, Lasu filed a motion for leave to file a second amended complaint for paternity and a motion for temporary orders. The court

entered an order on June 4, granting Lasu's motion to file a second amended complaint. Lasu filed her second amended complaint on July 2, seeking the court to establish Issak as the father of both Samuel and Daniel, to award her sole physical custody, and to order Issak to pay child support. Issak filed an answer on July 23, raising the "Affirmative Defense" and "Counterclaim" that the Nebraska and federal poverty guidelines are applicable to the case.

On August 28, 2013, Lasu filed another motion for temporary orders. The district court entered a temporary order on November 1, awarding Lasu sole legal and physical custody of Samuel and Daniel, and ordering Issak to pay $591 per month in child support commencing November 1.

On November 5, 2013, Issak filed a motion for relief from the temporary order, alleging that he and his wife added another child to their household subsequent to his July 25, 2012, motion to vacate (for a total of eight minor children with his wife), and he sought a deviation from the child support guidelines, seeking to pay $50 per month for both Samuel and Daniel. Lasu filed an objection to this motion on December 6, 2013. The court overruled Issak's motion on December 19.

Apparently, the parties were able to resolve all issues raised in Lasu's second amended complaint with the exception of Issak's child support obligation for Samuel and Daniel, and trial was held on April 16, 2014, to resolve that sole issue. The parties stipulated that Issak was the natural father of Samuel and Daniel; that Lasu was a fit and proper person to have sole legal and physical custody of the minor children, subject to Issak's weekly visitation; that Lasu would pay up to $480 of nonreimbursable medical expenses, per child, per year; and that Lasu would claim the dependency exemptions.

For purposes of calculating child support, the parties stipulated that Issak's wife's total monthly income was $1,386.67 and that she and Issak had eight minor children in their household. The parties further stipulated that Lasu pays $171 in child support to the father of her six other children, two

of whom reside in her household. The parties further stipulated to the exhibits entered into evidence: Issak's 2013 tax return, child support payment history report from the Nebraska Department of Health and Human Services, Lasu's pay statement, Issak's pay statement, Lasu's 2013 tax return, and two proposed child support calculations submitted by Issak and Lasu as aids to the court.

Both parties used $975 for Lasu's total monthly income and $2,415.88 for Issak's total monthly income in their child support calculations. Lasu's proposed calculation provided that Issak's child support obligation was $613 for two children and was $423 for one. Lasu arrived at this figure by first completing a joint physical custody support calculation between Issak and his wife (using his wife's stipulated income), and she determined that Issak would hypothetically owe his wife $318 per month in support under a joint physical custody arrangement. Lasu represented to the court that this first calculation "already contemplates the poverty guidelines and makes the required adjustment pursuant to the Nebraska Child Support Guidelines Section 4-218." Lasu then stated she provided Issak credit for his preborn children by incorporating that $318 figure into her proposed calculation between Issak and Lasu as Issak's "regular support for other children."

Issak calculated that his support obligation for his two children with Lasu would be $91, using a two-step calculation. First, he calculated what child support he would have to pay his wife if she was awarded custody of six of their eight children (because the income shares table went up to only six children); his calculation resulted in $1,231 in monthly child support. Issak then used that figure as a credit to be applied in his calculation of support owed to Lasu for Samuel and Daniel.

On May 12, 2014, the court entered an order for paternity, custody, and support. The court's order states that the parties had reached an agreement with regard to paternity and custody, and adduced evidence related to Issak's obligation to provide child support to Samuel and Daniel. The

order established Issak as the father of the minor children, and Lasu was awarded sole legal and physical custody. The court adopted Lasu's proposed child support calculation and ordered Issak to pay support in the amount of $613 per month for both children commencing May 1, 2014. The court found and ordered that Lasu's "Exhibit 16 comports with the spirit and intent of *Prochaska v. Prochaska*, 6 Neb. App. 302, 573 N.W.2d 777 (1998), as well as Nebraska Child Support Guideline Sections 4-205 and 4-220 . . . . This amount and the deviation are in the best interests of the minor children at issue." The net income figure for Issak relied upon by the court was $1,729, which was arrived at after deductions for taxes, FICA, retirement, and $318 attributed to support for Issak's other children.

On May 22, 2014, Issak filed a notice of appeal and an application to proceed in forma pauperis; attached to his application was a poverty affidavit asserting he has eight children and a wife who reside in his household and averring that his monthly expenses exceeded his adjusted gross income and that he receives "approximately $700 per month from the Supplemental Nutrition Assistance Program." On May 23, Lasu filed an objection to Issak's application to proceed in forma pauperis. A hearing on Issak's application was held on June 11. Issak testified he thought he had about $90 in his bank account. On June 16, the district court entered an order concluding that Issak had not established evidence that he was unable to pay the expected fees and costs for his appeal, and it denied his application to proceed in forma pauperis.

On July 14, 2014, Issak paid the statutory docket fee; he did not file an appeal of the denial of his application to proceed in forma pauperis.

## ASSIGNMENTS OF ERROR

On appeal, Issak argues, summarized and restated, that the district court erred (1) in denying his application to proceed in forma pauperis and (2) in determining that his child support obligation was $613 per month commencing May 1, 2014.

[1] Although Issak appears to argue in the body of his brief about the temporary child support orders and award of attorney fees awarded to Lasu during the pendency of the action, Issak did not assign any errors beyond the two stated above. In order 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. *Irwin v. West Gate Bank*, 288 Neb. 353, 848 N.W.2d 605 (2014).

## STANDARD OF REVIEW

[2] A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court. *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012).

[3-5] Domestic matters such as child custody, division of property, child support, and alimony are entrusted to the discretion of trial courts. *Gress v. Gress*, 274 Neb. 686, 743 N.W.2d 67 (2007). A trial court's determinations on such issues are reviewed de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Id*. Under this standard, an appellate court conducts its own appraisal of the record to determine whether the trial court's judgments are untenable such as to have denied justice. *Id*.

[6] 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. *Gress, supra*.

## ANALYSIS

*Denial of In Forma Pauperis.*

[7] We first address Issak's claim that the district court erred in denying his request to proceed in forma pauperis on appeal. After the district court denied his request to proceed in forma pauperis on June 16, 2014, he had 30 days to appeal the ruling or proceed by paying the docket fee. See § 25-2301.02(1). See, also, *Glass v. Kenney*, 268 Neb. 704,

687 N.W.2d 907 (2004); *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003). Instead of appealing the denial of his request for in forma pauperis status, Issak paid the statutory docket fee on July 14, 2014. Having chosen to pay the docket fee rather than appeal the denial of his request for in forma pauperis status, Issak cannot now be heard to complain of this issue.

*Child Support.*

Issak argues the district court abused its discretion in its determination of his child support obligation for Samuel and Daniel, because the income for his family of 10 is below the poverty guidelines as updated in the Federal Register, even prior to any order of child support, and therefore the court should have ordered him to pay only minimum support pursuant to Neb. Ct. R. § 4-209.

In its May 12, 2014, "Order for Paternity, Custody & Support," the district court found and ordered that Lasu's "Exhibit 16 comports with the spirit and intent of *Prochaska v. Prochaska*, 6 Neb. App. 302, 573 N.W.2d 777 (1998), as well as Nebraska Child Support Guideline Sections 4-205 and 4-220 . . . . This amount and the deviation are in the best interests of the minor children at issue." The court's reference to *Prochaska v. Prochaska*, 6 Neb. App. 302, 573 N.W.2d 777 (1998), indicates that consideration was given to Issak's obligation to support children in more than one family, and the court's references to Neb. Ct. R. §§ 4-205 (deductions) and 4-220 (duty to support subsequent children as defense for upward modification of existing support order) indicate consideration of these particular factors. However, there is no indication that the court considered the application of § 4-218 (basic subsistence limitation) on the child support ordered; perhaps because on its face, the child support order of $613 subtracted from the net monthly income of $1,729 used by the court left Issak with $1,116, which kept Issak above $973 (the poverty guideline basic subsistence level for one person in 2014). However, as noted at the outset of this

opinion, § 4-218 sets forth only the poverty guideline for one person—it does not set forth the basic subsistence levels for households consisting of more than one person. Rather, it appears to direct us to the Federal Register for the poverty guideline figures for households in excess of one person. In the more common divorce or paternity situation, a noncustodial parent's household may often consist of just one person; however, as obvious in this case, a noncustodial parent's household may consist of a spouse and other dependent children. In such cases, taking the poverty guideline figure that has been calculated for one person's basic subsistence and applying that same figure to a much larger family results in an inequitable outcome.

This court is mindful that a trial court is faced with a very difficult task when trying to calculate a fair amount of child support in this type of multifamily situation. In *Henke v. Guerrero*, 13 Neb. App. 337, 692 N.W.2d 762 (2005), this court reviewed a paternity action involving a minor child born to a mother and father not married to each other, but each married to other people with whom they also had children. We noted the complex multifamily situation and concluded that the child support and retroactive support ordered in that case resulted in a disproportionate amount of the father's net income going to the child at issue and that our concern must be for fairness for all the children. We also recognized that a perfectly fair economic result cannot be expected. *Id*.

In *Henke, supra*, the father was ordered to pay $252 per month retroactive to the first day of the month following the child's birth. Since the order was entered 43 months after the child's birth, this resulted in an immediate arrearage of $10,836, excluding interest. The father was ordered to pay $50 per month (in addition to current support of $252 per month) to address the arrearage. In considering the father's net income of $1,048.97 and the basic subsistence limitation of $748 for one person at that time, this court noted that the $252 child support order and the monthly $50 retroactive payment would leave the father with a monthly income $1.03

below the basic subsistence limitation. This court stated that the father must meet his current obligations for a family of five and concluded that the circumstances and equities—the father's lack of ability to pay and the needs of his other children—required a deviation as to the retroactive support. This court modified the retroactive support from $252 per month to $50 per month, thereby reducing the arrearages to a total of $2,150.

We note that this court in *Henke, supra*, did not consider the poverty guidelines for a family of five when reviewing the father's support obligation, and instead, it appeared to rely solely on the basic subsistence limitation for one person. However, in *Henke*, this court was focused on the application of the poverty guidelines with respect to the retroactive support only, since that was the error assigned on cross-appeal by the father. It was not argued that the poverty guidelines should be applied for a family of 5 when determining child support, as is being argued in the present case for Issak's family of 10.

[8-10] In general, child support payments should be set according to the Nebraska Child Support Guidelines, which are applied as a rebuttable presumption. See *Pearson v. Pearson*, 285 Neb. 686, 828 N.W.2d 760 (2013). All orders for child support obligations shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied. *Id.* See, also, Neb. Ct. R. § 4-203 (rev. 2011). The trial court may deviate from the guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate. *Pearson, supra*.

[11-13] 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. See Neb. Ct. R. § 4-201. However, absent a clearly articulated justification, any deviation from the guidelines is an abuse of discretion. *Gress v.*

*Gress*, 274 Neb. 686, 743 N.W.2d 67 (2007). If the district court fails to indicate that a deviation from § 4-218 (basic subsistence) is warranted, it abuses its discretion if its child support order drives the obligor's income below the poverty line set forth in § 4-218. See *id.*

[14-19] The instant case involves numerous minor children from various different relationships: Issak and his wife have a total of eight minor children together; while still married to his wife, Issak had two children with Lasu; and Lasu has six children from a previous marriage, two of whom reside with her. Both Lasu and the Issaks receive governmental assistance. There is no precise mathematical formula for calculating child support when subsequent children are involved. See *Brooks v. Brooks*, 261 Neb. 289, 622 N.W.2d 670 (2001). Such calculation is left to the discretion of the court as long as the court considered the obligations to both families and the income of the other parent of the subsequent children. See *id*. Subsequent familial relationships vary widely from case to case. *Id.* When a deviation from the guidelines is appropriate, the trial court should consider both parents' support obligations to all children involved in the relationships. *Brooks, supra*. In considering the obligation to those subsequent children, the trial court should take into consideration the income of the other parent of these children as well as any other equitable considerations. *Id*. The specific formula for making such calculations is left to the discretion of the trial court, as long as the basic principle that both families are treated as fairly as possible is adhered to. *Id.* In other words, a trial court has discretion to choose if and how to calculate the deviation, but must do so in a manner that does not benefit one family at the expense of the other. See *Emery v. Moffett*, 269 Neb. 867, 697 N.W.2d 249 (2005).

The district court in the instant case was faced with somewhat unusual and complicated familial relationships, and it chose to adopt Lasu's proposed child support calculations to account for Issak's eight minor children who he supports with his wife. The court's worksheet attached to the decree

purported to provide Issak with a $318 credit as the hypothetical child support he would owe to his wife for six of their eight children if they shared joint physical custody, bringing his net monthly income to $1,729.17. This resulted in Issak owing $613 per month in child support for Samuel and Daniel. However, giving Issak a credit of only $318 to support the eight children in his current household while paying $613 to support the two in Lasu's household is on its face not equitable. A significant flaw in Lasu's proposed calculation is the premise underlying the joint physical custody calculator she used which provides for a lower monthly child support obligation but must also include contributions for reasonable and necessary direct expenses such as clothing and extracurricular costs associated with the children. See Neb. Ct. R. § 4-212 (rev. 2011). These additional contributions were not considered in Lasu's calculation. Based upon Lasu's proposed calculation, after subtracting the $613 child support obligation from Issak's net income, his remaining income would be $1,116.17 per month, which on its face is above the basic subsistence level of $973 for one person in 2014. See § 4-218.

[20] However, Issak's central argument on appeal is that the district court's calculations essentially treated him as a single person, when in reality he is the head of a 10-person household whose total household income is below the poverty guidelines updated annually in the Federal Register. Issak relies on § 4-218, which provided:

> A parent's support, child care, and health care obligation shall not reduce his or her net income below the minimum of $973 net monthly for one person, *or* the poverty guidelines updated annually in the Federal Register by the U.S. Department of Health and Human Services under authority of 42 U.S.C. § 9902(2), except minimum support may be ordered as defined in § 4-209.

(Emphasis supplied.) Our courts have never explicitly addressed the latter part of § 4-218 referencing the poverty guidelines in the Federal Register.

[21,22] It is clear that under § 4-218, the minimum of "$973 net monthly for one person" is derived from the Federal Register poverty guidelines. The 2014 Federal Register provided that the poverty guideline for a household of one was $11,670 in annual income, which equals $973 per month. However, as Issak points out, he is *not* part of a one-person household; rather, he is married and supporting eight other minor children with his wife. Section 4-218 provides that a parent's support, childcare, and health care obligation shall not reduce his or her net income below $973 net monthly "*for one person.*" By logical extension, when dealing with a situation where a parent's household is *not* a one-person household, as in the instant case, the poverty guidelines as updated annually in the Federal Register should be used as the resource for determining the basic subsistence level for that household.

[23-26] Issak, his wife, and their 8 children constitute a household of 10. According to the 2014 poverty guidelines set forth in the Federal Register, the poverty guideline for a household of 10 was $48,210 in annual income, or $4,018 per month. In looking at the child support worksheet attached to the district court's order, Issak's net monthly income at the time of trial was $2,047.17 and his wife's net monthly income was $1,280.77, after providing them with the applicable deductions set forth in § 4-205. See, also, *Molczyk v. Molczyk*, 285 Neb. 96, 825 N.W.2d 435 (2013) (to determine obligor's net income for calculating support obligations, court subtracts these annualized deductions from obligor's gross income: taxes, FICA, allowable retirement contributions, previous court-ordered child support to other children, and allowable voluntary support payments to other children; to determine if obligor's income exceeds minimum subsistence level, court deducts obligor's support obligations that are specified in guidelines from obligor's net income). The combined monthly net income available to the Issaks' household of 10 in 2014 was $3,328, roughly $690 below

the poverty guidelines of $4,018 per month as set forth in the Federal Register. Therefore, the Issaks' combined household income fell below poverty guidelines even before any award of child support was entered. Because Issak's income, even when combined with his wife's income, was below the poverty guidelines for a household of 10 (as updated annually in the Federal Register), see § 4-218, the district court should have ordered minimum support pursuant to § 4-209 or otherwise set forth specific reasons for deviating from the basic subsistence requirement. Section 4-209 provides that in very low income cases, "a minimum support of $50, or 10 percent of the obligor's net income, whichever is greater, per month be set." Ten percent of Issak's net income would be $205 in child support for Samuel and Daniel.

[27] Similar to our earlier discussion of *Henke v. Guerrero*, 13 Neb. App. 337, 692 N.W.2d 762 (2005), we note again here that when determining child support in a complex multifamily situation, trial courts should be careful not to order a disproportionate amount of a child support obligor's net income to go to the children at issue, and that the goal must be for fairness for all the children for whom a parent must provide support. One way that might be accomplished in this case, for example, is to take only Issak's monthly net income of $2,047 into consideration when thinking about how much of that net income would be needed to support 10 children if his was the only source of income. Looking at a total monthly net income of $2,000 in the child support guidelines income shares table, we can see that $1,025 in monthly child support would be allocated to provide for six children. The income shares table stops at six children, and while the guidelines tell us how to calculate child support for income that exceeds the levels provided for in the table, the guidelines do not tell us how to calculate child support when a parent is responsible for supporting more than six children, as in the case before us. Pursuant to the table, a monthly net income of $2,000 calls for child support in the following amounts: $507 (one child),

$723 (two children), $830 (three children), $895 (four children), $960 (five children), and $1,025 (six children). At this income level, once reaching three children, we can see that the increments increase by $65 for each additional child. If we extrapolate that out to 10 children (8 in current household, 2 in Lasu's), the guidelines would suggest that $1,285 per month would be recommended to support those 10 children, or $128.50 per child. Ordering minimum support in this case pursuant to § 4-209 results in Issak owing $205 per month for the two children in Lasu's household, or $102.50 per child (this per child figure is supplied only for the purpose of showing comparable resources for each of Issak's 10 children and is not to be construed to mean that Issak's child support would reduce to $102.50 if only one of his children with Lasu remained eligible for child support). The minimum support based upon 10 percent of Issak's net income results in a much more fair allocation of Issak's net resources to all of Issak's 10 children. If we use our calculation of $1,285 per month in child support for 10 children, the district court's child support order of $613 per month for 2 children would result in almost half of the child support resources going to just 2 children, with the other half of the resources being shared by 8 children. As stated previously, a trial court has discretion to choose if and how to calculate a deviation where multiple families are involved, but must do so in a manner that does not benefit one family at the expense of the other. See *Emery v. Moffett*, 269 Neb. 867, 697 N.W.2d 249 (2005).

We therefore reverse the portion of the trial court's order setting the amount of child support to be paid by Issak, and consistent with our analysis above, we remand the cause to the district court with directions to enter an order finding Issak's child support obligation to be $205 per month for Samuel and Daniel effective May 1, 2014. Because of the many variables already discussed that can influence child support calculations in a multifamily case like this, neither the district court nor this court can calculate at this time what Issak would

owe in child support payable to Lasu when there is just one remaining minor child owed support. The parties will have to consider the familial circumstances, financial resources, and poverty guidelines, if applicable, relevant at that time and seek modification accordingly if warranted.

## CONCLUSION

We conclude that Issak's household income was below the federal poverty guidelines for a household of 10 and that thus, he should have been ordered to pay only minimum support. We therefore reverse the district court's order of child support and remand the cause to the district court with directions to enter an order finding Issak's child support obligation to be $205 per month for Samuel and Daniel effective May 1, 2014.

Reversed and remanded with directions.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Francisco J. Ayala, appellant.

870 N.W.2d 428

Filed April 14, 2015. No. A-14-386.

This opinion has been ordered permanently published by order of the Court of Appeals dated July 23, 2015.

1. **Trial: Evidence: Appeal and Error.** An appellate court reviews the trial court's conclusions with regard to evidentiary foundation and witness qualification for an abuse of discretion.
2. **Drunk Driving: Blood, Breath, and Urine Tests.** 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.
3. ____: ____. Pursuant to 177 Neb. Admin. Code, ch. 1, § 001.08A (2009), a Class A permit is a permit to perform a chemical test to analyze a subject's blood for alcohol content by an approved laboratory method.
4. ____: ____. Pursuant to 177 Neb. Admin. Code, ch. 1, § 006.04 (2009), the list of approved methods for Class A permits are (1) gas chromatography, (2) enzymatic alcohol dehydrogenase, and (3) radiative energy attenuation.
5. **Drunk Driving: Blood, Breath, and Urine Tests: Words and Phrases.** When a Class A permit lists "automated headspace gas chromatography" as the approved method, the words "automated headspace" are merely descriptive of the nature of the gas chromatography and do not violate 177 Neb. Admin. Code, ch. 1, § 006.04 (2009).

Appeal from the District Court for Scotts Bluff County, Randall L. Lippstreu, Judge, on appeal thereto from the

County Court for Scotts Bluff County, Kristen D. Mickey, Judge. Judgment of District Court affirmed.

Bell Island, of Island & Huff, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

Moore, Chief Judge, and Pirtle and Bishop, Judges.

Bishop, Judge.

Francisco J. Ayala was convicted of driving under the influence (DUI), over .15. Ayala challenges the admissibility of his blood test, arguing that the person who tested his blood did not have the proper Class A permit. The question before us is whether a Class A permit for "automated headspace gas chromatography" complies with 177 Neb. Admin. Code, ch. 1, § 006.04 (2009), which lists that one of the approved methods for a Class A permit is "gas chromatography." We find that a Class A permit for automated headspace gas chromatography is a proper permit pursuant to § 006.04, and thus the admission of Ayala's blood test into evidence was not an abuse of discretion. We therefore affirm.

## BACKGROUND

Ayala was arrested for DUI and taken to Regional West Medical Center in Scottsbluff, Nebraska, for a blood test. The blood sample was tested by Amy Langan, a forensic scientist with the Nebraska Health and Human Services Laboratory. Langan held a Class A permit authorizing her to perform "Automated Headspace Gas Chromatography."

Ayala was charged with "DWI (Blood) over .15, 1st offense," a Class W misdemeanor. Ayala filed a motion in limine seeking to exclude the blood test result because he alleged the blood was tested by a person who did not have a proper Class A permit pursuant to title 177. At a hearing on the motion in limine, Ayala argued that title 177 lists

"gas chromatography" as an approved method for Class A permits, but forensic scientist Langan's Class A permit states her approved method as "automated headspace gas chromatography"; therefore, he argues that Langan did not have an authorized permit under title 177. After reviewing the evidence, the court stated, "the fact that the permit says gas chromatography after two adjectives describing the nature of the gas chromatography in this court's mind does not violate the [t]itle 177, and specifically Section 006.004" and to rule otherwise would be "an ultra technical and unnecessarily strict reading of title 177." The county court overruled Ayala's motion in limine.

At trial, Langan's Class A permit came into evidence over Ayala's objections as to foundation and relevance. Ayala's blood test result of .21 grams of alcohol per 100 milliliters of blood came into evidence over Ayala's objection as to foundation. Ayala was convicted by a jury, and the county court accepted the jury's verdict.

Ayala appealed to the district court. The district court determined that the additional words "automated headspace" on Langan's Class A permit were insignificant and that "[a]ny variation between [t]itle 177 and Langan's Class A permit was insufficient to invalidate Langan's valid Class A permit." The district court therefore affirmed Ayala's conviction.

Ayala now appeals to this court.

## ASSIGNMENT OF ERROR

Ayala assigns that the county court erred in finding that the blood test was admissible when the person who tested the blood did not have the proper Class A permit.

## STANDARD OF REVIEW

[1] An appellate court reviews the trial court's conclusions with regard to evidentiary foundation and witness qualification for an abuse of discretion. *State v. Richardson*, 285 Neb. 847, 830 N.W.2d 183 (2013).

## ANALYSIS

[2] Currently, 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 chemical test in a DUI prosecution: (1) that the testing device was working properly at the time of the testing, (2) that the *person administering the test* was qualified and *held a valid permit*, (3) that the test was properly conducted under the methods stated by the Department of Health and Human Services Regulation and Licensure, and (4) that all other statutes were satisfied. *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008) (emphasis supplied). In the instant case, Ayala argues that his blood test was inadmissible because Langan did not hold a proper Class A permit.

[3,4] A Class A permit is "a permit to perform a chemical test to analyze a subject's blood for alcohol content by an approved laboratory method." 177 Neb. Admin. Code, ch. 1, § 001.08A (2009). The Nebraska Department of Health and Human Services issues the permit, which shall state the class of permit, and the approved method. 177 Neb. Admin. Code, ch. 1, § 003.01 (2009). The list of approved methods for Class A permits are (1) gas chromatography, (2) enzymatic alcohol dehydrogenase, and (3) radiative energy attenuation. 177 Neb. Admin. Code, ch. 1, § 006.04 (2009).

Langan has a Class A permit from the Nebraska Department of Health and Human Services authorizing her to analyze blood samples using "Automated Headspace Gas Chromatography." Langan testified that she used the gas chromatography method to analyze Ayala's blood and that the specific technique she used was "automated headspace." She explained that "automated headspace" describes how to get the sample from the headspace vials onto the gas

chromatograph, but that the instrument used to test Ayala's blood was a gas chromatograph.

[5] Based on our plain reading of title 177 of the Nebraska Administrative Code, we agree with the county court's finding that the words "automated headspace" are merely descriptive of the nature of the gas chromatography used by Langan and do not violate 177 Neb. Admin. Code, ch. 1, § 006.04. Because Langan held a proper Class A permit, the admission of Ayala's blood test into evidence was not an abuse of discretion.

## CONCLUSION

For the reasons stated above, we find that Langan held a proper Class A permit and that thus, the admission of Ayala's blood test into evidence was not an abuse of discretion. Accordingly, we affirm the decision of the district court, which affirmed the decision of the county court.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# David DeLaet et al., appellants, v. Blue Creek Irrigation District, appellee.

868 N.W.2d 483

Filed August 4, 2015. No. A-14-500.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **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.
4. **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.
5. **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.
6. ____. 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.

Appeal from the District Court for Garden County: Derek C. Weimer, Judge. Affirmed.

Gregory J. Beal for appellants.

Steven C. Smith, of Smith, Snyder, Petitt, Hofmeister & Snyder, G.P., for appellee.

Moore, Chief Judge, and Pirtle and Bishop, Judges.

Pirtle, Judge.

## INTRODUCTION

David DeLaet, Gerrod Toepfer, and Allen Peterson (collectively appellants) appeal from an order of the district court for Garden County which granted summary judgment in favor of Blue Creek Irrigation District (Blue Creek) and denied appellants' motion for partial summary judgment. We conclude that summary judgment was properly granted in favor of Blue Creek based on the ground that appellants' causes of action are barred by the statute of limitations. Accordingly, we affirm.

## BACKGROUND

Appellants are all longstanding property owners and irrigators in Garden County, Nebraska. They were all part of an entity called the Meeker Ditch Company, which was made up of private landowners who pooled resources to develop and manage an irrigation system for various irrigated areas in Garden County. Ultimately, the Meeker Ditch Company was dissolved and the members of that entity joined Blue Creek in 2002. The Meeker Ditch Company had been "served by the Graf Canal," which it abandoned upon joining Blue Creek.

Blue Creek is a political subdivision and an organized irrigation district pursuant to Neb. Rev. Stat. § 46-101 et seq. (Reissue 2010). Blue Creek has a board of directors and assesses taxes from the landowners. Blue Creek has 30 landowner members and covers approximately 3,500 acres of land. It is a small district by comparison to others in the immediate area and throughout Nebraska. Blue Creek is served by a district canal ditch from which the water is diverted and delivered to the individual landowners.

In preparation for the inclusion of the Meeker Ditch Company members into Blue Creek, additional pipelines had to be constructed to connect the Meeker Ditch Company members to the Blue Creek system. These pipelines were constructed in 2001 and paid for by the Meeker Ditch Company members. Three of the pipelines constructed are known as the East Meeker pipeline, the Middle or Central Meeker pipeline, and the West Meeker pipeline. Appellants DeLaet and Toepfer receive their water from the Middle Meeker pipeline and appellant Peterson is served by a pipeline which comes from the same turnout as the Middle Meeker pipeline. The Middle Meeker pipeline is the only system of water delivery to appellants' land, and there is no alternate system of ditches or canals or any other means of delivery of water to their property.

Since the inclusion of appellants' land into Blue Creek, there have been two occasions when the Middle Meeker pipeline has needed repair. For the first repair, Blue Creek reimbursed the landowners for the repair costs. It is not clear from the record before us when the first repair occurred. Appellants' brief states that it occurred in 2007, but there is nothing in the record to support that date. DeLaet's and Toepher's affidavits indicate only that the first repair was prior to August 2009, when the second repair occurred. When the second repair was made, the landowners paid for the repair and Blue Creek refused to reimburse the landowners.

On January 26, 2012, appellants filed a complaint alleging three causes of action against Blue Creek. The first cause of action was for declaratory relief to establish that Blue Creek is legally obligated to provide reasonable maintenance for the Meeker pipeline, as well as reasonable rules and regulations pertaining to its use and operation, or to provide an alternative means of delivery of water to the lands along the Meeker pipeline. The second cause of action was for a writ of mandamus to require Blue Creek to perform its duties under the law with respect to maintenance and operation of the Meeker pipeline, as well as reasonable rules and regulations pertaining to its use and operation. The third cause of action was for

a mandatory injunction to require Blue Creek to perform its legal obligations with respect to the maintenance, use, and operation of the Meeker pipeline.

Blue Creek filed an answer and alleged several affirmative defenses: separation of powers; waiver, laches, and estoppel; consent to inclusion into Blue Creek and its terms and conditions; and statute of limitations. Blue Creek also made a counterclaim seeking declaratory relief confirming its long-held policies and practices regarding water deliveries.

Appellants filed a reply and answer relating to Blue Creek's affirmative defenses and counterclaim. The pleading also asserted affirmative defenses to Blue Creek's counterclaim: failure to state a claim upon which relief can be granted; failure to join all necessary parties; consent; statute of limitations; and waiver, estoppel, and laches.

Appellants subsequently filed a "Motion for Partial Summary Judgment," asking the court to "enter a Summary Judgment or Partial Summary Judgment on [appellants'] First Cause of Action; [appellants'] Second Cause of Action; and [appellants'] Third Cause of Action." The trial court treated the motion as a motion for summary judgment or, alternatively, a motion for partial summary judgment on the first cause of action. Blue Creek also filed a motion for summary judgment.

A hearing was held on both summary judgment motions. Appellants offered affidavits and supplemental affidavits of DeLaet and Toepfer into evidence. DeLaet's and Toepfer's affidavits both state that each of them is familiar with the operation of Blue Creek and that Blue Creek has historically assumed responsibility for repairs, upkeep, and maintenance of all means of delivery of water to lands served by it and taxed by it.

DeLaet's and Toepfer's supplemental affidavits both state that there was never an understanding or agreement, either verbal or written, that the landowners would maintain the pipeline that delivered water to their property. The supplemental affidavits also state that the landowners have never

been polled in regard to who should have the responsibility of maintaining the pipelines. DeLaet's supplemental affidavit also states that there are no facts to support an allegation that maintenance of the pipeline by Blue Creek would be a burden to it, nor significantly increase its operating costs.

Blue Creek presented an affidavit of Dennis Miller, who owns land that was formerly under the Meeker Ditch Company and other land that has always been part of Blue Creek. He was also the president of Meeker Ditch Company at the time it was dissolved and has also been the president of Blue Creek for almost 10 years. Miller's affidavit states that the longstanding practice for Blue Creek has been to deliver water "to a turnout or gate" commonly referred to as the "paddle," which Blue Creek provides at its expense. The landowners are then responsible for all operation, maintenance, cleaning, and repair of pipelines and laterals running directly from the Blue Creek main canal to their lands.

Miller's affidavit further states that on several occasions since the inclusion of the Meeker Ditch Company lands into Blue Creek, all Blue Creek landowners have been polled on whether or not to continue the past practice of requiring landowner operation, maintenance, cleaning, and repair of pipelines and laterals running from the Blue Creek main canal, and the landowners have, by a large majority (basically all except appellants), elected to continue the practice.

Miller's affidavit also states that Blue Creek landowners have historically, by policy and agreement, maintained their own pipelines and all other laterals from the Blue Creek main canal. He states this was unanimously accepted by Blue Creek landowners, because it allowed Blue Creek landowners to keep the laterals or pipelines serving their lands cleaned according to their own scheduling and preferences, as well as reducing operating expenses of Blue Creek. The affidavit states that if Blue Creek operated, cleaned, maintained, and repaired irrigation water conveyances running from the main Blue Creek canal, it would more than double the current assessment of

$19 per acre paid annually by the landowners, due to additional labor requirements and cleaning devices.

Miller's affidavit specifically denies that Blue Creek has historically "'assumed responsibility for repairs, upkeep and maintenance of all laterals and pipelines running from the main canal,'" as stated in Toepfer's affidavit and similarly stated in DeLaet's affidavit.

Miller's affidavit states that when the Meeker Ditch Company landowners, including appellants, constructed the pipelines to deliver water to lands formerly included in the Meeker Ditch Company, they "were instructed as to maintenance, upkeep and operation of the pipelines by engineers from the Soil Conservation Service/Natural Resources Conservation Service." He contends appellants have failed and refused to follow the instructions for operation and maintenance of the Middle Meeker pipeline, which has impeded efficient delivery through the pipeline and resulted in damage to the pipeline.

A second affidavit of Miller states that at two Blue Creek member meetings, one held in July 2010 and the other in February 2011, the landowners were polled concerning their position on Blue Creek's practice of requiring landowners to maintain their pipelines. The minutes from the two meetings are attached to Miller's second affidavit. Included with the minutes from the February 2011 meeting is a document stating Blue Creek's current practice for pipeline operation, as well as other pipeline operation options. In regard to the current practice, it states: "[Blue Creek] delivers water to the inlet to any lateral, tube or pipeline at the point of removal from the main canal. Land owners and operators are responsible for the shut off valves and any structures necessary for diverting water from the main canal to their fields." Miller's second affidavit states that the optional approaches, which included Blue Creek's assuming responsibility for the maintenance of all laterals, tubes, and pipelines, were rejected by the board and landowners. The second affidavit also states that Miller had discussed maintenance and repair of pipelines

on other occasions with the landowners and that appellants were the only landowners preferring Blue Creek to repair and maintain the pipelines.

Miller's second affidavit further states that from the completion of the pipeline project in 2002 through 2009, all landowners, including appellants, maintained and repaired their own pipelines without complaint or disagreement. It further states that appellants have maintained and cleaned their own turnouts.

Also attached to Miller's second affidavit is a copy of an "Agreement Concerning Meeker Pipeline Project," which states: "Landowners may connect their own pipelines to carry water to their lands . . . . This will be done at their own cost and those pipelines will be solely their responsibility." Miller states that he circulated this agreement and obtained signatures of all the Meeker Ditch Company landowners, including appellants. At the time of the agreement, it was contemplated that "the water for the Middle Meeker lands would flow from the Blue Creek . . . canal down into the Graf canal and from there, as the Agreement reflects," the Meeker Ditch Company landowners would construct their own pipelines at their own cost to transport the water to their own lands, which is what was done. An attachment to DeLaet's supplemental affidavit also references the agreement. The attachment is a letter dated August 5, 2004, from Blue Creek's attorney, addressed to DeLaet and Miller, regarding "Winding Up of Meeker Ditch Company." The letter states, "I also understand that all of the landowners under the Meeker Ditch Company have executed the 'Agreement Concerning Meeker Pipeline Project.'"

The trial court found that Blue Creek was entitled to summary judgment on its counterclaim for declaratory judgment and that appellants' motion for partial summary judgment as it relates to the issue of declaratory judgment should be overruled. The court also found that Blue Creek was entitled to summary judgment in regard to the mandamus cause of action and the injunction cause of action. The trial court further

found that appellants' causes of action, even if meritorious, were time barred by the statute of limitations.

## ASSIGNMENTS OF ERROR

Appellants assign that the trial court erred in (1) granting Blue Creek's motion for summary judgment, (2) finding they were not entitled to mandamus relief, (3) finding injunctive relief was not warranted, and (4) finding that their causes of action were barred by the applicable statute of limitations.

## STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Daniels v. Maldonado-Morin*, 288 Neb. 240, 847 N.W.2d 79 (2014). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

## ANALYSIS

[3] We choose to first address appellants' assignment of error in regard to the statute of limitations, because if appellants' causes of action are barred by the applicable statute of limitations, we need not address the remaining assignments of error. See *Tierney v. Four H Land Co.*, 288 Neb. 586, 852 N.W.2d 292 (2014) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

The trial court determined that appellants' theories of recovery would all be subject to a 4-year statute of limitations. Specifically, it found that Neb. Rev. Stat. § 25-206 (Reissue 2008) would be the applicable statute of limitations to the theories of recovery allegedly created by Blue Creek's statutory duties to act; Neb. Rev. Stat. § 25-207 (Reissue 2008)

would be the applicable statute of limitations to the theories of recovery which allege that appellants' rights have been injured by Blue Creek's actions or inactions; and Neb. Rev. Stat. § 25-212 (Cum. Supp. 2014) would be the catchall statute of limitations for those causes of action not otherwise specified in other statutes of limitations. Under each of these statutes, the applicable statute of limitations is 4 years. We agree with the trial court's determination on the applicable statutes of limitations, and appellants do not contest the determination that a 4-year statute of limitations applies. Rather, appellants contest the trial court's finding that the causes of action accrued in 2002, when appellants became members of Blue Creek, and that therefore, the statute of limitations had expired at the time appellants filed the present action in 2012.

[4] 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. *Guinn v. Murray*, 286 Neb. 584, 837 N.W.2d 805 (2013).

[5,6] 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. *Kalkowski v. Nebraska Nat. Trails Museum Found.*, 20 Neb. App. 541, 826 N.W.2d 589 (2013). 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. *Id.*

The trial court found that appellants' causes of action accrued in 2002, because that is when they became members of Blue Creek and the policies and practices related to the delivery of water and the maintenance of the pipelines have not changed since then. The court further stated,

> Taking [appellants'] claims at face value, [Blue Creek] has had an obligation to maintain the individual water delivery systems since the inclusion of their lands into [Blue Creek]. That occurred in 2002. The duty, if it

> existed, existed beginning then and [Blue Creek] has failed to so act in accordance with that duty.

The court concluded, therefore, that the statute of limitations started to run in 2002 and expired in 2006.

Appellants argue that their causes of action are not barred by the statute of limitations, because Blue Creek has a continuing statutory duty pursuant to §§ 46-120 and 46-122 to maintain the means of delivery of water to the individual landowners' tracts of land. Section 46-120 provides:

> The [irrigation district] board shall have the power and it shall be its duty to manage and conduct the business affairs of the district, make and execute all necessary contracts, employ such agents, officers, and employees as may be required and prescribe their duties, establish equitable bylaws, rules and regulations for the distribution and use of water among the owners of such lands, and generally to perform all such acts as shall be necessary to fully carry out the purposes of sections 46-101 to 46-1,111. The bylaws, rules and regulations shall be printed in convenient form for distribution in the district.

Section 46-122(2) provides in part:

> It shall be the duty of the directors to make all necessary arrangements for right-of-way for laterals from the main canal to each tract of land subject to assessment, and when necessary the board shall exercise its right of eminent domain to procure right-of-way for the laterals and shall make such rules in regard to the payment for such right-of-way as may be just and equitable.

Appellants allege that the continuing statutory duty "rises anew with each and every irrigation season" and which statutory duty existed during the 4-year period of time prior to the filing of this action. Brief for appellants at 31. They further contend that Blue Creek's obligation to maintain the Middle Meeker pipeline did not become an issue until 2009, when Blue Creek refused to pay for the repair of a ruptured pipeline. They suggest that it was at that point that Blue Creek

refused to take responsibility for the maintenance of the arterial pipeline delivering water to appellants' land.

We find no merit to appellants' arguments and conclude that the trial court did not err in finding that appellants' claims are barred by the statute of limitations. Appellants became members of Blue Creek in 2002, and the pipeline project was completed at that time. Appellants' causes of action are all based on the contention that Blue Creek has an obligation to maintain the pipelines and has had that obligation since the inclusion of appellants' lands in Blue Creek in 2002. They do not allege that any policies or obligations of Blue Creek have changed since 2002.

Blue Creek presented evidence, by way of Miller's affidavit and his second affidavit, that appellants were made aware in 2002 that they and all former Meeker Ditch Company landowners were solely responsible for the pipelines carrying water to their lands. Miller's second affidavit states that he circulated the "Agreement Concerning Meeker Pipeline Project" and obtained signatures from all the Meeker landowners, including appellants. The agreement provides: "Landowners may connect their own pipelines to carry water to their lands . . . . This will be done at their own cost and those pipelines will be solely their responsibility." Appellants did not present any evidence to contradict Blue Creek's evidence that all Meeker Ditch Company landowners, including appellants, executed the agreement. In fact, appellants' evidence (the letter attached to DeLaet's supplemental affidavit) supports the statement in Miller's second affidavit that all Meeker Ditch Company landowners signed the "Agreement Concerning Meeker Pipeline Project." As previously set forth, the letter was addressed to DeLaet and Miller and stated that all Meeker Ditch Company landowners had executed the agreement. Although DeLaet's and Toepfer's supplemental affidavits state that there was never an agreement, either verbal or written, that the landowners would maintain the pipeline that delivered water to their property, such a statement is not sufficient to create a genuine issue of material fact when other

evidence from both parties shows the existence of a written agreement and such agreement is in the record.

Accordingly, we conclude that appellants' causes of action accrued in 2002 and are now time barred, as the statute of limitations has expired. The trial court did not err in granting summary judgment in favor of Blue Creek based on the statute of limitations.

Because we conclude that appellants' causes of action are barred by the statute of limitations, we need not address the remaining assignments of error. See *Tierney v. Four H Land Co.*, 288 Neb. 586, 852 N.W.2d 292 (2014).

## CONCLUSION

We conclude that summary judgment was properly granted in favor of Blue Creek based on the ground that appellants' causes of action are barred by the statute of limitations. Accordingly, the judgment of the trial court is affirmed.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Bernard J. Kobza and Vickey L. Kobza, husband and wife, appellants and cross-appellees, v. Rhonda Y. Bowers and Melvin L. Bowers, Jr., wife and husband, appellees and cross-appellants.

868 N.W.2d 806

Filed August 11, 2015. No. A-14-670.

1. **Injunction: Equity.** An action for injunction sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an action in equity, an appellate court tries the factual issues raised by the appellant's assignments of error de novo on the record and reaches its conclusions independent of the findings of the trial court; however, where credible evidence is in conflict on material issues of fact, an appellate court may consider and 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: Injunction.** Injunctive relief may be granted to an adjoining landowner upon a proper showing that an obstruction in a drainageway or natural watercourse constitutes a continuing and permanent injury to that landowner.
4. **Injunction: Proof: Appeal and Error.** A party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle him or her to relief.
5. **Waters: Words and Phrases.** Diffused surface water is defined as water which appears upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily results from rainfall or melting snow.
6. ____: ____. When diffused surface waters are channeled into a well-defined natural course, whether the course be ditch, swale, or draw in its primitive condition, a natural drainageway is formed.
7. ____: ____. Ground water is defined as that water which occurs or moves, seeps, filters, or percolates through the ground under the surface of the land.

8. **Waters.** Diffused surface waters may be dammed, diverted, or otherwise repelled, if necessary, and in the absence of negligence.
9. ____. When diffused surface waters are concentrated in volume and velocity into a natural depression, draw, swale, or other drainageway, the rule as to diffused surface waters does not apply.
10. ____. A natural drainageway must be kept open to carry the water into the streams, and a lower proprietor cannot obstruct surface water when it has found its way to and is running in a natural drainage channel or depression.
11. ____. A lower landowner who builds a structure across a natural drainageway has a continuing duty to provide for the natural passage through such obstruction of all the waters which may be reasonably anticipated to drain therein.
12. ____. Lower lands are under a natural servitude to receive the surface water of higher lands flowing along accustomed and natural drainageways.
13. ____. A lower estate is not under a natural servitude to receive diffused surface waters which have not found their way into a natural drainageway.
14. ____. It is essential that one seeking to prohibit a diversion of the flow of surface water show some damage or injury resulting from it.
15. **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.
16. **Injunction.** An injunction is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury.
17. ____. Injunctive relief should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
18. ____. As an injunction is an extraordinary remedy, it is available in the absence of an adequate remedy at law and where there is a real and imminent danger of irreparable injury.
19. **Injunction: Damages: Words and Phrases.** An injury is irreparable when it is of such a character or nature that the party injured cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard.
20. **Costs.** A prevailing plaintiff in actions for the recovery of money only or for the recovery of specific real or personal property shall be allowed costs.

Appeal from the District Court for Sarpy County: David K. Arterburn, Judge. Affirmed.

Paul F. Peters for appellants.

Brian J. Muench for appellees.

Irwin, Inbody, and Riedmann, Judges.

Riedmann, Judge.

## I. INTRODUCTION

Bernard J. Kobza and Vickey L. Kobza, husband and wife, appeal, and Rhonda Y. Bowers and Melvin L. Bowers, Jr., wife and husband, cross-appeal, from the order of the district court for Sarpy County which denied the Kobzas' request for a permanent injunction and denied the Bowerses' counterclaim for money damages and an injunction. We find no merit to the arguments on appeal or cross-appeal and therefore affirm.

## II. BACKGROUND

The Kobzas commenced this action seeking injunctive relief relating to the pooling of water on their property. In their counterclaim, the Bowerses also sought an injunction against the Kobzas as well as damages for the loss of trees on their property.

The Kobzas and the Bowerses own adjacent residential lots in Sarpy County, Nebraska. The Kobza property lies immediately south of the Bowers property. There are two drainageways that pass through the properties. The primary issue in this case involves what shall be referred to as "the western drainageway." This drainage path runs along the western border of both properties and flows into a pond several lots north of the Bowers property. The second drainageway runs through the eastern portion of the Kobza property onto the Bowers property, then turns westerly near the southern edge of the Bowers property until it joins with the western drainageway.

The Kobzas allege that the Bowerses unlawfully built an earthen berm which obstructs the flow of water in the western drainageway, causing water to back up onto the northwest corner of the Kobza property. They also allege that the Bowerses altered the natural course of the eastern drainageway by adding dirt fill, which moved the drainageway closer to the Kobza property line, endangering their property due to flooding in the event of a major rainfall. In their counterclaim, the Bowerses assert that the Kobzas unlawfully increased the flow of water by pumping ground water resulting in damage to the Bowers property. Thus, the Bowerses claim that the Kobzas should be enjoined from pumping water onto their property and be ordered to pay damages for the loss of the Bowerses' trees.

The Kobza residence was built in 1990. The Bowers residence was built in 1998 or 1999. After building their residence, the Kobzas started getting water in their basement. To alleviate the problem, they installed a sump pump and, several years later, an underground dewatering well. These structures are activated by underground probes and pump water at a rate of 30 to 40 gallons per minute through an underground pipe. Initially, the outflow pipe was connected to another piece of pipe running underneath the Bowers property, with the Bowerses' permission, and the water emptied into a culvert under the Bowerses' driveway where it continued to flow north from there. In 2008, however, the piping system failed on two occasions. After that, the Kobzas refused to repair the pipes and began discharging water at the property line. This resulted in water accumulating on the southwest corner of the Bowers property.

There were no issues with the ponding of water on either property while the piping system was in place. Bernard Kobza conceded at trial that if he had allowed the original piping system to be repaired and reattached, it would have disposed of all of the water coming from his sump pump and dewatering well. But he was unwilling to trust someone else with control over potential flooding on his property,

because he blamed the Bowerses for the previous breaks in the system.

In order to alleviate the flooding which was occurring on their property after the piping system was no longer operational, the Bowerses obtained a permit from Sarpy County and installed a second culvert in 2009. They also built an earthen berm extending from the point where the dewatering well discharges water to a point near the road at the west. They installed a pipe at the western end of the berm through the berm in order to facilitate the drainage of water from the Kobza property, through the berm, and into the culvert. The berm alleviated the flooding on the Bowers property, but water began backing up and pooling in the northwest corner of the Kobza property. The Kobzas discontinued use of their dewatering well in November 2010, however, and there has been no flooding on their property since then. The area has recovered with grass growing, and as the district court observed, it now has "a generally positive appearance."

Paul Woodward, a civil engineer, testified for the Kobzas at trial. He opined that the Bowerses' berm obstructs the flow of water, causing it to pond onto the Kobza property. He also testified that the present location of the eastern drainageway is different from its historic location. He could not say with certainty how the location of the drainage path had changed but believed it could be attributed to fill activities both at the time the Bowers residence was built and later within their backyard. According to Woodward, the eastern drainageway is also now more narrow and shallow than it used to be, which means there is less area for water to flow. He opined that in the event of a large rainfall, the result of these changes could be that excess water could drain back onto the Kobza property.

After trial, the district court entered an order denying the Kobzas' request for injunctive relief. The court found that the ponding issues on both parties' properties correlate with the elimination of ground water from the Kobzas' dewatering system, as opposed to accumulation from rainfall or snowmelt

alone. The court noted that the Kobzas cite to no case law which allows a landowner of an upper parcel to indiscriminately discharge ground water onto a lower parcel. The district court concluded that the Bowerses' action in building the berm provided adequately for the drainage of water and was therefore permissible. Similarly, the district court found that the Bowerses' actions with respect to the eastern drainageway provided for the natural passage of water, and there was no evidence to demonstrate that anything more than a de minimis injury would occur in the event of heavy rainfall. The district court also denied the Bowerses' counterclaim for damages for the loss of their trees and an injunction prohibiting the Kobzas from discharging water from their dewatering well. The Bowerses' request for attorney fees and court costs was also denied.

The Kobzas filed a motion for leave to file a fourth amended complaint after all evidence had been presented at trial but before written closing arguments had been submitted. The motion was denied. The Bowerses then moved for new trial, which was also denied. The Kobzas have now filed a timely appeal, and the Bowerses cross-appeal.

## III. ASSIGNMENTS OF ERROR

The Kobzas' nine assignments of error on appeal may be summarized as asserting that the district court erred in finding that they are not entitled to injunctive relief and refusing to allow them to amend their complaint after all evidence had been presented.

On cross-appeal, the Bowerses assign that the district court erred in (1) failing to award damages for the loss of their trees, (2) failing to enjoin the Kobzas from pumping ground water, and (3) failing to award costs.

## IV. STANDARD OF REVIEW

[1,2] An action for injunction sounds in equity. *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009). In an appeal of an action in equity, an appellate court tries the factual

issues raised by the appellant's assignments of error de novo on the record and reaches its conclusions independent of the findings of the trial court; however, where credible evidence is in conflict on material issues of fact, an appellate court may consider and give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Romshek v. Osantowski*, 237 Neb. 426, 466 N.W.2d 482 (1991).

## V. ANALYSIS

### 1. Appeal

The Kobzas assert that the district court erred in finding that they failed to meet their burden of proof and are therefore not entitled to injunctive relief. For the reasons explained below, we disagree.

[3,4] Injunctive relief may be granted to an adjoining landowner upon a proper showing that an obstruction in a drainageway or natural watercourse constitutes a continuing and permanent injury to that landowner. *Romshek, supra*. Under a de novo review, we are guided by the rule that a party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle him or her to relief. See *id*.

#### (a) Western Drainageway

With respect to the western drainageway, the Kobzas claim that the Bowerses' berm constitutes an unlawful obstruction of a natural drainageway causing damage to their property and, therefore, must be enjoined. We conclude that the Kobzas are not entitled to an injunction, because the injury to their property was caused by the increased volume of ground water they pumped from their dewatering well, and the Bowerses' diversion of such ground water was not negligent.

[5,6] Diffused surface water is defined as water which appears upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which

ordinarily results from rainfall or melting snow. *Id*. When diffused surface waters are channeled into a well-defined natural course, whether the course be ditch, swale, or draw in its primitive condition, a natural drainageway is formed. *Id*.

[7] In contrast, ground water is defined as that water which occurs or moves, seeps, filters, or percolates through the ground under the surface of the land. *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005); Neb. Rev. Stat. § 46-635 (Reissue 2010).

[8-11] The current Nebraska rule regarding diffused surface water was announced in *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962). The court in *Nichol* held that diffused surface waters may be dammed, diverted, or otherwise repelled, if necessary, and in the absence of negligence. *Id*. But when diffused surface waters are concentrated in volume and velocity into a natural depression, draw, swale, or other drainageway, the rule as to diffused surface waters does not apply. *Id*. A natural drainageway must be kept open to carry the water into the streams, and a lower proprietor cannot obstruct surface water when it has found its way to and is running in a natural drainage channel or depression. *Id*. Thus, a lower landowner who builds a structure across a natural drainageway has a continuing duty to provide for the natural passage through such obstruction of all the waters which may be reasonably anticipated to drain therein. *Id*.

In the present case, the water flowing from the Kobza property to the Bowers property was composed of both surface water in a natural drainageway and ground water. However, the water which was pooling on the Kobza property causing damage to the northwest corner was the result of ground water that was pumped from the Kobzas' sump pump and dewatering well. It is undisputed that water stopped ponding on both parties' properties in 2010 after the Kobzas discontinued use of their dewatering well, and thus, there was no evidence that surface water alone was causing any problems. Accordingly, the rule from *Nichol*, which would prohibit the Bowerses from

obstructing the flow of water in a natural drainageway, does not apply.

[12,13] The rule announced in *Nichol* was concerned with obstruction of naturally occurring water flowing in a natural drainageway. This means that a landowner is prohibited from impeding the flow of water as nature intended. In the instant case, however, the Kobzas' dewatering well altered the natural flow of water by increasing its volume so that the water flowing through the piping system inundated the Bowers property in an unnatural amount. In finding that the plaintiffs in *Romshek v. Osantowski*, 237 Neb. 426, 466 N.W.2d 482 (1991), were not negligent in the manner in which they drained water from their field, the Supreme Court noted that the water from the plaintiffs' field was not forced upon the defendants' land in great volume, but, rather, it flowed at a natural pace. Further, as explained in *Nichol, supra*, the common law recognized that lower lands are under a natural servitude to receive the surface water of higher lands flowing along accustomed and natural drainageways. A lower estate is not, however, under a natural servitude to receive diffused surface waters which have not found their way into a natural drainageway. *Nu-Dwarf Farms v. Stratbucker Farms*, 238 Neb. 395, 470 N.W.2d 772 (1991). The Kobzas point to no case law supporting their position that the Bowerses must accept the ground water that the Kobzas are diverting on their land.

In essence, diffused surface waters are treated as a common enemy, and we see no reason to treat ground water differently. See *id*. This means that the Bowerses were free, as lower proprietors, to dam it, provided that the interests of good husbandry were served thereby, that it was necessary to do so, and that it was reasonable under all the circumstances presented. See *Slusarski v. County of Platte*, 226 Neb. 889, 416 N.W.2d 213 (1987). We find the Bowerses' actions were reasonable under the circumstances. They first attempted to control the water by asking the Kobzas to repair the piping system, and when the Kobzas refused, the Bowerses installed a second

culvert. When this method did not alleviate the problem, they built the berm, still providing for the flow of water through the berm into the drainageway. Accordingly, the Kobzas failed to establish that they are entitled to an injunction concerning the western drainageway.

(b) Eastern Drainageway

[14] With respect to the water flowing in the eastern drainageway, the Kobzas claim that the Bowerses unlawfully altered the location of the drainageway and decreased its size. Woodward, the civil engineer, testified that the location of the eastern drainageway is different from its historic location, but he could not say why. He further explained that the eastern drainageway is more narrow and shallow than it was historically, and he believed that in the event of a major rainfall, it could cause problems. There was no evidence that there were any flooding problems resulting from the eastern ditch, however, and it is essential that one seeking to prohibit a diversion of the flow of surface water show some damage or injury resulting from it. See *Nu-Dwarf Farms, supra*. We therefore find that the district court did not err in concluding that the Kobzas failed to meet their burden of proof with respect to the eastern drainageway as well.

(c) Amending Complaint

[15] After all the evidence had been submitted, but before closing arguments were due, the Kobzas moved for leave to file a fourth amended complaint. They wanted to amend their complaint to add a paragraph stating that injunctive relief was necessary because they have no adequate remedy at law. The district court denied the motion, determining that because the case had been submitted to the court, it was too late for any further amendments. Because we have concluded that the Kobzas failed to prove they were entitled to injunctive relief, we need not address this assignment of error. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

*Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

### 2. Cross-Appeal

#### (a) Damages for Loss of Trees

The Bowerses argue that the district court erred in failing to award damages for the loss of their trees. Melvin Bowers testified that a willow tree, a spruce tree, and a bush died after the southwest corner of their property was flooded by water piped from the Kobzas' dewatering well. A neighbor of the parties who previously owned a tree business testified as to the cost of replacing the trees. However, the district court determined that there was no expert opinion as to the "'cause of death'" of the trees and noted that the only evidence as to the reason for the trees' demise was given by Melvin Bowers himself. Because he is not qualified as an expert in order to give a credible opinion, the district court found that the Bowerses' failure to present evidence as to the reason for the loss of trees was fatal to their recovery. We agree that expert testimony was required to establish the cause of the trees' death.

In *Lesiak v. Central Valley Ag Co-op*, 283 Neb. 103, 808 N.W.2d 67 (2012), the Nebraska Supreme Court reversed the trial court's decision to direct a verdict in the defendant's favor on the basis that the plaintiff failed to prove causation and damages. The plaintiff sued the defendant for damage to corn crops and called an agronomist as an expert witness at trial. The agronomist explained that he was able to determine the cause of the damage from reviewing the crop residue and root systems and explained his opinion that an improperly high rate of application of herbicide was the cause of the damage. On appeal, the Supreme Court concluded that the record contained evidence explaining the biological mechanism by which the damage could be caused and that thus, there was sufficient evidence from which the jury could have found the defendant's actions caused the plaintiff's damage. *Id*.

In the present case, however, the Bowerses failed to present any scientific evidence establishing the cause of the damage to their trees. The only evidence regarding causation was Melvin Bowers' testimony that the trees "died from all the water." This was insufficient to establish the causal link between excessive water and the loss of the trees.

Because the Bowerses failed to designate an expert witness to opine as to causation, they failed to present sufficient evidence proving the cause of the loss of their trees. Therefore, the district court did not err in denying their request for damages.

(b) Injunction

The Bowerses claim that the district court erred in failing to enjoin the Kobzas from pumping ground water onto the Bowers property. We disagree.

[16-19] An injunction is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury. *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004). Stated otherwise, injunctive relief should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *Id*. As an injunction is an extraordinary remedy, it is available in the absence of an adequate remedy at law and where there is a real and imminent danger of irreparable injury. *Id*. An injury is irreparable when it is of such a character or nature that the party injured cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard. *Id*.

In the present case, the Bowerses argue that it is not the prospect of damage to their land that requires the injunction, but, rather, it is the recurring waste of ground water by the Kobzas in violation of the public policy of the State. See *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 799, 140 N.W.2d 626, 636 (1966) (underground waters are part of waters referred to in Nebraska Constitution as

"natural want," and waste of such waters as natural resource is against public policy). The Bowerses have failed to prove that an injunction is appropriate, however, because there is no real and imminent danger of irreparable damage. The Kobzas have not pumped ground water via their dewatering well since 2010; thus, an injunction is not necessary to prohibit them from doing something they have not done for several years. Consequently, we find no error in the district court's denial of the Bowerses' request for injunctive relief.

### (c) Court Costs

[20] The Bowerses assert that the district court erred in failing to award court costs as part of its judgment in their favor. We agree that under Neb. Rev. Stat. § 25-1708 (Cum. Supp. 2014), a prevailing plaintiff in actions for the recovery of money only or for the recovery of specific real or personal property shall be allowed costs. Likewise, Neb. Rev. Stat. § 25-1710 (Reissue 2008) provides for the recovery of costs to a defendant upon a judgment in his favor for the actions listed in § 25-1708. However, the Bowerses did not prevail as plaintiffs in their counterclaim for money damages for the loss of their trees and the Kobzas' action was one for injunction, not for a monetary judgment or for the recovery of real or personal property. Therefore, they are not entitled to recover court costs, and the district court did not err in denying their request.

## VI. CONCLUSION

For the foregoing reasons, we affirm the decision of the district court.

Affirmed.

**Nebraska Court of Appeals**
I attest to the accuracy and integrity of this certified document.
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# In re Change of Name of Douglas David Pattangall. Douglas David Pattangall, appellant, v. State of Nebraska, appellee.

868 N.W.2d 816

Filed August 11, 2015. No. A-14-745.

1. **Affidavits: Appeal and Error.** A district court's denial of in forma pauperis under Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court.
2. **Constitutional Law: Judgments.** Except in those cases where the denial of in forma pauperis status would deny a defendant his or her constitutional right to appeal in a felony case, Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008) allows the court on its own motion to deny in forma pauperis status on the basis that the legal positions asserted by the applicant are frivolous or malicious, provided that the court issue a written statement of its reasons, findings, and conclusions for denial.
3. **Actions: Words and Phrases.** A frivolous legal position pursuant to Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) is one wholly without merit, that is, without rational argument based on the law or on the evidence.
4. **Statutes.** Where general and special provisions of statutes are in conflict, the general law yields to the special provision or more specific statute.
5. **Judgments: Records: Appeal and Error.** Where the record demonstrates that the decision of the trial court is ultimately correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.

Appeal from the District Court for Johnson County: Daniel E. Bryan, Jr., Judge. Affirmed.

Douglas David Pattangall, pro se.

Douglas J. Peterson, Attorney General, and Blake E. Johnson for amicus curiae State of Nebraska.

Moore, Chief Judge, and Pirtle and Bishop, Judges.

Moore, Chief Judge.

Douglas David Pattangall filed a petition for name change in the district court for Johnson County. He moved to proceed in forma pauperis, and the district court denied the motion on the ground that the petition asserted reasons that were frivolous and meritless. Pattangall appeals, and we affirm.

## FACTUAL BACKGROUND

Pattangall is an inmate incarcerated at the Tecumseh State Correctional Institution. On August 22, 2014, he filed a pro se petition for name change in the district court for Johnson County. Pattangall alleged that he sought to change his name to Adar ben-David for religious reasons. Pattangall moved the district court to proceed with the name change in forma pauperis.

The district court denied Pattangall's motion to proceed in forma pauperis on the same day the motion was filed with the court. The court stated that it denied the motion for the reason that Pattangall's petition asserted reasons that were frivolous and meritless.

Pattangall has timely appealed.

## ASSIGNMENTS OF ERROR

Pattangall assigns that the district court erred in denying his motion to proceed in forma pauperis.

## STANDARD OF REVIEW

[1] A district court's denial of in forma pauperis under Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court. See *Gray v. Kenney*, 290 Neb. 888, 863 N.W.2d 127 (2015).

Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Schaffer v. Cass County*, 290 Neb. 892, 863 N.W.2d 143 (2015).

## ANALYSIS

[2,3] Applications to proceed in forma pauperis are governed by § 25-2301.02.

> Except in those cases where the denial of in forma pauperis status "would deny a defendant his or her constitutional right to appeal in a felony case," § 25-2301.02(1) allows the court "on its own motion" to deny in forma pauperis status on the basis that the legal positions asserted by the applicant are frivolous or malicious, provided that the court issue "a written statement of its reasons, findings, and conclusions for denial."

*Peterson v. Houston*, 284 Neb. 861, 866, 824 N.W.2d 26, 32 (2012), quoting *Cole v. Blum*, 262 Neb. 1058, 637 N.W.2d 606 (2002). A frivolous legal position pursuant to § 25-2301.02 is one wholly without merit, that is, without rational argument based on the law or on the evidence. *Id*.

In this case, Pattangall sought to change his name pursuant to Neb. Rev. Stat. § 25-21,271 (Cum. Supp. 2014). Section 25-21,271 requires a person who desires a name change to file a petition in the district court of the county in which the person is a resident. The petition must set forth

> (a) that the petitioner has been a bona fide citizen of such county for at least one year prior to the filing of the petition, (b) the address of the petitioner, (c) the date of birth of the petitioner, (d) the cause for which the change of petitioner's name is sought, and (e) the name asked for.

§ 25-21,271(1). Pattangall's petition for name change alleged the following:

> 1. [Pattangall's] current address is 2725 No. Hwy 50, Tecumseh, Johnson County, Nebraska.

> 2. [Pattangall] has been a resident of Johnson County, Nebraska for more than one year prior to the filing of this Petition.
>
> 3. [Pattangall's] current name is Douglas David Pattangall.
>
> 4. [Pattangall's date of birth].
>
> 5. [Pattangall] seeks to have the name of Adar ben-David.
>
> 6. [Pattangall] seeks to have his name changed for religious reasons. [Pattangall] seeks to cast off the last vestiges of Christianity and fully identify with his ethnic ancestry, as well as manner of faith.

Comparing Pattangall's petition to the statutory elements, it is clear his petition complies with the statute.

Even though Pattangall's petition for name change is sufficient in form to comply with the statute, the district court denied Pattangall's motion to proceed in forma pauperis because it determined his position to be legally frivolous and meritless. The State, appearing in this case as amicus curiae, contends the court reached the correct decision even though it disagrees with the court's reasoning. The State contends that Nebraska law does not allow a district court to grant leave to proceed in forma pauperis for a name change proceeding. We agree with the State's position.

Two statutory provisions, as applied to a name change application, are in conflict. The general in forma pauperis rule, found in Neb. Rev. Stat. § 25-2301.01 (Reissue 2008), states:

> Any county or state court, except the Nebraska Workers' Compensation Court, may authorize the commencement, prosecution, defense, or appeal therein, of a civil or criminal case in forma pauperis. An application to proceed in forma pauperis shall include an affidavit stating that the affiant is unable to pay the fees and costs or give security required to proceed with the case, the nature of the action, defense, or appeal, and the affiant's belief that he or she is entitled to redress.

But, as the State demonstrates in its brief, Neb. Rev. Stat. § 25-21,273 (Reissue 2008) is a more specific statute which requires a petitioner seeking a name change to satisfy all of the costs for the proceedings. The pertinent part of § 25-21,273 reads, "All proceedings under sections 25-21,270 to 25-21,272 shall be at the cost of the petitioner or petitioners, for which fee-bill or execution may issue as in civil cases."

[4] Where general and special provisions of statutes are in conflict, the general law yields to the special provision or more specific statute. *Schaffer v. Cass County*, 290 Neb. 892, 863 N.W.2d 143 (2015). In this circumstance, the Legislature has made a specific provision that the cost of name change proceedings is to be borne by the petitioner. The general rule regarding in forma pauperis status yields to this more specific provision.

[5] We conclude that because a petitioner for a name change is statutorily required to pay for the cost of all proceedings, the district court properly denied Pattangall's application to proceed in forma pauperis. Where the record demonstrates that the decision of the trial court is ultimately correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. See *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005).

## CONCLUSION

The district court did not err when it denied Pattangall's application to proceed in forma pauperis.

Affirmed.

Nebraska Court of Appeals
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# Irene Joan Orquia Catlett, appellee, v. Jeffrey Paul Catlett, appellant.

869 N.W.2d 368

Filed August 18, 2015. No. A-14-741.

1. **Divorce: Appeal and Error.** An appellate court's review of a trial court's judgment in dissolution proceedings is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion.
2. ____: ____. Upon an appellate court's de novo review on the record in dissolution proceedings, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Divorce: Jurisdiction: Appeal and Error.** The standard of review in an appeal concerning a jurisdictional issue in an action for dissolution of marriage is the same standard for appellate review of any other judgment in a dissolution action.
4. **Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent of the trial court's decision.
5. **Divorce: Actions: Domicile: Intent.** Pursuant to Neb. Rev. Stat. § 42-349 (Reissue 2008), in order to maintain an action for divorce in Nebraska, one of the parties must have had actual residence in this state with a bona fide intention of making this state his or her permanent home for at least 1 year prior to the filing of the complaint.
6. **Divorce: Domicile: Jurisdiction.** Satisfaction of the residency requirement in Neb. Rev. Stat. § 42-349 (Reissue 2008) is required to confer subject matter jurisdiction on a district court hearing a dissolution proceeding.
7. **Jurisdiction: Words and Phrases.** Jurisdiction is defined as a court's power or authority to hear a case.

8. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.
9. **Judgments: Jurisdiction.** A judgment entered by a court which lacks subject matter jurisdiction is void.
10. **Judgments: Jurisdiction: Collateral Attack.** A void judgment entered by a court which lacks subject matter jurisdiction may be attacked at any time in any proceeding.
11. **Divorce: Actions: Domicile: Words and Phrases.** The language of Neb. Rev. Stat. § 42-349 (Reissue 2008) requiring an "actual residence in this state" means that one party is required to have a bona fide domicile in Nebraska for 1 year before commencement of a dissolution action.
12. **Domicile: Intent: Words and Phrases.** Domicile is obtained only through a person's physical presence accompanied by the present intention to remain indefinitely at a location or site or by the present intention to make a location or site the person's permanent or fixed home.
13. **Domicile.** Once established, domicile continues until a new domicile is perfected.
14. **Property Division.** The purpose of a property division is to distribute the marital assets equitably between the parties.
15. **Divorce: Alimony.** A court entering a decree in a dissolution proceeding may order alimony under Neb. Rev. Stat. § 42-365 (Reissue 2008) as may be reasonable with regard to the listed statutory factors.
16. **Alimony: Property Division.** While the criteria for reaching a reasonable award of alimony overlap with the criteria for dividing property reasonably, the two serve different purposes and are considered separately.
17. **Alimony.** In addition to the statutory factors, a trial court awarding alimony also considers the income and earning capacity of each party, as well as the general equities of each situation.
18. **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.
19. **Divorce: Child Support.** The Nebraska divorce statutes do not impose a duty upon any individual other than a parent to pay for the support of minor children.
20. **Child Support: Rules of the Supreme Court.** The purpose of 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.

21. **Affidavits: Breach of Contract.** An affidavit of support signed as part of a federal immigration process is an independent contract that may be enforced separately under a breach of contract theory.
22. **Parent and Child.** A parenting plan shall serve the best interests of the child.
23. **Parent and Child: Visitation.** A reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent.
24. **Visitation.** There is not a certain mathematical amount of visitation that is considered reasonable; the determination of reasonableness is to be made on a case-by-case basis.
25. **Attorney Fees.** An award of attorney fees depends on multiple factors including the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.

Appeal from the District Court for Nemaha County: Daniel E. Bryan, Jr., Judge. Affirmed in part, and in part vacated.

Matt Catlett for appellant.

Angelo M. Ligouri, of Ligouri Law Office, for appellee.

Irwin, Inbody, and Riedmann, Judges.

Riedmann, Judge.

## INTRODUCTION

Jeffrey Paul Catlett appeals from a decree of the district court for Nemaha County, Nebraska, dissolving his marriage to Irene Joan Orquia Catlett and issuing further orders in connection with that dissolution. Jeffrey argues that the district court lacked subject matter jurisdiction over the dissolution proceeding and abused its discretion in its determinations regarding property, support, and children. We affirm the decision of the district court on all issues with the exception of its award of child support and health insurance for Jeffrey's ex-stepdaughter, which award we vacate.

## BACKGROUND

Jeffrey and Irene met in Kuwait in 2010. Jeffrey is an American citizen and contracts with a company in Kuwait to work overseas. Irene is a Filipino national who moved to Kuwait in 1997. They were married in April 2011. The parties' son, Jeffrey Paul Catlett II (J.P.), was born in December 2011. For a period of time, Jeffrey and Irene resided together in Kuwait. In December 2012, Irene moved to Jeffrey's house in Auburn, Nebraska, with J.P. and her daughter from a prior relationship. In order to facilitate this move to the United States, Jeffrey sponsored the visas for Irene and her daughter, which included contracting with the federal government and promising to maintain them at an income level of at least 125 percent of the poverty threshold. Irene filed a complaint for dissolution of marriage in the district court for Nemaha County on June 13, 2013.

*Trial Evidence of Jeffrey's Domicile.*

In the dissolution complaint, Irene alleged that Jeffrey had been a resident of Nebraska for more than 1 year prior to the filing and that "[f]or more than one (1) year last past and during that time [he] has had a bona fide intention of making the State of Nebraska his home and place of residence." Jeffrey admitted the above residency statement in his answer and counterclaim and further affirmatively stated that he was "a resident of Auburn, Nemaha County, Nebraska, and has been a resident of the State of Nebraska for more than one year prior to the filing of" the counterclaim. He further identified the Auburn address for both himself and Irene, with a notation that he was currently employed overseas in Kuwait.

At trial, Irene testified that Jeffrey works in Kuwait but is a resident of Nemaha County. Jeffrey did not contest this testimony at trial. Additionally, when his counsel asked, "Okay. And we've heard some testimony that you — your permanent residence is still Auburn, Nebraska; is that — ," he answered, "I have two residences: Here and Kuwait."

Although residency was not a contested issue at trial, evidence offered for other purposes revealed that Jeffrey purchased a house in Auburn in July 2009 which he continues to maintain and plans to maintain in the future. While Jeffrey was in Kuwait, he maintained a bank account in Auburn and his cousin held a financial power of attorney for him so she could take care of certain affairs of his in Auburn through this account. Jeffrey's tax records indicate that he was present in the United States for 36 days in 2012, 21 days in 2011, and 60 days in 2010. He listed on his tax returns that he was a Kuwait resident full year, lived in rental housing in Kuwait, and entered Kuwait with a permanent resident visa. The tax records also reflect that he maintained a home in the United States while living abroad. In the paperwork sponsoring Irene's and her daughter's visas, Jeffrey listed his house in Auburn as his mailing address, did not list a place of residence different from his mailing address, and listed his country of domicile as Kuwait. In Jeffrey's proposed parenting plan in this proceeding, he stated that although he "works overseas he has vacation time from work when he returns to Nebraska." He proposed spending all of his vacation time from arriving at the airport to departing as parenting time with J.P. in Nebraska.

*Property.*

The evidence revealed that Jeffrey has maintained his employment for the entire time of the parties' marriage and that his average monthly income exceeds $13,000. Since Irene moved to the United States to act as a stay-at-home mother to J.P., to her daughter, and to Jeffrey's son from a prior relationship, Irene has not worked, except for a 1-week job through a "temp" agency. During the marriage, the parties purchased a Chevrolet Tahoe. Other property of the parties includes funds in several bank accounts in Jeffrey's name. The parties also have debts of over $150,000, including credit cards and personal loans in Jeffrey's name. During the

marriage, Irene had access to only one credit card, with an outstanding balance of under $3,000 at the time of trial.

*Posttrial Proceedings.*

Following trial, the district court entered a decree and order dissolving the parties' marriage. In the decree, the court specifically found that it had jurisdiction over the subject matter of the action. It awarded the legal and physical custody of J.P. to Irene with parenting time awarded to Jeffrey, ordered Jeffrey to pay child support and health insurance for both J.P. and Irene's daughter along with alimony and attorney fees to Irene, and provided for a division of property.

Jeffrey timely filed a motion to vacate or modify, arguing for the first time that he was not a Nebraska resident and that the court lacked subject matter jurisdiction. Jeffrey also alleged deficiencies in the substance of the court's award as it related to support for Irene's daughter, alimony, and the division of property. Jeffrey also moved for a new trial.

At a hearing on Jeffrey's motions, the district court received affidavits from both parties on the issue of jurisdiction. In his affidavit, Jeffrey blamed his attorney for his prior pleadings asserting Nebraska residency and claimed that he in fact was a resident of Kuwait at all relevant times.

According to Jeffrey's affidavit, he moved from Delray Beach, Florida, to Auburn in 2003 to look after his ill mother. He stayed with his cousin during this time. He resided in Auburn until May 2004, when he accepted a position as a contractor supporting U.S. troops in Iraq. In February 2005, Jeffrey moved from Iraq to Kuwait, and he has lived there since. His cousin and her son lived in Jeffrey's Auburn house after he purchased it. Jeffrey stated that he has qualified as a bona fide resident of Kuwait for tax purposes since 2005. He claimed he has never voted in Nebraska, although Irene asserted without evidence in her affidavit that he is a registered voter in Nebraska. She also stated, without supporting

evidence, that Jeffrey maintains a driver's license and "conceal and carry permit" in Nebraska.

The court denied Jeffrey's motions, and he timely appealed.

## ASSIGNMENTS OF ERROR

Jeffrey assigns that the district court erred in its (1) exercise of subject matter jurisdiction, (2) division of property, (3) award of alimony to Irene, (4) determination of child support, (5) award of parenting time to Jeffrey, (6) award of attorney fees to Irene, and (7) failure to grant Jeffrey's motions to modify or vacate or for a new trial.

## STANDARD OF REVIEW

[1,2] An appellate court's review of a trial court's judgment in dissolution proceedings is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. See *Huffman v. Huffman*, 232 Neb. 742, 441 N.W.2d 899 (1989). In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *id.*

[3,4] The standard of review in an appeal concerning a jurisdictional issue in an action for dissolution of marriage is the same standard for appellate review of any other judgment in a dissolution action. *Id.* When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent of the trial court's decision. See *Rozsnyai v. Svacek*, 272 Neb. 567, 723 N.W.2d 329 (2006).

## ANALYSIS

*Subject Matter Jurisdiction.*

Jeffrey argues that the district court lacked subject matter jurisdiction over these proceedings because neither party had

an actual residence in Nebraska with a bona fide intention of making it his or her permanent home for at least 1 year prior to the filing of the action. Based upon our de novo review of the record, we conclude that the district court had subject matter jurisdiction under Neb. Rev. Stat. § 42-349 (Reissue 2008) because evidence in the record supports a finding that Jeffrey was domiciled in Nebraska for more than 1 year before the filing of the dissolution complaint.

[5,6] Section 42-349 provides that in order to maintain an action for divorce in Nebraska, one of the parties must have had "actual residence in this state with a bona fide intention of making this state his or her permanent home for at least one year prior to the filing of the complaint." See *Rozsnyai v. Svacek, supra*. Satisfaction of the residency requirement in § 42-349 is required to confer subject matter jurisdiction on a district court hearing a dissolution proceeding. Neb. Rev. Stat. § 42-351 (Reissue 2008); *Rozsnyai v. Svacek, supra*.

[7-10] Jurisdiction is defined as a court's power or authority to hear a case. *Kuhlmann v. City of Omaha*, 251 Neb. 176, 556 N.W.2d 15 (1996). Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties. *Id.* A judgment entered by a court which lacks subject matter jurisdiction is void. *Id.* It is a longstanding rule in Nebraska that such a void judgment may be attacked at any time in any proceeding. *Id.* This is true even if a party attacks subject matter jurisdiction only after being displeased with the decision of a district court. See *Paulsen v. Paulsen*, 11 Neb. App. 582, 658 N.W.2d 49 (2003) (vacating judgment for lack of subject matter jurisdiction where mother raised jurisdictional issue on appeal only after custody was awarded to child's father).

[11-13] The Nebraska Supreme Court has interpreted the language of § 42-349 requiring an "actual residence in this state" to mean that one party is required to have a "'bona fide domicile'" in Nebraska for 1 year before commencement of a dissolution action. *Huffman v. Huffman*, 232 Neb.

742, 748, 441 N.W.2d 899, 904 (1989). Domicile is obtained only through a person's physical presence accompanied by the present intention to remain indefinitely at a location or site or by the present intention to make a location or site the person's permanent or fixed home. *Id.* The absence of either presence or intention thwarts the establishment of domicile. *Id.* Once established, domicile continues until a new domicile is perfected. See *State v. Jensen*, 269 Neb. 213, 691 N.W.2d 139 (2005). In some cases, persons with significant physical absences from Nebraska in the year preceding a petition for dissolution may qualify as Nebraska domiciliaries for jurisdictional purposes. See *Rector v. Rector*, 224 Neb. 800, 401 N.W.2d 167 (1987) (finding jurisdiction where truckdriver who spent majority of his time driving cross country was raised in North Platte, Nebraska, considered it his home, did his banking there, and testified to several years of residence before filing petition for divorce).

Irene does not satisfy § 42-349 because she resided in Nebraska for only about 6 months before filing her petition, and so jurisdiction is dependent upon Jeffrey's domicile. Although the record is clear that Jeffrey was present in the United States for only 36 days in 2012, the year preceding the dissolution petition, we must consider all of the evidence to determine whether Jeffrey established and maintained a Nebraska domicile in the years before this action was filed. See *Rector v. Rector, supra*.

Evidence that Jeffrey formed the intent to make Nebraska his permanent home exists from the time period beginning when he bought a home in Auburn in July 2009. Jeffrey's cousin lived in his Auburn home and took care of some of his affairs from Nebraska with a power of attorney. Jeffrey used the address of the Auburn home for several official purposes, including filing tax and immigration forms. Jeffrey disclosed on his tax forms that he "maintain[ed] a home in the United States" at the Auburn house address. He also held a bank account in Auburn.

Further, Jeffrey's pleadings, testimony, and representations to the district court in this case serve as evidence that he intended to make Nebraska his permanent or fixed home. See *State ex rel. Rittenhouse v. Newman*, 189 Neb. 657, 204 N.W.2d 372 (1973) (holding that testimony as to intent is entitled to great weight in domicile determinations). In his answer and counterclaim, Jeffrey admitted that for more than a year he had held a "bona fide intention of making the State of Nebraska his home and place of residence." Jeffrey listed the Auburn home as his mailing address in his pleadings and stated multiple times that he was a Nebraska resident, despite being currently employed overseas. In his proposed parenting plan, Jeffrey represented that he returns to Nebraska during vacation from his work and proposed spending all of his vacation time parenting J.P. in Nebraska. From this evidence, we determine that Jeffrey formed the intent to make Nebraska his fixed home more than 1 year before the petition for dissolution of marriage was filed.

Although Jeffrey was working in Kuwait during this time period, he returned to Nebraska during vacation from work. His physical presence in Nebraska and consistently returning to the state, combined with the intent to make it his permanent home, were sufficient for Jeffrey to establish Nebraska as his domicile. See *Huffman v. Huffman*, 232 Neb. 742, 441 N.W.2d 899 (1989). Jeffrey testified to the length of this domicile when he admitted in pleadings that he had been a resident for more than 1 year with the requisite intent. Accordingly, the trial court had jurisdiction under § 42-349 and this assignment of error is without merit.

*Division of Property.*

[14] Jeffrey next argues that the trial court abused its discretion in its division of property. The purpose of a property division is to distribute the marital assets equitably between the parties. Neb. Rev. Stat. § 42-365 (Reissue 2008); *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

Under § 42-365, the equitable division of property is a three-step process. *Gangwish v. Gangwish, supra*. The first step is to classify the parties' property as marital or nonmarital. *Id.* The second step is to value the marital assets and marital liabilities of the parties. *Id.* The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Gangwish v. Gangwish, supra*. The principles and factors to be considered in reaching an equitable division 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.

§ 42-365.

At the time of the marriage, Jeffrey owned a home in Auburn. During the marriage, certain improvements were made to the home. The court concluded that the home was a premarital asset and that the improvements were made with premarital funds and therefore constituted property belonging to Jeffrey. The court determined, however, that $3,000 of marital funds were used to pay down the mortgage, and it awarded one-half of that amount to Irene; Jeffrey argues the court erred in making this award, because there was no evidence that Irene contributed financially to such payment.

Despite the district court's award of all personal property to Jeffrey with the exception of Irene's wedding and engagement rings, her and her daughter's clothing, and her daughter's bedroom set, Jeffrey argues that the court erred in ordering an equalization payment of $13,500. The district court arrived at this amount by awarding Irene one-half ($2,000) of the equity in the family vehicle and approximately one-third ($10,000) of the parties' bank account, in addition to the

$1,500 mortgage contribution previously discussed. Jeffrey argues that because he was awarded all of the debt, he should not have been assessed an equalization payment.

Jeffrey seems to argue that because Irene did not contribute financially to the household, she should not have been given anything beyond the few personal items awarded. While it is true that Irene was not employed outside the home while in Auburn, she was responsible for caring for J.P. and maintaining the residence while Jeffrey was in Kuwait, at Jeffrey's direction. Until moving to Auburn, she was gainfully employed in Kuwait, and she gave up that employment to move to the United States. Her cultural barriers and instructions from Jeffrey to "be a stay-at-home mother" prevented her from obtaining outside employment. Irene's contributions to the marriage are relevant and must be taken into consideration. See *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998).

Jeffrey also argues that funds in his Kuwait bank account should be considered nonmarital. At the time of the divorce, this account held in excess of $28,000. These funds came from Jeffrey's salary, which was deposited directly into this account, as well as a loan that Jeffrey took from the bank. Jeffrey's arguments that these funds are nonmarital seem to be that Irene did not contribute to the account and that he planned to use the loan to pay debts after the divorce was finalized. However, although Jeffrey testified that he planned to use the loan funds postmarriage, Jeffrey listed the debt from the loan as a marital debt, commingled the funds with his salary, and spent the majority of the loan on general expenses indistinguishable from other marital expenses before the marriage ended. Therefore, we do not find error in the trial court's determination that the remaining loan funds were marital property. Additionally, this account held at least some funds derived from Jeffrey's salary during the marriage. To the extent that Jeffrey argues Irene is not entitled to any portion of his income because she did not provide income, the assertion

is without merit. As described above, Irene's contributions to the marriage merit consideration even if she did not contribute financially to this account. See *id.* Applying the factors set forth in § 42-365, we find no abuse of discretion in the court's division of property and allocation of debt.

*Alimony.*

[15-18] A court entering a decree in a dissolution proceeding may order alimony under § 42-365 "as may be reasonable" with regard to the same factors listed above in the division of property section. While the criteria for reaching a reasonable award of alimony overlap with the criteria for dividing property reasonably, the two serve different purposes and are considered separately. § 42-365. In addition to the property division factors listed above, a trial court awarding alimony also considers the income and earning capacity of each party, as well as the general equities of each situation. See *Becker v. Becker*, 20 Neb. App. 922, 834 N.W.2d 620 (2013). 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. *Id.*

The Nebraska Supreme Court has recognized the potential disruption that occurs when someone immigrates for a marriage and has consequently upheld an award of alimony in this situation, in even short marriages. See *Anderson v. Anderson*, 290 Neb. 530, 861 N.W.2d 113 (2015) (affirming alimony of $600 for 60 months following marriage of less than 3 years). In the present case, the parties had a short marriage, which weighs against a lengthy award of alimony. However, the other statutory and case law factors support the district court's award.

Although Jeffrey contributed the heavy majority of the income to the marriage, Irene contributed to the care of the parties' child, her child, and Jeffrey's child from a prior marriage. Irene also changed her employment status during the

marriage in reliance on Jeffrey's support when she left Kuwait, where she was employed, to move to the United States as a stay-at-home mother. Jeffrey currently enjoys considerably greater earning capacity than Irene. Irene will also have a unique need of support as she searches for work in a new country as a custodial parent. The district court properly considered these factors. Given our de novo review of the record pertaining to the relevant legal considerations, we find no abuse of discretion in the district court's award of alimony of $1,500 per month for 12 months. This award cannot be considered so untenable as to deprive Jeffrey of a substantial right. See *Becker v. Becker, supra*.

*Child Support.*

Jeffrey next assigns that the district court erred in awarding 6 months of child support and health insurance for his stepdaughter, Irene's daughter. Because an ex-stepfather has no duty to support a stepchild after he has divorced the child's mother unless he stands in loco parentis to the child, we vacate the award of child support and health insurance for Irene's daughter.

[19] The Nebraska divorce statutes do not impose a duty upon any individual other than a parent to pay for the support of minor children. *Weinand v. Weinand*, 260 Neb. 146, 616 N.W.2d 1 (2000). In the absence of a statute, the common law does not impose a liability for support upon stepparents except in some instances where the stepparent voluntarily takes the stepchild into his or her family and assumes, in loco parentis, the obligations incident to a parental relationship. *Id.* Additionally, parties in a proceeding to dissolve a marriage cannot control by agreement the disposition of matters pertaining to minor children. *Id.*

In *Weinand*, the parties agreed that the husband stood in loco parentis to his stepdaughter and would pay child support in an amount determined by the court. On appeal, the Nebraska Supreme Court noted that the parties could not stipulate to matters involving minor children, found

that the husband no longer stood in loco parentis to the ex-stepdaughter, and vacated the district court's award of child support. *Id.* Although the husband in *Weinand* had acted as a parent to the minor child during the marriage and had obtained visitation since the separation, the court held that at the time of the dissolution, he had lived in a separate residence and had not performed all of the duties and obligations of a parent such as attending to the child's ongoing daily physical and emotional needs. *Id.* The term "in loco parentis" refers to a person who has fully put himself or herself in the situation of a lawful parent by assuming *all* the obligations incident to the parental relationship and who actually discharges those obligations. *Id.*

Here, there is no evidence that Jeffrey stands in loco parentis to Irene's daughter. There is no evidence that Jeffrey has sought even minimal visitation with the child, and certainly no evidence from which we could conclude that he assumed and discharged all of the obligations of parenting her. Accordingly, Nebraska law does not obligate Jeffrey to pay child support for his stepchild.

Jeffrey's agreement at trial to pay child support also does not obligate him under Nebraska law. At trial, Jeffrey submitted a child support calculation including Irene's daughter and agreed during testimony to pay child support. However, as the Nebraska Supreme Court held in *Weinand v. Weinand, supra*, a party's agreement to pay an unspecified amount of child support does not provide a district court with the authority to order support under the statutes or common law of Nebraska. Accordingly, we must vacate the order of child support as it pertains to Irene's daughter.

[20] While Jeffrey does owe Irene's daughter an obligation pursuant to the "I-864EZ" immigration contract form he signed, this contract does not obligate Jeffrey to pay child support under the Nebraska Child Support Guidelines. Further, no breach of contract action was properly before the trial court for enforcement of that contract. Jeffrey sponsored

Irene's daughter as an immigrant to the United States and contractually agreed with the federal government to support her at an income that is at least 125 percent of the federal poverty guidelines for her household size. Although this immigration contract provides an independent basis upon which Jeffrey is obligated to support Irene's daughter, the purpose of the contract and level of support it requires differ from those of the Nebraska Child Support Guidelines. The purpose of the federal immigration affidavit of support is to prevent immigrants from becoming public charges, while the purpose of 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 *Anderson v. Anderson*, 290 Neb. 530, 861 N.W.2d 113 (2015). See, also, *In re Marriage of Dickson*, 337 P.3d 72 (Kan. App. 2014) (unpublished memorandum opinion listed in table of "Decisions Without Published Opinions") (noting that immigration affidavit of support does affect award of spousal support given difference in origin and purpose of each obligation).

[21] As the Nebraska Supreme Court has recognized, an affidavit of support signed as part of a federal immigration process is an independent contract that may be enforced separately under a breach of contract theory. See *Anderson v. Anderson, supra*. A court will not ordinarily order enforcement of an affidavit of support as part of a dissolution proceeding unless one of the parties specifically alleges a breach of contract claim. See *id.* See, also, *Yuryeva v. McManus*, No. 01-12-00988-CV, 2013 WL 6198322 (Tex. App. Nov. 26, 2013) (unpublished memorandum opinion). Although Irene's daughter could seek enforcement of Jeffrey's affidavit of support in a court of law, she did not do so here.

We therefore conclude that Jeffrey's immigration contract is a separately enforceable and independent contract, but is not a basis for requiring him to pay child support. See *Weinand v. Weinand*, 260 Neb. 146, 616 N.W.2d 1 (2000). Given that

the district court's order has its own expiration date and uses the Nebraska Child Support Guidelines for the amount of support ordered, it cannot be said to be enforcing the immigration contract. Further, the immigration contract is between Irene's daughter, Jeffrey, and the federal government and is enforceable by those parties. See 8 U.S.C. § 1183a(a)(1)(B) (2012). Because Irene's daughter is not a party to this action and no breach has been asserted, the trial court's decree ordering child support cannot be construed as enforcement of Jeffrey's contractual obligation.

Similarly, we must vacate the district court's award of health insurance coverage of Irene's daughter. This is a form of support which Jeffrey is not required to provide under Nebraska dissolution statutes or the immigration contract for the reasons discussed above.

*Parenting Time.*

[22-24] Jeffrey argues that the district court erred in awarding him only 4 weeks of visitation with J.P. outside the United States instead of the 12 weeks he proposed. A parenting plan shall serve the best interests of the child. Neb. Rev. Stat. § 43-2929(1) (Cum. Supp. 2014). See 2015 Neb. Laws, L.B. 219. Determination of the best interests of the child includes consideration of the relationship of the minor child to each parent prior to the commencement of the action as well as the general health, welfare, and social behavior of the minor child. Neb. Rev. Stat. § 43-2923 (Cum. Supp. 2014). A reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). There is not a certain mathematical amount of visitation that is considered reasonable; the determination of reasonableness is to be made on a case-by-case basis. See *id*.

In this case, Irene has been the primary caretaker for J.P. during the marriage, and she has been the sole caretaker for

long stretches while she and J.P. lived in Nebraska and Jeffrey worked in Kuwait. She testified to a concern with Jeffrey's taking J.P. to Kuwait because of her inability to travel to Kuwait should an issue arise or J.P. not be returned according to the court order. Jeffrey testified that he had no intention of keeping J.P. in Kuwait against the court order but that he had only 30 days of vacation time to spend in the United States and needed visitation in Kuwait to maintain a relationship with J.P. Jeffrey's proposed parenting plan included 12 weeks of overseas "summer" parenting time, while Irene proposed no overseas parenting time.

Given our review of the record, including the special challenges posed by Jeffrey's work schedule overseas, the disruptions of international travel for a young child, and the relationship J.P. has with his parents, we do not find an abuse of discretion in the district court's award of 4 weeks of summer parenting time outside the United States. This assignment of error is without merit.

*Attorney Fees.*

[25] Jeffrey argues that the district court erred in awarding Irene an additional $5,000 of attorney fees in its decree. An award of attorney fees lies in the discretion of the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004). An award of attorney fees depends on multiple factors including 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. See *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008).

Jeffrey notes that the attorney fees he incurred in this case are significantly higher than those incurred by Irene. This suggests that Irene's expenses are not unreasonable in amount. Jeffrey also argues that litigation costs for both were increased

by Irene's motion to continue the trial. However, the record reflects that the motion for continuance was based on Jeffrey's attorney's providing discovery documents 2 days before trial. Accordingly, the continuance does not influence the equities of the case in favor of either party. Given the disparity in income between the parties, we find no abuse of discretion in the district court's award of attorney fees.

*Failure to Grant Motion to Vacate or Motion for New Trial.*

Jeffrey's only argument that the district court erred in denying his motions is that the court ruled from the bench and did not first take the matter under advisement. He cites no law to support his argument that it is error to rule from the bench, nor do we find any.

## CONCLUSION

We find that the district court had subject matter jurisdiction over the proceedings below, and we find no abuse of discretion in the court's division of property, award of alimony, award of parenting time, or award of attorney fees. The district court's order is affirmed as to these issues. However, we hold that despite Jeffrey's agreements to pay some amount of support for Irene's daughter, his ex-stepchild, the district court did not have the authority to order child support or health insurance for this child. Accordingly, we vacate the judgment as to the order of support and health insurance for Irene's daughter.

Affirmed in part, and in part vacated.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Justin S. Furstenfeld, appellant, v. Lisa B. Pepin, appellee.

869 N.W.2d 353

Filed August 18, 2015. No. A-14-814.

1. **Records: Appeal and Error.** A party's brief may not expand the record.
2. **Appeal and Error.** The purpose of an appellant's reply brief is to respond to the arguments the appellee has advanced against the errors assigned in the appellant's initial brief.
3. **Waiver: Appeal and Error.** Errors not assigned in an appellant's initial brief are thus waived and may not be asserted for the first time in a reply brief.
4. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion.
5. **Contracts.** The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.
6. **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.
7. **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.
8. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

9. **Appeal and Error.** For an appellate court to consider an alleged error, a party must specifically assign and argue it.
10. ____. Appellate courts do not generally consider arguments and theories raised for the first time on appeal.
11. **Rules of Evidence.** Under Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2008), all relevant evidence is admissible unless there is some specific constitutional or statutory reason to exclude such evidence.
12. **Trial: Evidence.** Evidence which is not relevant is not admissible.
13. **Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
14. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
15. **Evidence: Proof.** For evidence to be relevant, all that must be established is a rational, probative connection, however slight, between the offered evidence and a fact of consequence.
16. **Attorney and Client: Presumptions: Proof.** On the issue of an attorney's authority to make statements on behalf of a client, there is a presumption that the attorney has authority and that presumption continues until the want of such authority is established. The burden of proof of such want of authority is upon the party asserting the same.
17. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.
18. **Attorneys at Law: Witnesses.** When a party seeks to disqualify an opposing attorney by calling that attorney as a witness, the court must strike a balance between the potential for abuse and those instances where the attorney's testimony may be truly necessary to the opposing party's case.
19. **Attorneys at Law: Testimony: Proof.** The party moving to disqualify an opposing attorney bears the burden of establishing that the attorney's testimony will be necessary.
20. **Trial: Attorneys at Law: Witnesses: Evidence.** A party seeking to call opposing counsel can prove that counsel is a necessary witness by showing that (1) the proposed testimony is material and relevant to the determination of the issues being litigated and (2) the evidence is unobtainable elsewhere.
21. **Contracts.** A settlement agreement is subject to the general principles of contract law.

22. **Contracts: Compromise and Settlement.** To have a settlement agreement, there must be a definite offer and an unconditional acceptance.
23. **Attorney and Client: Compromise and Settlement.** The decision to settle a lawsuit belongs to the client; because the client bears the risk when settling or refusing to settle a dispute, it is the client, not the lawyer, who should assess whether the risk is acceptable.
24. ____: ____. Although lawyers retain apparent authority to make procedural and tactical decisions through the existence of the attorney-client relationship, a lawyer cannot settle a client's claim without express authority from the client.
25. **Attorney and Client: Compromise and Settlement: Appeal and Error.** Disputes over a lawyer's authority to settle are factual issues to be resolved by the trial court, and an appellate court will not set aside a trial court's factual findings regarding settlement disputes unless such findings are clearly erroneous.
26. **Rules of the Supreme Court: Child Support.** In general, child support payments should be set according to the Nebraska Child Support Guidelines.
27. **Rules of the Supreme Court: Child Support: Stipulations.** Stipulated agreements of child support are required to be reviewed against the Nebraska Child Support Guidelines.
28. ____: ____: ____. If the court approves a stipulation which deviates from the Nebraska Child Support Guidelines, specific findings giving the reason for the deviation must be made.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Affirmed.

Matt Catlett, of Law Office of Matt Catlett, for appellant.

Terrance A. Poppe, Benjamin D. Kramer, and Andrew K. Joyce, of Morrow, Poppe, Watermeier & Lonowski, P.C., L.L.O., for appellee.

Moore, Chief Judge, and Pirtle and Bishop, Judges.

Moore, Chief Judge.

## I. INTRODUCTION

Lisa B. Pepin filed a complaint to modify the parenting time and support provisions of a decree of dissolution. During the ensuing litigation, Pepin and her former husband,

Justin S. Furstenfeld, engaged in settlement negotiations and Pepin believed an oral settlement agreement had been reached. Furstenfeld later refused to sign a stipulation memorializing the oral agreement, and Pepin filed a motion to enforce. The district court granted Pepin's motion to enforce, and Furstenfeld appeals. Finding no merit to Furstenfeld's arguments, we affirm.

## II. FACTUAL BACKGROUND

[1] At the outset, we must pause to observe that Furstenfeld's brief contains no fewer than 18 separate assertions which were not annotated to the record presented to this court. He acknowledges as much at the end of each such statement by noting the assertion is not in the record. Pepin has objected to Furstenfeld's characterization of the factual background of the case and correctly notes that a party's brief may not expand the record. See *State v. Patton*, 287 Neb. 899, 845 N.W.2d 572 (2014). Within our factual background, we will only include those facts which are supported by the record presented to this court.

In December 2010, Pepin and Furstenfeld's marriage was dissolved pursuant to a decree of dissolution. An amended decree was entered on January 21, 2011. While these decrees are not in our record, the district court's order in this proceeding indicates that the initial decree approved the parties' property settlement, custody agreement, and support agreement and that the amended decree corrected errors in two provisions of this agreement. On August 30, Pepin filed an amended complaint for modification of the decree, seeking an increase in Furstenfeld's child support obligation and a modification or suspension of his parenting time with the parties' minor child. The district court originally set a trial date of May 21, 2012, for Pepin's complaint for modification.

On May 16, 2012, Pepin; Pepin's attorney, Terrance Poppe; and Furstenfeld's attorney, Matt Catlett, met at Poppe's office to conduct a telephonic deposition of Furstenfeld. At the

time, Furstenfeld was residing at an out-of-state rehabilitation facility. Instead of conducting a deposition, however, the parties, through their attorneys, engaged in settlement negotiations and an apparent agreement was reached. After reaching this agreement, Poppe and Catlett jointly contacted the district court judge to notify the court of the agreement and to remove the matter from the court's trial calendar. Poppe proceeded to prepare a stipulation containing the terms of the parties' agreement.

Furstenfeld refused to sign the stipulation Poppe prepared. On June 18, 2012, Pepin filed a motion to enforce the settlement agreement. Specifically, her motion stated that she sought to enforce "the oral agreement reached by the parties on May 21, 2012." The court held a hearing on Pepin's motion on April 7, 2014.

At the hearing, Pepin testified that she attended a meeting at her attorney's office on May 16, 2012. During the meeting, Pepin learned from Poppe that Catlett was also present that day in another conference room within the office; Pepin did not personally interact with Catlett. At the end of this meeting, Pepin understood that a solid agreement had been reached and both attorneys were to call the judge and advise the court that the matter had been settled. Pepin further testified that Poppe prepared a stipulation for modification of decree that same day which was consistent with the terms of the oral agreement that had been reached earlier in the day. Over Furstenfeld's objection, the court received a copy of the stipulation into evidence.

The stipulation for modification of decree provided, in pertinent part, that Furstenfeld's child support obligation would increase to $3,000 per month commencing June 1, 2012. The stipulation stated that a Nebraska child support calculation worksheet was attached and incorporated, although the copy of the stipulation received in evidence did not contain the worksheet. The stipulation also provided that Furstenfeld's obligation to pay 80 percent of employment-related daycare

expenses would terminate on May 31, 2012; that he would remain obligated to provide health insurance for the parties' minor child; and that he would also pay the first $480 of any health care expenses for the minor child which were not covered by health insurance and 80 percent of those uncovered expenses thereafter. The stipulation further stated that the minor child's image would not be used for any purpose by Furstenfeld's band and that the child would not attend any of Furstenfeld's concerts without Pepin's prior approval. Other provisions included within the stipulation provided that Furstenfeld would pay $2,500 toward Pepin's attorney fees, that certain orders to show cause would be vacated, and that the parties would not make disparaging or derogatory comments about the other through various means of communication.

Following Pepin's testimony, Poppe called Catlett as a witness to testify in order to provide foundation for an e-mail regarding the oral settlement agreement and to establish that Catlett and Furstenfeld engaged in communications during the May 16, 2012, meeting. Catlett objected to being called as a witness and cited a number of Nebraska authorities which he believed established that an attorney does not have authority to bind a client to an agreement simply because the attorney had been retained by the client. The court overruled the objection and permitted Pepin to question Catlett on a limited basis. After determining it would allow Catlett to testify, the court permitted Furstenfeld to obtain other counsel. Furstenfeld elected to represent himself.

Catlett acknowledged that on May 15, 2012, he sent an e-mail to Poppe which contained the terms on which Furstenfeld offered to settle the case. The next day, Catlett arrived at Poppe's office to conduct a telephonic deposition of Furstenfeld. Catlett confirmed that settlement negotiations ensued, an agreement was reached, and he and Poppe contacted the court to inform it that the matter had been settled. Later that day, Catlett received an e-mail from Poppe's

assistant which stated that it included the stipulation for modification of decree based on the agreement reached that morning. The e-mail further stated that Poppe would "work up" a child support calculation that "matches" the $3,000 figure to attach to the stipulation. Catlett sent the following response to Poppe's assistant:

> I believe this accurately reflects the agreement. I'll send to [Furstenfeld], and once he returns to me the executed original, I will get it to [Poppe]. The trial date has been removed from the judge's calendar, so we're not under a rush, although I think we told the judge we'd get it to him for approval by the end of next week. Neither party will need to appear since we're not changing custody or parenting time.

During his testimony, Catlett also stated that he could not remember whether the attachment to the e-mail was the same document he was reviewing during his testimony. Catlett further remarked that he recalled certain aspects of the stipulation, but did not recall others. However, he did not have any reason to believe that the proposed stipulation entered into evidence was not the same document which was attached to the e-mail on May 16, 2012.

On cross-examination, Catlett stated that his client had not given him the right to sign off on anything. Later in the hearing, Furstenfeld testified that he did not authorize Catlett to make the settlement offer contained in the May 15, 2012, e-mail.

On July 31, 2014, the district court entered an order finding that the parties had entered into a binding settlement agreement on May 16, 2012. The court determined that this agreement unconditionally resolved all material terms of the dispute. The court further found that the proposed stipulation which had been entered into evidence at the hearing accurately reflected the terms of the parties' agreement. Finally, the court approved the terms of the stipulation, finding them to be fair, reasonable, not unconscionable, and in the best

interests of the parties' minor child. The court directed Poppe to prepare an order consistent with the stipulation, including child support calculations, for the court's approval.

On August 29, 2014, the court signed and filed the order Poppe prepared. A child support worksheet was attached to that order.

Furstenfeld has appealed.

## III. ASSIGNMENTS OF ERROR

Furstenfeld assigns four errors. He asserts the district court erred when it (1) received certain exhibits into evidence, (2) permitted Pepin to call Catlett as a witness, (3) sustained Pepin's motion to enforce, and (4) incorporated into its order a child support calculation worksheet which was unsupported by evidence.

[2,3] Furstenfeld also includes an additional assignment of error in his reply brief. For the first time, he assigns as error and argues that the district court should not have permitted Pepin to present oral testimony at the hearing. We will not address this argument because it was not raised in Furstenfeld's initial brief. The purpose of an appellant's reply brief is to respond to the arguments the appellee has advanced against the errors assigned in the appellant's initial brief. *Linscott v. Shasteen*, 288 Neb. 276, 847 N.W.2d 283 (2014). Errors not assigned in an appellant's initial brief are thus waived and may not be asserted for the first time in a reply brief. *Id*.

## IV. STANDARD OF REVIEW

[4] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion. *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014).

[5] The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to

reach an independent, correct conclusion irrespective of the determinations made by the court below. *Strategic Staff Mgmt. v. Roseland*, 260 Neb. 682, 619 N.W.2d 230 (2000).

[6-8] 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. Merchant*, 285 Neb. 456, 827 N.W.2d 473 (2013). 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*. An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id*.

## V. ANALYSIS

### 1. Equitable Estoppel

In the first argument section of his brief, Furstenfeld asserts the district court should have applied the principles of equitable estoppel to overrule Pepin's motion to enforce. He reasons that Pepin effectively withdrew her motion to enforce the May 16, 2012, agreement when she continued to litigate her modification action after filing the motion to enforce. Furstenfeld highlights the fact that Pepin filed numerous motions after her motion to enforce which included an amended motion to take Furstenfeld's deposition, a motion to release Furstenfeld's medical records, a motion regarding parenting time during Christmas 2013, and a motion to suspend Furstenfeld's parenting time. Pepin argues that we should not address this argument because Furstenfeld did not raise the issue of equitable estoppel before the district court.

[9,10] Furstenfeld has not properly preserved this issue for appeal. First, we observe that he does not assign error to this issue in his brief. For an appellate court to consider an alleged error, a party must specifically assign and argue it.

*Melanie M. v. Winterer*, 290 Neb. 764, 862 N.W.2d 76 (2015). Even if we generously assume that this argument somehow relates to one of the four errors Furstenfeld has assigned, this issue was not presented to the district court at the hearing on the motion to enforce. At the hearing, Furstenfeld argued against Pepin's motion to enforce on the ground that Catlett did not have authority to enter into the settlement agreement. Nothing remotely resembling the doctrine of equitable estoppel was raised as an issue at the hearing. As has long been the case, appellate courts do not generally consider arguments and theories raised for the first time on appeal. *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015); *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011); *Tolbert v. Jamison*, 281 Neb. 206, 794 N.W.2d 877 (2011).

### 2. Evidence at Hearing on Motion to Enforce

In his first assigned error, Furstenfeld attacks the district court's evidentiary rulings regarding three separate exhibits. He argues the court should not have received into evidence an e-mail message sent May 15, 2012, from Catlett to Poppe, the proposed stipulation, or a January 2014 letter from Poppe addressed to Catlett. We separately analyze each exhibit below.

#### (a) May 15, 2012, E-mail

At the hearing, Pepin sought to introduce a copy of an e-mail Poppe received from Catlett. This e-mail indicated Furstenfeld's willingness to settle the case and included six settlement terms. Furstenfeld objected to the court's receipt of this exhibit on relevance and hearsay grounds. The district court overruled Furstenfeld's objections and stated that it would receive only the portions of the exhibit which were admissible and only for a limited purpose. On appeal, Furstenfeld maintains his contention that this e-mail was irrelevant and hearsay.

[11-14] Under Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2008), all relevant evidence is admissible unless there is some specific constitutional or statutory reason to exclude such evidence. *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015). Evidence which is not relevant is not admissible. *Id*. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Id*. A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

[15] We find this exhibit to be relevant to the determination of this action. Pepin asserted that she and Furstenfeld reached a settlement agreement; Furstenfeld denied that an agreement had been reached and also argued that Catlett never had authority to enter into a settlement agreement or engage in settlement negotiations. Clearly, this exhibit has some probative value relating to the issue of whether Catlett had authority to enter into a settlement agreement or engage in settlement negotiations. For evidence to be relevant, all that must be established is a rational, probative connection, however slight, between the offered evidence and a fact of consequence. *Griffith v. Drew's LLC*, 290 Neb. 508, 860 N.W.2d 749 (2015). The district court did not abuse its discretion when it determined this exhibit was relevant.

Furstenfeld also claims this e-mail is hearsay because Catlett did not have authority to act as his agent and make statements on his behalf. Neb. Evid. R. 801(4)(b), Neb. Rev. Stat. § 27-801(4)(b) (Reissue 2008), provides in relevant part that a statement is not hearsay if

> [t]he statement is offered against a party and is (i) his own statement, in either his individual or a representative capacity, . . . (iii) a statement by a person authorized by

> him to make a statement concerning the subject, or (iv) a statement by his agent or servant within the scope of his agency or employment . . . .

There is no dispute that Pepin was offering the statements in the e-mail against Furstenfeld.

[16] Since this e-mail was offered against Furstenfeld, the next question is whether the statements made within the e-mail were made by Catlett while he was acting within the scope of his agency or employment. We note that Catlett states within the e-mail that Furstenfeld authorized him to make the offer. However, in his brief, Furstenfeld argues that this statement should have no bearing on the issue of whether Catlett actually had authority to make statements on his behalf. On the issue of an attorney's authority to make statements on behalf of a client, the Nebraska Supreme Court has held that when an attorney appears in a cause, there is a presumption that the attorney has authority and that presumption continues until the want of such authority is established. See, *Lennon v. Kearney*, 132 Neb. 180, 271 N.W. 351 (1937); *Nichols Media Consultants v. Ken Morehead Inv. Co.*, 1 Neb. App. 220, 491 N.W.2d 368 (1992). The burden of proof of such want of authority is upon the party asserting the same. *Id*.

We find no merit to Furstenfeld's arguments that his testimony that Catlett was not authorized to make any statements on his behalf was sufficient to rebut the presumption of such authority. The court's order demonstrates that it determined Furstenfeld's testimony on this issue was not conclusive. Rather, the court found the evidence established that Catlett was authorized to act on his behalf. There was no error in this determination, and this exhibit was not hearsay.

Furstenfeld's arguments relating to the court's receipt of this exhibit in evidence are without merit.

### (b) Proposed Stipulation

Furstenfeld also asserts that the district court should not have received the proposed stipulation into evidence because

it was not relevant. He focuses on the fact that Pepin's motion stated that the parties had reached a settlement agreement on May 21, 2012, whereas she testified at the hearing that the agreement was reached on May 16. Therefore, he argues the proposed stipulation was irrelevant because it did not tend to prove or disprove the fact that the parties reached an agreement on May 21. In response, Pepin states that this discrepancy in date was clearly recognized by the parties at the hearing and that Furstenfeld did not raise this discrepancy as an issue.

Furstenfeld's arguments are not persuasive. It is quite clear from the record that Pepin sought to enforce the settlement agreement she believed the parties reached on May 16, 2012. The date discrepancy was not raised at the hearing, and there is nothing in the record which demonstrates that this discrepancy was material to the outcome of the case. The proposed stipulation exhibit was clearly relevant to the issue of whether the parties had reached an oral settlement agreement prior to trial.

(c) January 16, 2014, Letter

Furstenfeld's final evidentiary challenge relates to the court's receipt of the January 16, 2014, letter Poppe sent to Catlett. In this letter, Poppe stated that he intended to call Catlett as a witness at the hearing on the motion to enforce if Furstenfeld continued to refuse to execute the proposed stipulation. Poppe offered this letter as evidence at the hearing and informed the court that he was offering this letter to reflect that he had attempted to avoid calling Catlett as a witness, but had no other choice. Other than Poppe's statements to the court, Pepin did not provide any other foundation for this exhibit.

[17] For the sake of argument, we will assume that Furstenfeld correctly argues that the court's receipt of this exhibit constituted error on the basis of relevance. However, to constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial

right of a litigant complaining about evidence admitted or excluded. *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012). Furstenfeld cannot show the admission of this letter into evidence prejudiced a substantial right because the district court did not rely upon this exhibit in ruling upon Pepin's motion. In fact, this exhibit is not even mentioned in the court's order. This assigned error is without merit.

### 3. Pepin's Calling Catlett as Witness

Furstenfeld also assigns error to the district court's decision to permit Pepin to call Catlett as a witness at the hearing. He asserts that it was not necessary for Pepin to call Catlett as a witness to prove that an oral agreement was reached. According to Furstenfeld, the court's decision to allow Catlett's testimony and then subsequently rely on that testimony to sustain Pepin's motion "rigged" the game in Pepin's favor. Brief for appellant at 23.

[18-20] When a party seeks to disqualify an opposing attorney by calling that attorney as a witness, the court must strike a balance between the potential for abuse and those instances where the attorney's testimony may be truly necessary to the opposing party's case. See *Beller v. Crow*, 274 Neb. 603, 742 N.W.2d 230 (2007). The party moving to disqualify an opposing attorney bears the burden of establishing that the attorney's testimony will be necessary. *Id*. A party seeking to call opposing counsel can prove that counsel is a necessary witness by showing that (1) the proposed testimony is material and relevant to the determination of the issues being litigated and (2) the evidence is unobtainable elsewhere. *Id*.

The record from the hearing on the motion to enforce reveals that the district court allowed Pepin to question Catlett on a "very limited" basis. Specifically, Pepin sought to establish foundation for the e-mail Catlett sent to Poppe regarding the parties' agreement and to establish that Furstenfeld engaged

in telephone communication with Catlett on May 16, 2012, during the settlement negotiations.

We find no error in the district court's determination to allow Pepin to question Catlett on a limited basis. Catlett's testimony was material to the issues being litigated. Pepin demonstrated to the court that Catlett's testimony would confirm the authenticity of the e-mail sent to Poppe regarding the proposed stipulation and would also establish that Furstenfeld participated in settlement negotiations through telephone communication. The record reveals there was no other witness who could provide this evidence. Because Pepin established that Catlett's testimony was material and relevant to the litigated issues and could not be obtained elsewhere, the district court correctly permitted the questioning.

Furstenfeld also argues that Neb. Rev. Stat. § 7-107 (Reissue 2012) prohibited Catlett from testifying to establish the existence or terms of the agreement. The relevant portion of § 7-107 provides:

> An attorney or counsel has power: . . . (2) to bind his client by his agreement in respect to any proceeding within the scope of his proper duties and powers; but no evidence of any such agreement is receivable except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court . . . .

Furstenfeld contends that the language "statement of the attorney himself" should only apply to statements made in open court that there is an agreement to settle and recitations of the agreement's terms. In other words, he concludes an attorney's testimony is not permitted under the statute. He asserts that Catlett never made such a statement during the hearing.

In support of his arguments, Furstenfeld relies upon two cases, *Heese Produce Co. v. Lueders*, 233 Neb. 12, 443 N.W.2d 278 (1989), and *Luethke v. Suhr*, 264 Neb. 505, 650 N.W.2d 220 (2002). We have closely reviewed these cases

and determine that neither case squarely addresses the issue of whether an attorney's testimony as a witness satisfies the statutory language cited above. *Heese Produce Co.* discusses, among other issues, the failure to object to written correspondence adduced to prove the existence of a settlement agreement. *Luethke* primarily discusses when, and under what circumstances, a lawyer may bind his or her client to a settlement agreement entered into without express authority from the client.

Upon our review, we agree with the district court's conclusion that a settlement agreement may be established by the testimony of the attorney of the party sought to be bound. The plain language of § 7-107 supports such a result. See *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013) (absent statutory indication to contrary, appellate court gives words in statute their ordinary meaning). We further note that attorney testimony was received in *Luethke v. Suhr, supra*, in an attempt to establish the existence of a settlement agreement. This assigned error is without merit.

### 4. Sufficiency of Evidence on Motion to Enforce

In addition to the previous errors discussed above, Furstenfeld also argues there was not sufficient evidence for the district court to sustain Pepin's motion to enforce the agreement. He focuses his discussion on the fact that Pepin could not produce any direct evidence to establish that Furstenfeld had given Catlett express authority to enter into the settlement agreement. We reject this argument.

[21,22] Nebraska case law establishes that a settlement agreement is subject to the general principles of contract law. See *Woodmen of the World Life Ins. Soc. v. Kight*, 246 Neb. 619, 522 N.W.2d 155 (1994). To have a settlement agreement, there must be a definite offer and an unconditional acceptance. *Heese Produce Co. v. Lueders, supra*.

[23-25] Nebraska law is clear that the decision to settle a lawsuit belongs to the client; because the client bears the risk when settling or refusing to settle a dispute, it is the client, not the lawyer, who should assess whether the risk is acceptable. See *Luethke v. Suhr, supra*. Although lawyers retain apparent authority to make procedural and tactical decisions through the existence of the attorney-client relationship, a lawyer cannot settle a client's claim without express authority from the client. *Id*. Disputes over a lawyer's authority to settle are factual issues to be resolved by the trial court, and an appellate court will not set aside a trial court's factual findings regarding settlement disputes unless such findings are clearly erroneous. See *id*.

In this case, the district court's order reviewed the evidence adduced at the hearing and found that Catlett had authority to settle the case on Furstenfeld's behalf. The evidence at the hearing established that Furstenfeld and Catlett were in telephone communication during the negotiations on May 16, 2012. After these negotiations, Catlett and Poppe jointly informed the court, without any qualifications, that the matter had been settled. Thereafter, Catlett sent an e-mail response to Poppe's proposed stipulation in which he stated the proposed stipulation accurately reflected the parties' agreement. Catlett further testified at the hearing that he did not have any reason to believe the proposed stipulation was not the same document he reviewed 2 years prior to the hearing.

The court also specified in its order that it did not find Furstenfeld's testimony determinative on the issue of whether Catlett had been given authority to settle. In effect, this finding was a determination that Furstenfeld's testimony was not as credible as Pepin's evidence.

Having reviewed the record, we conclude the district court did not clearly err in determining that Furstenfeld granted Catlett the necessary authority to settle the modification action. The record contains sufficient evidence for the district court to have sustained Pepin's motion to enforce.

### 5. Child Support

For his final assignment of error, Furstenfeld claims the district court erred when it adopted Poppe's child support calculations in its August 29, 2014, order. He broadly asserts that there is no legal significance to any agreement that purports to establish or modify a child support obligation.

[26-28] In general, child support payments should be set according to the Nebraska Child Support Guidelines. *Anderson v. Anderson*, 290 Neb. 530, 861 N.W.2d 113 (2015). Stipulated agreements of child support are required to be reviewed against the guidelines. *Molina v. Salgado-Bustamante*, 21 Neb. App. 75, 837 N.W.2d 553 (2013). If the court approves a stipulation which deviates from the guidelines, specific findings giving the reason for the deviation must be made. *Id.*

The child support worksheet attached to the August 29, 2014, order shows gross monthly income for Pepin of $1,250 and for Furstenfeld of $35,000; with respective net incomes of $1,101.08 and $22,740.09, for a total of $23,841.17 combined net monthly income. The total obligation of child support for the parties combined net monthly income is $2,201; with the father's share at $2,099. In addition, a "Section 4-203(C) Additional Support Worksheet (Optional)" is attached which sets forth the net monthly combined income above $15,000 at $8,841.17. This worksheet then sets the additional support pursuant to Neb. Ct. R. § 4-203(C) (rev. 2011) at $884.12, resulting in Furstenfeld's final share of $2,943.

Section 4-203(C) of the child support guidelines provides in part:

> [I]f total net income exceeds $15,000 monthly, child support for amounts in excess of $15,000 monthly may be more but shall not be less than the amount which would be computed using the $15,000 monthly income unless other permissible deviations exist. To assist the court and not as a rebuttable presumption, the court may use the amount at $15,000 plus: 10 percent of net income above $15,000 for one, two, and three children; 12 percent of

net income above $15,000 for four children; 13 percent of net income for five children; and 14 percent of net income for six children.

The worksheet adopted by the court complied with the provisions of § 4-203(C) as the additional support was 10 percent of Furstenfeld's net income above $15,000. While there is no evidence in the record regarding the parties' incomes at the time of the amended decree or the hearing on the motion to enforce, the parties agreed in the stipulation that Furstenfeld's child support obligation would be increased to $3,000 and that a child support calculation worksheet would be attached. The child support calculation worksheets attached to the court's order are consistent with the guidelines, and we can find no abuse of discretion in the court's adoption of the stipulation and the child support worksheets.

## VI. CONCLUSION

The district court did not err when it concluded that Pepin and Furstenfeld had reached a settlement agreement. We affirm the court's order.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Kyel Christine Hopkins, appellee, v. Robert Keith Hopkins, appellant.

869 N.W.2d 390

Filed August 25, 2015. No. A-14-790.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **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. **Modification of Decree: Child Custody.** Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
5. **Modification of Decree: Child Custody: Words and Phrases.** A material change of circumstances means evidence that shows that something has occurred which, if the trial court had been aware of the existence of these circumstances initially, would have resulted in the trial court's granting the children's custody, in their best interests, to the other parent.
6. **Modification of Decree: Child Custody: Proof.** Before custody may be modified based upon a material change in circumstances, it must be shown that the modification is in the best interests of the child.
7. ____: ____: ____. The party seeking modification bears the burden of showing a material change of circumstances affecting the best interests of the child.

8. **Modification of Decree: Child Custody: Convicted Sex Offender.** When the grounds for modification of child custody are based on the presence of a registered sex offender residing in a home, such grounds for modification must also be analyzed under the statutory framework found in Neb. Rev. Stat. § 43-2933 (Reissue 2008).
9. ____: ____: ____. Pursuant to Neb. Rev. Stat. § 43-2933(1)(b) and (3) (Reissue 2008), when a person involved in a custody dispute is residing with someone who is required to register as a sex offender under the Sex Offender Registration Act as a result of a felony conviction in which the victim was a minor or as a result of an offense that would make it contrary to the best interests of the child if the person had custody, such cohabitation development shall be deemed a change in circumstances sufficient to modify a previous custody order, unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record.
10. **Modification of Decree: Child Custody: Convicted Sex Offender: Presumptions.** In order to modify custody based on Neb. Rev. Stat. § 43-2933(3) (Reissue 2008), a material change in circumstances need not be established, because the statute creates a statutorily deemed change of circumstances sufficient to warrant a change in custody if a registered sex offender is residing in a parent's home. However, the presumption against custody can be overcome if the court finds there is no significant risk to the children and states its reasons in writing.
11. **Modification of Decree: Child Custody: Convicted Sex Offender: Proof.** If an attempt to change custody is not successful pursuant to Neb. Rev. Stat. § 43-2933 (Reissue 2008), then as to any other grounds for modification alleged, the party seeking the modification in custody bears the burden of showing a material change of circumstances affecting the best interests of the child.

Appeal from the District Court for Phelps County: Terri S. Harder, Judge. Affirmed as modified.

Mindy L. Lester, of Ross, Schroeder & George, L.L.C., for appellant.

Nicholas D. Valle, of Langvardt, Valle & James, P.C., L.L.O., for appellee.

Moore, Chief Judge, and Pirtle and Bishop, Judges.

Bishop, Judge.

Kyel Christine Hopkins and Robert Keith Hopkins were divorced in March 2004. According to the decree dissolving their marriage, Kyel was awarded custody of their minor children, Alexus and Hadley Hopkins. In January 2013, Kyel filed an application to modify the decree, seeking to modify Robert's parenting time. In March 2013, Robert filed a counterclaim seeking legal and physical custody of the children, subject to Kyel's reasonable right of visitation. After a bench trial, the district court filed an order in which it denied Kyel's application to modify and Robert's counterclaim. Robert appeals and claims that pursuant to Neb. Rev. Stat. § 43-2933 (Reissue 2008), the fact Kyel is married to and living with a registered sex offender constitutes a material change in circumstances; that there is a significant risk to the children; and that it is in the children's best interests that he be awarded custody. We affirm as modified.

## BACKGROUND

Kyel and Robert were married in July 1999. They have two children together: Alexus, born in February 1999, and Hadley, born in March 2001. Kyel and Robert were divorced in March 2004. The divorce decree awarded "custody" to Kyel, subject to Robert's reasonable rights of visitation to include every other weekend from 6 p.m. on Friday to 6 p.m. on Sunday and every Tuesday evening from 4 to 7:30 p.m. Robert was ordered to pay child support to Kyel in the amount of $284 per month.

In January 2013, Kyel filed an application to modify, seeking to modify Robert's parenting time.

In March 2013, Robert filed an answer and counterclaim. In his answer, he denied that it was in the children's best interests to decrease his parenting time, but affirmatively alleged that it would be in the children's best interests to increase his parenting time. In his counterclaim, Robert sought legal and physical custody of the children, subject to Kyel's reasonable right of visitation.

A bench trial was held on July 1 and August 1, 2014. A substantial amount of testimony involved Kyel's current husband, Thomas Rott (Tom), and his status as a registered sex offender.

Kyel had lived on a farm near Glenvil, Nebraska, for 3 to 4 years prior to trial. She worked as a "CNA" and "med aide" in Blue Hill, Nebraska; her shift was from 6 a.m. to 2:15 p.m. (she did not specify which days of the week). In addition to Alexus and Hadley, Kyel has two other daughters, who are not Robert's.

Kyel testified that she has known Tom for approximately 5 years. Kyel and Tom (along with Alexus, Hadley, and Kyel's two other daughters) moved in together in September 2011. Kyel and Tom were married in June 2012. Kyel testified that she knew about Tom's history as a sex offender before she moved in with him.

Tom testified that he was incarcerated from 2003 to 2007 for sexually assaulting his stepdaughter during a prior marriage. Tom testified that while he was incarcerated at the penitentiary, he took "GOLF 1, 2, and 3" ("GOLF 3" was specifically for sex offenders). He said that "GOLF is a program where you start looking at your thought processes, patterns, looking at your thinking distortions and your beliefs, how to challenge those thoughts, recognizing them, challenging them, and learning not to think that way again." Tom said it took him 2 years to successfully complete GOLF 1 through 3. At the Lincoln Correctional Center, Tom went through an inpatient sex offender program, and he successfully completed the program after 18 to 20 months. He is a registered sex offender in Glenvil.

Kyel testified that before she and all four girls moved in with Tom, she called the "child protective services hotline" to talk to that agency, and that she also talked to her family; she did not tell Alexus and Hadley (aged 11 and 9 at the time) because she thought they were too young and she wanted to protect them from the social aspect of the situation. Kyel also

did not tell Robert about Tom because she has "never been able to talk to him about anything."

Kyel testified that both girls at issue in this case have a good relationship with Tom; they help him with projects and they ask him for help. There is no indication that the girls are afraid of Tom. And Kyel testified that there is no significant risk to having Tom in the home. Kyel testified there is a lock on the bathroom door—not because of Tom's past, but because before Kyel and Tom moved in together, the girls were not used to living with a man and it "didn't really matter if you happened to walk in on . . . one of your sisters." The girls are also told to take their clothes with them when they bathe, so that no one is walking around the house in a towel. Kyel and Tom both testified that if the court determines that Tom is a risk, he will move out of the home immediately.

Tom also testified that in the family home, there are bathroom locks and a dress code, and that he is rarely alone with just one child. He is in the home with the girls every morning from 6 to 7 a.m., the time between when Kyel leaves for work and when he leaves for work. Tom testified that "red flags" would include his being withdrawn or depressed, spending a lot of time with one child alone, granting special privileges to one child, or keeping secrets. (There was testimony that Tom took Alexus hunting on one or two occasions for a few hours. There was also testimony that the girls had not told Kyel about two occasions when Tom had angry outbursts—once when he threw something at a grain bin and once when he slammed on the brakes while driving.)

Kyel testified that Hadley is going into the seventh grade. Hadley is "slightly delayed" and had to repeat first grade, but "tested out of all of her IEPs" last year. Kyel testified that Alexus does "[g]reat" in school and is extremely intelligent. Both girls are involved in activities. Hadley participates in chess club and 4-H. Alexus participates in "Skills USA" and "one act," and is on the bowling team at her school. Both girls also do chores at home.

Kyel testified that she and Robert do not get along very well, but that she tries to encourage the girls' relationship with him. If one of the girls has an activity or wants to do something besides going to Robert's, Kyel encourages that child to talk to Robert about it. Kyel wanted the girls to have a good relationship with Robert and thought that it was her job to facilitate that. However, Kyel was upset that the girls sometimes quit activities to spend time with Robert; she thought they should have the option of doing both. Kyel wanted the parenting time schedule changed so that the girls had more freedom during the school year to do activities; she wanted to reduce Robert's school year visitation to one weekend per month, but give him more time during the summer.

Robert lives in Central City, Nebraska, and at the time of trial had been married to his wife for 5 years. Robert's wife has two children of her own, and she and Robert also have one child together, who was 3 years old at the time of trial and has Down syndrome. At the time of trial, Robert was working the night shift (5:30 p.m. to 5:30 a.m.) Mondays through Thursdays at a company in Grand Island, Nebraska. He testified that it was only a matter of time before he would switch to the day shift. Robert testified that his wife was fully supportive of his seeking custody of the girls. Robert testified that if he got custody of the girls, he would facilitate a relationship between the girls and Kyel.

Robert testified that Kyel monitors all of his conversations with the girls and that he can always hear Kyel in the background when he is on the telephone with them; however, Robert has not talked to Kyel about it. Robert admits that after Kyel took Alexus' "Facebook" privileges away (for not giving Kyel the password), he helped Alexus set up a new account so that he and Alexus could communicate; he said that he had the password for the new account, but Alexus testified that Robert does not have the password. Kyel testified that this incident is an example of how Robert tries to circumvent her parenting.

Robert did not know that Hadley "was in an IEP process" until the day before trial; he said that Kyel never told him. Robert said that if he had known, he would have attended the related meetings. Robert testified that he had not attended parent-teacher conferences in several years, but would have attended if he had known about them. Robert acknowledged that he could have called the relevant school but did not. Robert said that the girls have changed schools multiple times while in Kyel's custody since the divorce. Kyel testified that she never told the girls' schools not to give information to Robert. Kyel testified that she put Robert's name and telephone number on all school forms.

Robert testified that he told Alexus about Tom's past in July 2013 when he became aware of it; Robert had "Google[d]" Tom's name to find out Kyel and Tom's address, and Tom's name "popped up" on the sex offender registry. Robert testified that he did not try to talk to Kyel about it and that he did not call Joan Schwan, after she became the girls' therapist.

Schwan is a licensed independent mental health practitioner who has been working with Alexus and Hadley since August 2013. Schwan testified that Alexus loves Robert and enjoys spending time with him, but that she also likes her school and is involved in a lot of activities. Because Robert lived in Central City, a custody change would mean changing schools. Schwan tried to help Alexus share her feelings with both parents when things come up, because Alexus felt like she had to "keep it all in herself like the weight of the world was on her shoulders, and that's been a lot of stress for her." According to Schwan, Alexus has wavered on where she wants to live; she previously said she wanted to live with Robert (but at the time was mad at Kyel and had a boyfriend in Central City, where Robert lives), but recently said she wanted to stay at her same school.

Schwan testified that Hadley is emotionally delayed and that she has some cognitive delays. Hadley was going into the seventh grade, but was more like a fourth grader emotionally

and a fifth grader intellectually. Hadley is "pretty concrete" in her thinking; she does not think through the long-term consequences of her decisions. Schwan said that at the beginning of therapy, Hadley wanted to stay with Kyel, but that Hadley recently said she wants to live with Robert because she wants to spend more time with her "baby sister," who is Robert's youngest daughter; Schwan testified that Hadley does not really understand that if she lives with Robert, it would mean being separated from her siblings who live at Kyel's house. Schwan testified that Hadley is a "people pleaser" and tries to make everyone happy, especially because the court date was getting closer.

Schwan testified that she was aware that Tom spent 4 years in prison for sexual assault of his stepdaughter; she had reviewed his criminal charges and some of the evaluations from the state penitentiary. Schwan has never met Tom. And while she has training regarding sex offenses, Schwan works with juvenile sex offenders, not adult sex offenders. In September 2013, Schwan had a therapy session with Kyel, Alexus, and Hadley wherein Kyel shared Tom's past with the girls. Schwan testified that Hadley accepted the news "okay" but that Alexus got angry and shut down, saying, "I've already known for years." Alexus said that Robert trusted her enough to tell her, and he told her not to trust Tom; Alexus was mad at Kyel for keeping it a secret from her.

Schwan would check in with Alexus and Hadley regarding Tom's behavior and would look for signs of grooming (which she described as gaining the trust of a would-be child victim, finding out if the child would keep secrets, and granting special favors to the child) or other inappropriate behavior. Schwan also worked with the girls regarding appropriate boundaries, red flags, and risks. Schwan testified that no grooming was ever reported to her and that there seemed to be very good boundaries in the home. Schwan testified that she did not perceive a risk to the children.

Schwan acknowledged that Kyel was previously involved with a man who fathered her youngest daughter and who was convicted of sexually assaulting her oldest daughter when she was 5 years old. Thus, Tom is Kyel's second relationship with a sex offender. However, Schwan testified that she and Kyel have talked about Kyel's ability to see red flags and that Kyel is working on it. Schwan also acknowledged that the girls had not told Kyel about Tom's angry outbursts (once when he threw something at a grain bin and once when he slammed on the brakes while driving), but Schwan said it was significant that they reported the incidents to Schwan—the girls did not keep the incidents a secret. Schwan also testified that since the girls are old enough, she has done some work with them on self-protection and boundaries, so that the girls know what to do. Schwan testified that she does not believe the girls are at risk in Kyel's home.

Both Alexus and Hadley testified in chambers. Hadley testified that she wanted to live with Robert so that she can see him and his youngest daughter more. She loves both of her parents. She testified that at Kyel's house, she does chores and sometimes gets to go to the library or "hang out" with friends. She testified that at Robert's house, "we usually just watch TV" and she has more freedom. Hadley did not like all of the chores (cleaning up after all of her farm animals) at Kyel's house. She wanted to be able to see her friends more and "go to the water park and hang out." Hadley got along fine with Tom and was not afraid of him.

Alexus testified that either house is a good house. She had opinions about where she wants to live, but stated that "it's just too much to choose," and she wants to stay out of it. Alexus was mad at Kyel for not telling her about Tom's past, but she felt safe at Kyel's and did not feel like she is in danger with Tom.

Several other witnesses testified on behalf of the parties. All of Kyel's witnesses testified that she is a good mother and that there are no concerns about Tom or his past; some

witnesses testified that they let their children spend the night at Kyel's after Kyel informed them about Tom's status as a sex offender. All of Robert's witnesses testified that he is a good father and loves his children.

After a bench trial, the district court filed its order on August 5, 2014, wherein it denied Kyel's application to modify and Robert's counterclaim. As to Kyel's application to modify, the court noted that Kyel claimed a material change in circumstances due to the children's ages and their desires, and Kyel's desire, that, in the court's words, "they be able to participate in extra-curricular activities in high school without having to miss activities or negotiate for [Robert's] permission to modify his visitation schedule." The court concluded that the fact the children are teenagers and involved in activities was not a material change in circumstances and that it was certainly anticipated that those things would occur. The court "encourage[d]" both parties to be "increasingly flexible about the time they have with their children so that a visitation schedule does not interfere with their opportunity to be 'normal' teenagers."

When evaluating Robert's counterclaim, the court said:

> The Court must evaluate the COUNTERCLAIM in light of Neb. Rev. Stat. § 43-2933(1)(b) and (c). The foregoing is a section from the PARENTING ACT that deals with custody and visitation of minor children as it relates to living with a sex offender. [Subsection (1)(b)] provides that if a child is residing in a household with a sex offender, the Court must make a finding of no significant risk to the child before the child can be left in that household. Subsection [(1)(c)] provides that a child who is permitted unsupervised contact with a person who must register under the Sex Offender Registration Act is prima facia [sic] evidence that the child is at significant risk. The statute goes on to provide that this prima facia [sic] evidence constitutes a presumption which affects the burden of producing evidence. Based

> on the foregoing, [Robert] has a presumption in his favor due to the fact that [Kyel] has married and lives with a sex offender.

After placing "considerable weight" on the testimony of Schwan, the court found that "the fact that the children are living with [Tom] is not a material change in circumstances warranting a change of custody," and the court found that "the children are not at significant risk with [Tom]." The court also considered "all of the other factors presented with respect to a change in custody, including the children's preference," but did not find a material change in circumstances. Accordingly, the court denied Robert's counterclaim with regard to custody. The court did, however, characterize Robert's request for "'just and equitable relief'" as an opportunity to specify holiday and summer parenting time, since the original decree of dissolution failed to do so.

Robert has filed this timely appeal.

## ASSIGNMENTS OF ERROR

Robert claims that the district court erred in (1) finding no significant risk to the minor children, (2) finding no material change in circumstances, (3) failing to make a determination as to the best interests of the minor children, and (4) failing to award custody to Robert.

## STANDARD OF REVIEW

[1,2] 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. *Watkins v. Watkins*, 285 Neb. 693, 829 N.W.2d 643 (2013). 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. *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. *State on behalf of Savannah E. & Catilyn E. v. Kyle E.*, 21 Neb. App. 409, 838 N.W.2d 351 (2013).

## ANALYSIS

### *Change in Circumstances and Significant Risk Pursuant to § 43-2933.*

[4-8] At the outset, we note that the parties and the district court refer to a "material change in circumstances" when discussing § 43-2933 as well as other grounds for modification; and while § 43-2933(3) refers to a "change in circumstances," the statute does not contain the word "material." That distinction will be further addressed later in this opinion. But our discussion must first start with *Watkins, supra*, wherein the Nebraska Supreme Court interpreted § 43-2933 for the first time and concluded that the statute provided for a statutorily deemed change in circumstances and that such a change in circumstances is sufficient for modification. Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Watkins, supra*. A material change of circumstances means evidence that shows that something has occurred which, if the trial court had been aware of the existence of these circumstances initially, would have resulted in the trial court's granting the children's custody, in their best interests, to the other parent. See *Hicks v. Hicks*, 223 Neb. 189, 388 N.W.2d 510 (1986). Before custody may be modified based upon a material change in circumstances, it must be shown that the modification is in the best interests of the child. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015). The party seeking modification bears the burden of showing a material change of circumstances affecting the best interests of the child. *Hicks, supra*. While these principles generally apply in custody modifications, when the grounds for modification are based on the presence of a registered sex offender

residing in a home, *Watkins* tells us that such "grounds for modification must also be analyzed under the statutory framework found in § 43-2933 relating to a sex offender residing in the home." 285 Neb. at 699, 829 N.W.2d at 648.

Section 43-2933(1)(b) provides:

> No person shall be granted custody of, or unsupervised parenting time, visitation, or other access with, a child if anyone residing in the person's household is required to register as a sex offender under the Sex Offender Registration Act as a result of a felony conviction in which the victim was a minor or for an offense that would make it contrary to the best interests of the child for such access unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record.

Section 43-2933(3) provides that "[a] change in circumstances relating to [the above-quoted] subsection . . . is sufficient grounds for modification of a previous order."

[9] *Watkins v. Watkins*, 285 Neb. 693, 829 N.W.2d 643 (2013), is the only appellate case in Nebraska to discuss or apply § 43-2933 to date. In *Watkins*, the Nebraska Supreme Court stated:

> Pursuant to the plain language of § 43-2933(1)(b) and (3), when a person involved in a custody dispute is residing with someone who is required to register as a sex offender under the Sex Offender Registration Act as a result of a felony conviction in which the victim was a minor or as a result of an offense that would make it contrary to the best interests of the child if the person had custody, such cohabitation development shall be deemed a change in circumstances sufficient to modify a previous custody order, unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record. Thus, in applying § 43-2933, a district court must first determine whether there is an individual residing in the household who is required to

> register under the Sex Offender Registration Act and, if so, whether the offense triggering the registration requirement is due to a felony conviction in which the victim was a minor, whether the offense triggering the registration would make it contrary to the best interests of the child whose custody is at issue, or whether the offense does not meet either of these two descriptions. *If the district court finds the offense to be a felony involving a minor victim or an offense contrary to the best interests of the child*, § 43-2933(1)(b), *there is a statutorily deemed change of circumstances*, § 43-2933(3), *and custody shall not be granted to the person who resides with the sex offender unless there is a finding by the district court that the circumstances present no significant risk.* In sum, taken together, § 43-2933(1)(b) and (3) create a statutory presumption against custody being awarded to the person residing with a sex offender who committed the described offenses, but the presumption can be overcome by evidence.

285 Neb. at 700-01, 829 N.W.2d at 649 (emphasis supplied).

[10] Accordingly, in order to modify custody based on § 43-2933(3), a material change in circumstances need not be established, because the statute creates a statutorily deemed change of circumstances sufficient to warrant a change in custody if a registered sex offender is residing in a parent's home. However, the presumption against custody can be overcome if the court finds there is no significant risk to the children and states its reasons in writing, as the district court did here. Robert argues that because Kyel is now married to and residing with a registered sex offender, the district court erred in finding that there was not a material change in circumstances sufficient for modification of custody. Robert cites to *Watkins, supra*, for the proposition that § 43-2933(1)(b) and (3), taken together, create a statutory presumption against awarding custody to the person residing with a sex offender who committed the described offenses. Robert argues that because there

was no dispute at trial that Tom is a convicted felon who is required to register as a sex offender due to a felony involving a minor child, the statute provides that a change of circumstances sufficient for modification has occurred.

In this case, the evidence shows that subsequent to the decree, Kyel moved in with and eventually married Tom, a registered sex offender. The record shows that the offense triggering registration was based on Tom's conviction of attempted sexual assault, a Class III felony; the victim was his 15-year-old stepdaughter. Accordingly, Tom's requirement that he register as a sex offender is the result of a felony conviction in which the victim was a minor. Because Robert established that Kyel resided with a sex offender, the statute provides that a change of circumstances sufficient for modification has occurred, and it is presumed under the statute that Kyel may not have custody, unsupervised parenting time, visitation, or other access to Alexus and Hadley. This court views this presumption to mean that it is not in the best interests of children to live in the home of a registered sex offender when the underlying offense involved a minor or other offense contrary to the best interests of the child. However, this presumption can be overcome if the district court finds, based on the evidence, that there is no significant risk to the children and states its reasons in writing or on the record. In this case, the district court did so find and stated in its order:

> [Tom] was convicted of a felony offense involving a child. He spent four years in the Nebraska State Penitentiary for this offense. He is required to register as a sex offender pursuant to Nebraska law. While at the penitentiary, [Tom] successfully completed a two year sex offender treatment program and other programming to better himself. [Tom] testified at trial.
>
> Joan Schwan, a licensed mental health practitioner, testified. [She] has been seeing the minor children since June, 2013 [and] is aware of [Tom's] background. Through counseling, she has evaluated the home for risk

> factors, has talked to the girls about boundaries, and evaluated whether any grooming behaviors by [Tom] were going on. She testified that no questionable behavior by [Tom] was reported by the girls. She testified that she does not believe [Tom was] a risk to the children. Alexus testified that she felt safe at [Kyel's] home and that she is friends with Tom. She testified that she knew about the sex offender registry the summer before her 7th grade year. Alexus recounted a couple of times that Tom had angry outbursts, however, nothing remotely of a sexual nature. Hadley also stated that Tom was good and that she gets along fine with him. She . . . reports that Tom yells and sends her to the corner for discipline. She reports no actions of a sexual nature by Tom.

After placing "considerable weight" on the testimony of Schwan, the court found that "the fact that the children are living with [Tom] is not a material change in circumstances warranting a change of custody" and the court found that "the children are not at significant risk with [Tom]."

Robert argues that the district court erred by concluding there was no material change in circumstances, because "there is a statutory material change in circumstances," and that the court "should have first determined there was a material change in circumstances and then moved to the next step of the analysis." Brief for appellant at 17. To the extent Robert is arguing that the district court should have concluded there was a statutorily deemed change in circumstances and then proceeded to determine whether there was a significant risk to the children, we agree. However, although not set forth in the precise language preferred, it is clear that the district court properly evaluated the facts of the case in accordance with the statute by specifically addressing Tom's registered sex offender status, and then evaluating whether he posed a significant risk to the children. The district court concluded that there was no significant risk to the children and that the fact Tom lived with the children was not

a material change in circumstances warranting a change of custody. In order to conclude there was no significant risk to the children, the court had to consider the best interests of the children. Implicit in the district court's holding is the determination that it was not in the children's best interests to modify custody based solely on the fact that Tom lived with them. Our Supreme Court likewise concluded that the record in *Watkins v. Watkins*, 285 Neb. 693, 702, 829 N.W.2d 643, 650 (2013), established that the children therein "were not at significant risk and that the best interests of [the children] did not require modification." Thus, although there was a statutorily deemed change of circumstances and a statutory presumption that Kyel would not have custody, unsupervised parenting time, visitation, or other access to Alexus and Hadley due to Tom's presence in the household, the district court provided sufficient reasons supported by the record that Alexus and Hadley were not at significant risk and it was not in their best interests to modify custody on this basis. Like the court in *Watkins, supra*, we believe that the district court made a thorough and careful evaluation of the evidence and did not abuse its discretion in reaching its conclusion. To the extent, however, that the district court's order can be read to say there was no change in circumstances with regard to the application of § 43-2933, it is modified accordingly to be consistent with this opinion.

Although Robert directs us to evidence in the record to suggest that the district court should have concluded there was a significant risk, 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. *State on behalf of Savannah E. & Catilyn E. v. Kyle E.*, 21 Neb. App. 409, 838 N.W.2d 351 (2013).

*Best Interests and Custody.*

Robert argues that because there was a change in circumstances pursuant to § 43-2933, the court was obligated

to determine the best interests of the children as set forth in the Parenting Act, and that best interests required that custody be awarded to him. It appears that Robert is arguing that once a statutorily deemed change of circumstances has been established pursuant to § 43-2933, it is no longer necessary to prove a material change in circumstances as to other allegations upon which a change in custody is being sought. We disagree. Once the statutorily deemed change in circumstances has been established pursuant to § 43-2933, and the district court concludes there is no significant risk to the children, then as to any other grounds alleged as a basis for modification, we return to the legal proposition ordinarily applied, namely, that custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Watkins, supra*. Continued discussion of *Watkins* is helpful with regard to this issue as well.

In *Watkins v. Watkins*, 285 Neb. 693, 829 N.W.2d 643 (2013), after determining that modification of custody was not required due to the cohabitation of the mother with a registered sex offender, the district court then evaluated whether a material change in circumstances occurred to justify modification based on other grounds alleged. In *Watkins*, the other grounds alleged included concerns about the sex offender's 10-year-old son who had behavioral issues, as well as concerns raised about the mother's lack of stability as evidenced by her eight residence changes over the course of about 6 years. The district court in *Watkins* determined that there had not been a material change in circumstances based upon any risks posed by the son, because he was no longer residing with the mother, and that although there was some concern about the mother's stability, it also was not sufficient to establish a material change of circumstances warranting a change of custody. The Supreme Court concluded that the district court did not err or abuse its discretion in making those determinations.

[11] Accordingly, *Watkins* makes it clear that a person seeking a change in custody based upon "material" changes in circumstances cannot piggyback such alleged material changes on the statutorily deemed change in circumstances provided by § 43-2933. Rather, if the attempt to change custody is not successful pursuant to § 43-2933, then as to any other grounds for modification alleged, the party seeking the modification in custody bears the burden of showing a material change of circumstances affecting the best interests of the child. See *Hicks v. Hicks*, 223 Neb. 189, 388 N.W.2d 510 (1986).

A material change of circumstances means evidence that shows that something has occurred which, if the trial court had been aware of the existence of these circumstances initially, would have resulted in the trial court's granting the children's custody, in their best interests, to the other parent. See *Hicks, supra*. Here, as in *Watkins, supra*, after concluding a modification of custody was not warranted pursuant to § 43-2933, the district court went on to consider whether a material change in circumstances affecting the best interests of the children had occurred based upon the other matters raised by Robert as a basis to modify custody. In the case before us, the district court stated specifically:

> The Court has considered all of the other factors presented with respect to a change in custody, including the children's preference. The Court does not find that there is a material change in circumstance based on all of the other factors presented. It is significant to the Court that Alexus has attended 6 or 7 schools and Hadley has attended 5 schools. Hadley has special needs and school is challenging for her. The girls have been in [their current] School District for a couple of years now and the Court believes it is important that they both have the stability and structure of remaining in the same school system.

Robert argues that the district court abused its discretion "in that it made no determination or finding whatsoever regarding

the best interests of these children." Brief for appellant at 25. When considering the other factors alleged by Robert to constitute a basis for a change in custody, the court says only that it "does not find that there is a material change in circumstances based on all of the other factors presented." Apparently, Robert views this as a failure by the court to consider the children's best interests. However, it is clear that the court considered whether there was any material change affecting the best interests of the children, as evidenced by the court's discussion of matters pertinent to the children, such as their preferences about where to live, their educational needs, and their stability. The evidence presented at trial was that the girls' preferences for custody had changed over time. Alexus did not want to offer an opinion at the time of trial, but according to Schwan, Alexus did not want to change schools. And while Hadley had recently expressed a desire to live with Robert so that she could spend more time with his youngest daughter, Schwan testified that Hadley does not really understand that if she lives with Robert, it would mean being separated from her siblings at Kyel's house. The court took the children's preferences into consideration, along with the other evidence presented, when making its decision to deny modification of custody as noted above.

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. *Watkins v. Watkins*, 285 Neb. 693, 829 N.W.2d 643 (2013). And 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. *State on behalf of Savannah E. & Catilyn E. v. Kyle E.*, 21 Neb. App. 409, 838 N.W.2d 351 (2013).

Having considered the record and bases asserted by Robert in support of modification of custody in addition to § 43-2933, we cannot say that the district court abused its discretion

in concluding that there was no material change in circumstances affecting the best interests of the children on these other grounds. And as discussed earlier, after finding a statutorily deemed change in circumstances in accordance with § 43-2933, a consideration of the children's best interests is inherent in determining whether residing with a registered sex offender poses a significant risk. The district court's reasons for concluding that Tom's residence with the children did not pose a significant risk were set forth in the order and are supported by the record.

## CONCLUSION

For the reasons stated above, we agree with Robert that there was a statutorily deemed change of circumstances in this case pursuant to § 43-2933, and to the extent the district court's order can be read to say there was no change in circumstances with regard to the application of § 43-2933, it is modified accordingly to be consistent with this opinion. However, we cannot say that the district court abused its discretion in determining that modification of custody was not warranted pursuant to § 43-2933 or the other grounds alleged in Robert's counterclaim seeking to modify custody. Thus, we affirm as modified.

Affirmed as modified.

**Nebraska Court of Appeals**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# In re Interest of Alex F. and Tony F., children under 18 years of age. State of Nebraska, appellee and cross-appellee, v. Floyd F., appellant, and Shelly F., appellee and cross-appellant.

870 N.W.2d 150

Filed August 25, 2015. No. A-14-883.

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. **Due Process.** The determination of whether the procedures afforded an individual comport with due process is a question of law.
3. **Juvenile Courts: Jurisdiction: Child Custody.** Following an adjudication hearing at which a juvenile is adjudged to be under Neb. Rev. Stat. § 43-247(3)(a) or (c) (Supp. 2013), the court may order the Department of Health and Human Services to prepare and file with the court a proposed plan for the care, placement, services, and permanency which are to be provided to such juvenile and his or her family.
4. ____: ____: ____. A juvenile court may approve a proposed case plan, modify the plan, order that an alternative plan be developed, or implement another plan that is in the juvenile's best interests.
5. ____: ____: ____. Once a child has been adjudicated under Neb. Rev. Stat. § 43-247(3) (Supp. 2013), the juvenile court ultimately decides where a child should be placed. Juvenile courts are accorded broad discretion in determining the placement of an adjudicated child and to serve that child's best interests.
6. **Juvenile Courts: Child Custody.** A juvenile court may always order a change in an adjudicated juvenile's custody and care, including placement, when the change is in the best interests of the juvenile.
7. ____: ____. When a juvenile is adjudged to be under Neb. Rev. Stat. § 43-247(3) (Supp. 2013), the court may permit such juvenile to remain in his or her own home subject to supervision or may make an order

committing the juvenile to the care and custody of the Department of Health and Human Services.

8. ____: ____. Under Neb. Rev. Stat. § 43-247(3) (Supp. 2013), a juvenile court may enter a dispositional order removing a juvenile from his or her home upon a written determination that continuation in the home would be contrary to the health, safety, or welfare of such juvenile and that reasonable efforts to preserve and reunify the family have been made if required.
9. **Juvenile Courts: Due Process.** Hearings regarding rehabilitative plans in juvenile cases are dispositional hearings, in which Nebraska rules of evidence do not apply, and due process safeguards at a disposition or detention hearing are less than those required at a hearing regarding the termination of parental rights.

Appeal from the County Court for Madison County: Ross A. Stoffer, Judge. Affirmed.

Ryan J. Stover, of Stratton, DeLay, Doele, Carlson & Buettner, P.C., L.L.O., for appellant.

Gail E. Collins, Deputy Madison County Attorney, for appellee State of Nebraska.

Mark D. Albin, of Albin Law Office, for appellee Shelly F.

Brad Easland, guardian ad litem.

Irwin, Inbody, and Riedmann, Judges.

Riedmann, Judge.

## INTRODUCTION

Floyd F. appeals and Shelly F. cross-appeals from the order of the county court of Madison County, sitting as a juvenile court, which changed placement of their minor child Tony F. We find no merit to their arguments and therefore affirm the decision of the juvenile court.

## BACKGROUND

Floyd and Shelly are the biological parents of Alex F., born in 2001, and Tony, born in 2003. The Nebraska Department

of Health and Human Services (the Department) has received 18 reports of abuse and neglect involving this family dating back to October 2001. The concerns regarded inappropriate discipline, inappropriate supervision, the children being uncontrolled by their parents, the mental capacity of the parents, the children's hygiene, and the dirty and unsanitary conditions of the home.

The present case was commenced when Tony's school contacted police in November 2012 because he was uncontrollable. Tony was removed from the classroom by police and was determined to pose a safety risk to himself or others. Police placed him in emergency protective custody in the adolescent psychiatric unit of a local hospital. A subsequent visit to the home found its conditions to be unsanitary and unsafe for the children.

The following day, the State filed a petition to adjudicate the children under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). The petition alleged that Alex and Tony

> are juveniles who are in a situation dangerous to life or limb or injurious to the health or morals of the juveniles and/or who lacks [sic] parental care by reason of the fault or habits of their parents; and/or whose mother and father have neglected or refused to provide proper or necessary subsistence, education or other care necessary for the health, moral or well-being of the juveniles.

Specifically, the petition alleged that the parents have failed to provide a reasonably clean and safe residence, failed to provide reasonably clean and appropriate clothing, or failed to provide reasonably necessary food or medication for the children. Floyd and Shelly pled no contest to the allegations in the petition, and the children were adjudicated.

A review hearing was held in September 2014. The evidence presented indicated that although the children were initially placed in out-of-home care, they were placed back in the home in February 2013. At the time of the hearing, Tony was 10 years old and was verified for special education

services at school due to a behavioral disorder. He has a history of extreme aggression in the school setting, including running away, throwing rocks with the intent to hurt, throwing chairs, pulling computers off tables, banging his head, kicking, hitting, screaming, biting, and spitting. According to the Department, Tony struggles with authority in a setting where there are expectations, which is likely due to the fact that rules and expectations did not exist in the home before the Department's involvement.

Prior to February 2013, academic expectations for Tony were minimal and the school's main goal was to maintain order and avoid incidences of aggression. Tony began medication to assist with mood stabilization and aggression in January, and the school staff reported that the changes in Tony were dramatic. The last 4 months of the 2012-13 school year, Tony did all of the expected academic work and began to rebuild and repair relationships with his peers. His compliance declined significantly during periods that the medication was not given as prescribed, and the Department had to arrange for the administration of Tony's medication from November 1, 2013, until January 31, 2014, after discovering that he was not taking it.

At the time of the hearing, however, Tony had recently begun fifth grade at the middle school and was already struggling. He was asked to leave the classroom 4 out of the first 5 days of school and had an extreme, aggressive, and violent outburst on August 28, 2014, where he caused extensive damage to school property. The school expressed concern that Tony was not receiving his medication or was not receiving it timely.

The Department's report received into evidence at the hearing indicates that there are no rules, structure, or consequences for the children in the home. There are few expectations of Tony, and his parents do whatever is necessary to avoid conflict with him. The Department specifically noted that Floyd does not even try to make it appear there are rules

or consequences for Tony and that Floyd is not open to any suggestion regarding Tony's need to be held more accountable. According to the Department, Floyd and Shelly are setting Tony up for failure in other settings where there are structure, rules, and consequences, and this is especially true in school.

The Department's first case plan goal for Floyd and Shelly was for them to take care of their own mental health needs and be able to provide the children an environment which promotes positive emotional growth. Shelly attended individual therapy for 7 months and made some improvements. However, Floyd attended individual therapy for only a brief period of time before the therapy was terminated for his insistence that he was not going to change and did not have anything to work on. The therapist recommended that Floyd be assessed for depression to determine if he would benefit from medication, but he was not willing to do so. Similarly, Floyd only participated in a few sessions of family therapy and insisted it was a waste of time, even though the children and Shelly reported that it was helpful. Floyd was very vocal that Shelly was the problem in the home and that she needed to make changes, but that he had nothing to work on. Floyd never successfully completed an anger management class because, although he attended, he claimed that he did not need the service and did not have anything to work on. He turned his back to the presenter and slept or looked out the window during the class. While Shelly continued to cooperate and had attended every team meeting, Floyd had not attended any team meetings over the 6 months prior to the Department's report and was adamant that he did not intend to start.

The second case plan goal was for Floyd and Shelly to provide a safe and stable home environment for the children, which includes keeping the home free from debris and meeting the children's emotional needs. Floyd and Shelly took a parenting class in February 2013; Shelly received a certificate

of completion but Floyd did not, based on his behavior and lack of participation during the class. The cleanliness of the home continued to be an issue, and the family was asked to address the home's condition in June, July, and August 2014. The Department's report also noted that the children's hygiene has been maintained at a very minimal level.

In summary, the Department's report indicated that it had invested an extraordinary amount of resources into assisting this family in the nearly 2 years that Alex and Tony had been in its legal custody. The primary reason that the children were placed in the Department's custody was Tony's extreme behavior problems, with the conditions of the home being the second reason for removal. Tony's behaviors had seemed to improve with medication, but now that he is in middle school, it remains to be seen whether his new school will be as tolerant of his behaviors as the elementary school was. Tony is still struggling with the rules and structure of the school, after having no rules or expectations all summer while at home. The caseworker stated, "This is something that I talked endlessly with the family about over the summer, and something that the Department and providers have spent 2 years trying to address with the family." According to the Department's report, Shelly had learned the right tools and how to implement them, but her efforts were often futile because Floyd would send counterproductive messages, had made little effort to change anything, and would send negative messages to the children about school rather than encouraging them to do their best. After almost 2 years, it was clear to the caseworker that Floyd was not going to change.

Based on the foregoing, the Department's report recommended that a 3-month review be scheduled with the potential to close the case at that time due to a lack of progress in a family who was not amenable to services. At the hearing, however, the State noted that the Department's report was prepared prior to the incident Tony had at school on August 28,

2014, which incident colors the Department's recommendation. Based on the new incident, the State concluded that a 3-month review was inappropriate.

The court noted that almost 2 years into the case, Tony was only making minimal progress. But the court also noted that because Tony was only 10 years old, there was still time to correct his behavior and help him become a productive citizen in the future. The court identified its options as follows:

> There's no — absolutely no reason that I know of, no scientific reason, no other reason that I know of, that says that Tony is someone we should wash our hands of, that we cannot change Tony at all, that Tony should just be a forgotten soul, so to speak, and we should just give up on him. There's nothing that I know of that tells me that Tony can't change and we can't help Tony change.
>
> And there's where I'm at. I'm at the point of, you know, what do I do? Do I wash my hands of Tony and let him, you know, stay in the environment where he's at and let things keep going the way they are? Or do I grab the bull by the horns and say doggone it, Tony deserves better. I mean, we've got to do something to make things change for Tony. And what is that that we have to do?
>
> . . . I think one of the few things that we haven't tried is taking him out of the home.

Accordingly, the juvenile court found that the Department's case plan was not in Tony's best interests and modified the plan for Tony to be removed from the home. As such, the case plan was disapproved and the Department was ordered to find a foster home or group home for Tony. Floyd timely appeals, and Shelly cross-appeals.

## ASSIGNMENTS OF ERROR

On appeal, Floyd assigns that the juvenile court erred in disapproving the case plan court report and ordering the removal of Tony from the home.

On cross-appeal, Shelly also assigns that the juvenile court erred in disapproving the case plan court report and ordering the removal of Tony from the home.

## 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 Chloe P.*, 21 Neb. App. 456, 840 N.W.2d 549 (2013). The determination of whether the procedures afforded an individual comport with due process is a question of law. *Id*.

## ANALYSIS

Floyd and Shelly argue that the juvenile court erred in disapproving the case plan and removing Tony from the home, because there was no motion before the court requesting a change and there was insufficient evidence presented to establish that a change was necessary. We disagree.

[3,4] Following an adjudication hearing at which a juvenile is adjudged to be under § 43-247(3)(a) or (c) (Supp. 2013), the court may order the Department to prepare and file with the court a proposed plan for the care, placement, services, and permanency which are to be provided to such juvenile and his or her family. Neb. Rev. Stat. § 43-285(2) (Cum. Supp. 2014). The court may approve the plan, modify the plan, order that an alternative plan be developed, or implement another plan that is in the juvenile's best interests. *Id*. Consequently, in the present case, the juvenile court was not required to approve the Department's proposed case plan recommending no change in Tony's placement and had the authority to disapprove the plan and order an alternative one.

[5,6] Section 43-285(2) provides that once a child has been adjudicated under § 43-247(3), the juvenile court ultimately decides where a child should be placed. 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.*, 283 Neb. 581, 811 N.W.2d 214 (2012). A juvenile court may *always* order a change in an adjudicated juvenile's custody and care, including placement, when the change is in the best interests of the juvenile. See *id*.

[7,8] Thus, in the present case, a motion requesting a change in Tony's placement was unnecessary. It was within the juvenile court's authority to disapprove of the Department's proposed plan and order an alternative one changing his placement, so long as it found that Tony's best interests were served by changing his placement, which it did. Once the juvenile court adjudicated Tony as a child within the meaning of § 43-247(3)(a), the court had jurisdiction over him and could determine his placement. Neb. Rev. Stat. § 43-284 (Cum. Supp. 2014) provides that when any juvenile is adjudged to be under § 43-247(3), "the court may permit such juvenile to remain in his or her own home subject to supervision or may make an order committing the juvenile to . . . (6) the care and custody of the Department." Similarly, under this section, the court may enter a dispositional order removing a juvenile from his or her home upon a written determination that continuation in the home would be contrary to the health, safety, or welfare of such juvenile and that reasonable efforts to preserve and reunify the family have been made if required. The juvenile court has broad discretion as to the disposition of those who fall within its jurisdiction. *In re Interest of T.T.*, 18 Neb. App. 176, 779 N.W.2d 602 (2009). As stated by the Nebraska Supreme Court:

> 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. Once a child has been adjudicated under § 43-247(3), the juvenile court ultimately decides where a child should be placed. Juvenile courts are accorded broad discretion in

> determining the placement of an adjudicated child and to serve that child's best interests.

*In re Interest of Karlie D.*, 283 Neb. at 592, 811 N.W.2d at 224-25. See, also, *In re Interest of Gabriela H.*, 280 Neb. 284, 785 N.W.2d 843 (2010) (stating juvenile court has authority to determine placement of juvenile under its jurisdiction even if such determination is contrary to Department's position).

The question then becomes whether the court abused its discretion in rejecting the Department's plan and ordering out-of-home placement for Tony.

The exhibits made clear that at the time of the September 2014 review hearing, Alex and Tony had been in the care and custody of the Department for 22 months and Tony was making little, if any, improvement. In fact, less than 2 weeks before the hearing, Tony had a significant, aggressive outburst at school. Despite intensive services provided to the family, it was clear that Floyd demonstrated a continued disregard for the severity of the situation and for the court's requirements. He repeatedly indicated that he would not comply and did not believe he needed to change. Tony was at home during the summer, and shortly into the new school year, he had already been asked to leave the classroom all but 1 day. The caseworker emphasized that Tony had no rules, structure, or expectations all summer, despite her repeated discussions with the family, and that he was struggling returning to the school environment. Moreover, Tony was just starting middle school, and it is unclear whether his new school will be as tolerant of his behaviors as the elementary school was. Thus, the juvenile court believed that allowing Tony to continue in the home would not be in his best interests.

At the time of the review hearing, the juvenile court believed it was at a crossroads in the case, with only two options: give up on Tony or take more drastic measures to try to help Tony make improvements in his behaviors. The court believed that because Tony was just 10 years old, there was time to get him more significant help in order to improve his behavior and,

ultimately, assist him to have a better future. Therefore, the court opined it was in Tony's best interests to change his placement, because allowing him to remain in the home was not benefiting him. Upon our de novo review, we find no abuse of discretion in this determination.

Floyd and Shelly also argue that when the juvenile court disapproved the case plan and removed Tony from the home without notice to the parties or the opportunity to be heard, their due process rights were violated. We find no merit to this argument.

Floyd and Shelly claim they had no notice that Tony might be removed from the home, because the adjudication petition that was filed was done so as a result of a "dirty house." Brief for appellant at 10. It is true the specific allegations of the adjudication petition were that the parents failed to provide a reasonably clean and safe residence for the children; however, the report that led to the filing of the adjudication petition was a result of Tony's being uncontrollable in the classroom and ultimately being taken to the adolescent psychiatric unit of a local hospital. In the 2 years following, Floyd and Shelly were offered services dealing with appropriate parenting skills and how to develop rules and structure in the home. The record does not contain any indication that Floyd or Shelly objected to these rehabilitation plans as being unreasonable or immaterial to the issues adjudicated.

In *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003), the child was adjudicated on the basis of an unclean house. Subsequent rehabilitation plans went far beyond education for the parents on how to maintain a clean house. The Nebraska Supreme Court stated that the "conditions observed in the house were only a symptom of the problems which led to the adjudication and the subsequent plans for reunification. They did not represent a situation which could be remedied by simply hiring a cleaning service." *Id.* at 164, 655 N.W.2d at 685. The parental rights were ultimately

terminated for failure to comply with the rehabilitation plan, and the decision was affirmed on appeal.

[9] Here, after the children were adjudicated, Floyd and Shelly had ample notice, through the services offered, that more than just a dirty house was at issue. We have held that hearings regarding rehabilitative plans in juvenile cases are dispositional hearings, in which Nebraska rules of evidence do not apply, and due process safeguards at a disposition or detention hearing are less than those required at a hearing regarding the termination of parental rights. See *In re Interest of Daniel W.*, 3 Neb. App. 630, 529 N.W.2d 548 (1995), *reversed on other grounds* 249 Neb. 133, 542 N.W.2d 407 (1996). Given the notice provided to Floyd and Shelly of the issues to be corrected, we conclude that Floyd's and Shelly's due process rights were not violated.

Finally, Shelly asserts that her due process rights were violated when the juvenile court failed to follow proper statutory procedures when removing Tony from the home. She claims that Neb. Rev. Stat. § 43-248 (Cum. Supp. 2014) applies in principle in this case and that there were no findings any of the grounds set forth in § 43-248 were met.

Section 43-248 sets forth the procedures for when a peace officer may take a juvenile into temporary custody without a warrant or court order. This statute describes preadjudication detentions, however. See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). And thus, it does not apply in the present case because Tony had already been adjudicated under § 43-247(3)(a) (Reissue 2008) and was in the legal custody of the Department. As stated above, a juvenile court may always change the placement of an adjudicated juvenile when such change would be in the juvenile's best interests. See *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012).

Shelly also asserts that when the juvenile court entered its order removing Tony from the family home, no findings were made that the child was in danger for his health, safety, or

welfare as required by § 43-284. Contrary to Shelly's argument, the court's order of September 9, 2014, found that continuation of the juvenile in his home would be contrary to the welfare of the juvenile and that reasonable efforts were made to prevent or eliminate the need for removal. As such, we reject her arguments and find no violation of her due process rights.

## CONCLUSION

Upon our de novo review, we conclude that the juvenile court did not abuse its discretion in disapproving the case plan and ordering the Department to locate a foster or group home for Tony. We therefore affirm.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellant, v. Edward E. Hood, appellee.

869 N.W.2d 383

Filed August 25, 2015. No. A-15-199.

1. **Criminal Law: Judgments: Appeal and Error.** In the absence of a specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.
2. **Motions to Suppress: Appeal and Error.** Neb. Rev. Stat. § 29-824 (Reissue 2008) provides the State with the specific right of appealing a district court's ruling granting a motion to suppress.
3. ____: ____. Neb. Rev. Stat. § 29-825 (Reissue 2008) outlines the process for filing with the appellate court an application of review of an order granting a motion to suppress.
4. **Motions to Suppress: Time: Appeal and Error.** Neb. Rev. Stat. § 29-826 (Reissue 2008) gives the district court the authority to establish time limits for the State to file a notice of intent with the clerk of the district court seeking review of an order granting a motion to suppress and to file the application with the appellate court.
5. **Jurisdiction: Time: Appeal and Error.** Timeliness of an appeal is a jurisdictional necessity.
6. **Legislature: Courts: Time: Appeal and Error.** When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly.

Appeal from the District Court for Garden County: Derek C. Weimer, Judge. Appeal dismissed.

Greg M. Ariza, Special Deputy Garden County Attorney, for appellant.

No appearance for appellee.

Inbody, Pirtle, and Bishop, Judges.

Pirtle, Judge.

## INTRODUCTION

The State of Nebraska brings this appeal from an order of the Garden County District Court granting Edward E. Hood's motion to suppress evidence. Because we conclude that the State failed to comply with the statutory requirements for docketing an appeal in this court, the case is dismissed for lack of jurisdiction.

## BACKGROUND

The State has filed an application for review of a district court order granting Hood's motion to suppress. The suppression order was entered on February 27, 2015. The State timely filed a notice of intent to appeal on March 4, pursuant to Neb. Rev. Stat. § 29-826 (Reissue 2008). At that point, the State had 30 days, or until April 3, in which to file its application for review with the consent of the Attorney General. See Neb. Rev. Stat. § 29-825 (Reissue 2008). It did so on April 1. However, § 29-825 requires that the application be accompanied by a copy of the suppression order and "a bill of exceptions containing all of the evidence."

It also appears that while the State had filed a praecipe for a bill of exceptions and its application for review stated it was attaching the bill of exceptions, it did not file the actual bill of exceptions with the clerk of the Court of Appeals until April 7, 2015.

On May 11, 2015, a show cause order was issued giving the State 15 days to file a response, to include a supporting affidavit or affidavits, if necessary, specifically addressing why the bill of exceptions was not timely filed in this matter, or otherwise show cause why this appeal should not be dismissed for lack of jurisdiction pursuant to Neb. Ct. R. App. P. § 2-107(A)(2) (rev. 2012).

On May 18, 2015, the State filed its response to the show cause order and attached the affidavit of the court reporter, wherein she stated as follows:

> On March 4, 2015, I received the State's Praecipe for Bill of Exceptions to include transcripts and exhibits for hearings held October 6, 2014 and February 17, 2015 to be filed with the Clerk of the Supreme Court of Nebraska.
>
> . . . I filed the bill of exceptions with the Garden County District Court on April 6, 2015; and filed the bill of exceptions with the Court of Appeals on April 7, 2015, by electronic mail.
>
> . . . My understanding was the bill of exceptions was to be completed within seven (7) weeks after the filing of a notice of appeal, April 22, 2015, pursuant to Neb. R. of Appellate Practice § 2-105.

In fact, our record confirms that the court reporter's e-mail with the bill of exceptions was sent on April 7, 2015, at 5:11 p.m. Thus, the question before us is whether the State's failure to file the bill of exceptions in this matter on or before April 3, in compliance with Neb. Rev. Stat. § 29-824 et seq. (Reissue 2008), requires us to dismiss the appeal for lack of jurisdiction.

## ANALYSIS

[1-4] In the absence of a specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case. *State v. Wieczorek*, 252 Neb. 705, 565 N.W.2d 481 (1997); *State v. Ritz*, 17 Neb. App. 589, 767 N.W.2d 809 (2009). Section 29-824 provides the State with the specific right of appealing a district court's ruling granting a motion to suppress. Section 29-825 outlines the process for filing with the appellate court an application of review of an order granting a motion to suppress. Section 29-826 gives the district court the authority to establish time limits for the State to file a notice of intent with the clerk of the district

court seeking review of an order granting a motion to suppress and to file the application with the appellate court.

In the present case, the suppression order was entered on February 27, 2015. The State timely filed a notice of intent to appeal on March 4, pursuant to § 29-826. At that point, the State had 30 days, or until April 3, in which to file its application for review with the consent of the Attorney General. See § 29-825. It did so on April 1. However, the application must be accompanied by a copy of the suppression order and "a bill of exceptions containing all of the evidence," pursuant to §§ 29-824 and 29-825. While the State timely filed a praecipe for a bill of exceptions and its application for review stated that it was attaching the bill of exceptions, it had not filed the actual bill of exceptions on or before April 3.

It appears that the State attempted to comply with this requirement by requesting a bill of exceptions with the clerk of the district court. Without specifically addressing the question of whether a request for a bill of exceptions is appropriate for compliance with the statutory mandates of § 29-825, we note that in the present case, the State failed to file the prepared bill of exceptions with this court by April 3, 2015. The only reason given for this, apparently, is the court reporter's statement in her affidavit that she believed she had 7 weeks instead of 30 days to complete and file the bill of exceptions with the clerk of the appellate court. The statute specifically requires the appealing party, not the court reporter, to timely file the relevant documents with the clerk of the appellate court. See § 29-825. Therefore, a misunderstanding by the court reporter in these circumstances does not excuse the appealing party's responsibility for timely compliance with the requirements of the statute.

The dissent asserts that "[e]ven had the State gone to the court reporter on the 30th day to obtain the bill of exceptions in order to file it, the bill of exceptions would not have been ready." On the other hand, had the State checked on the status of the bill of exceptions with the court reporter on the 21st,

25th, or even the 28th day, the court reporter's misunderstanding of the applicable law most likely would have been discovered and the 30-day deadline still capable of being met.

[5,6] Timeliness of an appeal is a jurisdictional necessity. *State v. Wieczorek, supra*; *State v. Ritz, supra*. When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly. *Id.*

## CONCLUSION

Because the State failed to timely file a bill of exceptions containing all of the evidence with this court by April 3, 2015, the appeal must be dismissed for lack of jurisdiction. See §§ 29-825 and 29-826.

Appeal dismissed.

Inbody, Judge, dissenting.

I respectfully disagree with the majority's determination that the failure of the State to timely file the bill of exceptions as required by § 29-825 defeats jurisdiction in this court. Assuming, without deciding, that the filing of the bill of exceptions within 30 days of February 27, 2015, is a jurisdictional requirement, the specific facts surrounding the untimeliness of the filing of the bill of exceptions in this case were caused solely by the court reporter whose responsibility it was to timely prepare the bill of exceptions. Therefore, the failure of the State to timely file the bill of exceptions should not defeat the jurisdiction of this court. Case law supports this position.

In *Larson v. Wegner*, 120 Neb. 449, 233 N.W. 253 (1930), the Nebraska Supreme Court considered when the filing of a transcript on appeal from the district court to the Supreme Court was a jurisdictional requirement. The court noted that the general rule is that for the Supreme Court to acquire jurisdiction of an appeal, the transcript must be filed with the court within 3 months from the rendition of the final order. However, an appellant will not be deprived of an appeal where the appellant is free from neglect and was prevented from

having his appeal docketed by the appellate court within the statutory period through the neglect or failure of the proper officer to prepare the transcript. "[W]here the appellant has done all things necessary, he cannot be deprived of his appeal by the negligence or fault of the officers of the court whose duty it is to prepare the transcript." *Id.* at 451, 233 N.W. at 254. There is a caveat to the exception: If the appellant relies upon the court official to file the necessary transcript and perfect an appeal, where the filing is not the duty of the court official, the appellant makes the court official his agent for that purpose, and the negligence in filing or failing to file is that of the appellant. See *Larson v. Wegner, supra*. See, also, *Marcotte v. City of Omaha*, 196 Neb. 217, 220, 241 N.W.2d 838, 840 (1976) ("while the requirement . . . that 'a transcript of the proceedings containing the final judgment or order' be filed with the petition in error is jurisdictional, the inability of a petitioner in error, who has timely filed his petition to obtain and file the transcript, occasioned solely by the failure of the public official charged with responsibility for furnishing the transcript to perform his public duty, does not defeat the jurisdiction of the appellate court").

Cases where untimeliness has not been excused have included those where the appellant chooses the agent for delivery of the application, bond, or transcript for filing with the clerk, and, in these cases, the appellant bears the responsibility for the untimeliness of the filing. See, *Lopez v. IBP, inc.*, 264 Neb. 273, 646 N.W.2d 628 (2002) (appellant was not free from neglect in delay in filing application for review where appellant listed wrong address for clerk of Workers' Compensation Court, causing delay in delivery); *Drier v. Knowles Vans, Inc.*, 144 Neb. 619, 14 N.W.2d 222 (1944) (postal authorities' actions did not excuse appellant's untimely filed bond where appellant selected agent and placed burden upon that agent to search out and find justice to deliver required bond for appeal); *Larson v. Wegner, supra* (appellant selected U.S. mail to transport transcript to clerk of Supreme

Court and any negligence in untimely delivery of transcript was attributable to appellant who selected agent of transport and delivery); *U. P. R. R. Co. v. Marston*, 22 Neb. 721, 36 N.W. 153 (1888) (appellant's attorney's agreement with justice of peace for justice to file transcript in district court did not relieve appellant from consequence of justice's neglect to timely file transcript). See, also, *Marcotte v. City of Omaha, supra* (order dismissing appeal was correct where no reason appeared in record to excuse failure to timely file petition in error and certified copy of transcript).

Jurisdiction was also defeated by failure to timely file a transcript and certified order of the court in *Geller v. Elastic Stop Nut Corporation*, 147 Neb. 330, 23 N.W.2d 271 (1946), wherein the Nebraska Supreme Court held that the failure to timely file the aforementioned documents prevented the district court from acquiring jurisdiction of an appeal from the dismissal of a workers' compensation case. The Nebraska Supreme Court held that although the worker had filed a motion to include in the record on appeal to the district court a complete certified transcript of all the pleadings and orders in the compensation court, the transcript was filed out of time under the provisions of the relevant statute. Further, no showing was made that any officer of the compensation court caused a delay in his securing a certified transcript of the pleadings therein, including the order of said court appealed from, and the record reflected that the transcript had been certified within time to have permitted the worker to have perfected the appeal in the manner as required by statute.

In contrast, cases where untimeliness has been found not to defeat the jurisdiction of the appellate court have focused on the lack of culpability of the appellant. In *Liljehorn v. Fyfe*, 178 Neb. 532, 134 N.W.2d 230 (1965), the district court dismissed the appellants' appeal from county court because a purported transcript, although filed in 30 days, was not signed and certified by the county judge. The Nebraska Supreme Court stated:

> There is no doubt that if the officer or judge undertakes to perform some act *not required of him,* he acts as agent of appellant and his neglect or failure is attributable to appellant himself. [Citations omitted.] But, where the default relates only to the failure of the officer to perform a duty imposed on him by law, the right to appeal is not destroyed by the failure to perfect the appeal in time. In such a case appeal may be had after the time fixed by statute and a proper transcript filed after term.

*Id.* at 535, 134 N.W.2d at 232.

The record showed on its face an "utter failure by the court to perform a mandatory statutory duty charged as the responsibility of the judge alone." *Id.* The appellants had no duty to perform in securing the signing and certification of the transcript, and the county judge performed the appellants' job of timely delivering the transcript to the clerk of the district court. The appellants "were not required to perform a futile act." *Id.* at 536, 134 N.W.2d at 232. "[O]fficial neglect cannot be excused by saying a properly prepared transcript would have been ready had appellants called in due time and made another demand." *Id*. "'[A] party cannot be deprived of his appeal by the wrong of the officer, when he is without fault himself.'" *Id.* at 536, 134 N.W.2d at 232-33.

In *Cheney v. Buckmaster*, 29 Neb. 420, 45 N.W. 640 (1890), an appeal was dismissed for lack of jurisdiction where the transcript was not filed within 30 days as required by statute, even though the transcript was ordered promptly by a party intending to appeal a judgment from county court to district court and the failure to promptly file was not on account of the carelessness or negligence of the appellants or their attorney, but the neglect of the county judge. In opposition to a motion to dismiss, the appellants offered the affidavit of the county court judge which stated, in part:

> "At the time of the filing of the appeal [the appellant's] attorney[] demanded of me a transcript of the judgment docket of said case, and that I would have complied with

> said demand within thirty days from the date of said judgment was it not for the fact that I understood, until after the expiration of thirty days from the date of said judgment, that I had until the second day of the next term of the district court for said county in which to make out said transcript."

*Id.* at 422, 45 N.W. at 641.

The Nebraska Supreme Court reversed and reinstated the appeal, noting that it did not appear the judge was to file the transcript, that the appellant requested the county judge to make a certified copy of the judgment on the fourth day after trial, and that the appellant "had a right to expect that the request would be complied with in ample time." *Id.* at 423, 45 N.W. at 641. The court stated, "While the law requires a suitor to be diligent in perfecting his appeal, yet if, without any failure on his part he is prevented from doing so on account of the failure of the proper officer to make out the transcript, he will not be deprived of his right of appeal." *Id.*

Three years later, the Nebraska Supreme Court relied upon *Cheney v. Buckmaster, supra*, in deciding *Omaha Coal, Coke & Lime Co. v. Fay*, 37 Neb. 68, 55 N.W. 211 (1893), wherein the appellants appealed to the district court but failed to timely file a transcript. The Nebraska Supreme Court stated in *Fay*:

> [T]he case of *Cheney v. Buckmaster* . . . is authority for holding that where a transcript was ordered promptly a party intending to appeal is justified in relying upon the presumption that it will be prepared within a proper period, and that he cannot be deprived of his appeal by the failure of the county judge to so prepare it. The plaintiff in error ordered the transcript immediately upon the rendition of judgment, and he was not required by law to procure it, and file it in the district court within any shorter time than thirty days after the rendition of judgment. The transcript was not prepared within this time, and even had the [appellant's] attorney not been ill,

> had he gone to the county judge to request the transcript upon the thirtieth day it would not have been ready.

37 Neb. at 71-72, 55 N.W. at 212. See, also, *Harte v. Gallagher*, 186 Neb. 141, 181 N.W.2d 251 (1970) (dismissal of appeal in probate case caused by county judge's failure to perform mandatory duty to timely prepare and transmit transcript to district court did not defeat appeal); *R. V. R. R. Co. v. McPherson*, 12 Neb. 480, 481, 11 N.W. 739, 740 (1882) (Nebraska Supreme Court affirmed district court's reinstatement of appeal where appellant "made every effort to perfect the appeal within the time limited by statute, but was prevented by the negligence, or failure to perform his duty, of the county judge" to make and deliver transcript to her).

In the instant case, the majority is deciding that the filing of the bill of exceptions within 30 days is jurisdictional. Neither the Nebraska Supreme Court nor a full panel of the Court of Appeals has decided this issue. Although the issue was addressed by one judge of this court in *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999), decisions by one judge of this court or the Supreme Court are not binding and are not eligible to be cited as precedent. See *State v. White*, 220 Neb. 527, 371 N.W.2d 262 (1985). However, in order to proceed with the analysis, I will assume that the majority's determination of this issue is correct, without conceding this point.

The appellant timely filed his notice of intent to appeal and the praecipe for the bill of exceptions on March 4, 2015, and timely filed its application for review with the consent of the Attorney General on April 1. The appellant retained the responsibility for filing the bill of exceptions with the clerk of the Court of Appeals by April 3 but was prevented from doing so by the court reporter's failure to perform her mandatory duty to timely prepare the bill of exceptions. The court reporter's affidavit states that although she received the State's praecipe for the bill of exceptions on March 4, she believed that she had 7 weeks from the date of the filing of the notice

of appeal to complete the bill of exceptions in this case. Even had the State gone to the court reporter on the 30th day to obtain the bill of exceptions in order to file it, the bill of exceptions would not have been ready. Since there has been no negligence or carelessness on the part of the appellant in this case, the failure of the court reporter to perform her official duties does not deprive the appellant of his appeal. Although the majority places the burden on the appellant to call the reporter and check the progress of the bill of exceptions, "official neglect cannot be excused by saying a properly prepared transcript would have been ready had appellants called in due time and made another demand." *Liljehorn v. Fyfe*, 178 Neb. 532, 536, 134 N.W.2d 230, 232 (1965). The appellant timely filed his praecipe for the bill of exceptions on March 4, 2015, and "had a right to expect that the request would be complied with in ample time." See *Cheney v. Buckmaster*, 29 Neb. 420, 423, 45 N.W. 640, 641 (1890).

I would find that it would be wrong to deprive this court of jurisdiction under the specific facts surrounding the untimeliness of the filing of the bill of exceptions in this case, since it was caused solely by the court reporter, whose responsibility it was to timely prepare the bill of exceptions. Therefore, the filing of the bill of exceptions on April 7, 2015, which is more than 30 days after the February 27 entry of the suppression order, does not defeat the jurisdiction of this court.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Jason Sellers, appellant, v.
Stephanie Sellers, appellee,
and State of Nebraska,
intervenor-appellee.

869 N.W.2d 703

Filed September 1, 2015. No. A-14-665.

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 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. **Child Support: Rules of the Supreme Court.** Interpretation of the Nebraska Child Support Guidelines presents a question of law.
4. **Judgments: Appeal and Error.** An appellate court resolves questions of law independently of the lower court's conclusion.
5. **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.
6. **Judges: Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion.
7. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered.

8. **Courts: Child Support.** The trial court has discretion to choose whether and how to calculate a deduction for subsequent children.
9. **Child Support.** No precise mathematical formula exists for calculating child support when subsequent children are involved, but the court must perform the calculation in a manner that does not benefit one family at the expense of the other.
10. **Modification of Decree: Child Support: Proof.** The party requesting a deduction for his or her obligation to support subsequent children bears the burden of providing evidence of the obligation, including the income of the other parent of the child.
11. **Child Support: Appeal and Error.** A party may raise two separate issues on appeal when a trial court allows a deduction for the obligor's support of subsequent children: (1) whether the court abused its discretion by allowing a deduction and (2) whether the court's method of calculation was an abuse of discretion.
12. **Records: Appeal and Error.** An appellate brief generally may not expand the evidentiary record and should limit itself to arguments supported by the record.
13. **Child Support: Appeal and Error.** Whether a child support order should be retroactive is entrusted to the discretion of the trial court, and an appellate court will affirm its decision absent an abuse of discretion.
14. **Child Support.** In determining whether to order retroactive support, a court must consider the parties' status, character, situation, and attendant circumstances. As part of that consideration, the court must consider whether the obligated party has the ability to pay the lump-sum amount of a retroactive award.
15. **Modification of Decree: Child Support: Time.** Absent equities to the contrary, modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification.
16. **Child Support: Child Custody.** In the determination of child support, the children and the custodial parent should not be penalized by delay in the legal process, nor should the noncustodial parent gratuitously benefit from such delay.
17. **Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
18. **Trial: Evidence: Appeal and Error.** Upon a de novo review in an appellate court, incompetent, irrelevant, and immaterial evidence offered in the original trial, which was admitted over proper objections by the adverse party, will be disregarded.

Appeal from the District Court for Lincoln County: Richard A. Birch, Judge. Affirmed.

Monelle M. Nichols, of Nichols Law, for appellant.

Stephanie Sellers, pro se.

Claudine K. Thorne, Deputy Lincoln County Attorney, for intervenor-appellee.

Moore, Chief Judge, and Pirtle and Bishop, Judges.

Moore, Chief Judge.

## I. INTRODUCTION

Jason Sellers appeals from the order of the district court for Lincoln County, which modified his child support obligation to Stephanie Sellers, also known as Stephanie Rodriguez, for the support of the parties' minor children. Because we find no abuse of discretion in the court's modification of Jason's child support, we affirm.

## II. BACKGROUND

Jason and Stephanie were married in February 2001 and are the parents of three minor children. In March 2010, the district court dissolved Jason and Stephanie's marriage, awarded Stephanie custody of the parties' children, and ordered Jason to pay child support of $96 per month. Jason was incarcerated at the time the decree was entered.

In March 2013, Stephanie requested a review of Jason's child support, pursuant to Neb. Rev. Stat. § 43-512.12 (Cum. Supp. 2014), which provides for a review by the Nebraska Department of Health and Human Services (Department) "in cases in which a party has applied for services under Title IV-D of the federal Social Security Act . . . to determine whether to refer such orders to the county attorney or authorized attorney for filing of an application for modification." Jason failed to provide adequate financial information to the

Department, creating a rebuttable presumption that there had been a material change in his financial circumstances such that his child support obligation should be increased. See Neb. Rev. Stat. § 43-512.14 (Reissue 2008).

On December 11, 2013, following a review by the Department's "Review and Modification Unit," the State of Nebraska filed a complaint for modification of child support, requesting an increase in Jason's monthly child support obligation based on a change in circumstances to an amount consistent with the Nebraska Child Support Guidelines. Jason was personally served with the complaint on January 21, 2014.

After three continuances, two of which were at Jason's request, a modification hearing was held before the district court on June 17, 2014.

At the time of the modification hearing, Jason lived with his current wife, their 1-year-old son, and his 5-year-old stepson. Jason has been involved in his stepson's life since his birth and is the only father this child has ever known. Jason's wife is a stay-at-home mother.

At the time of the decree in March 2010, Jason was incarcerated for assault. The district court overruled Jason's relevance objection to the reason for his incarceration. Jason was released from prison in June 2010. Jason is now employed at a company where he earns $16.12 per hour and works 40 hours per week. He contributes to a retirement account through his employment at a rate of 4 percent. Jason has health insurance available to him through his employment, which insurance he provides for himself and his children. To provide this health insurance for the three minor children in this case, Jason pays an additional $135 per month above what it costs him to provide health insurance for himself.

Jason has been diagnosed with diverticulitis, and he testified about his costs for medication and surgeries resulting from the condition. Jason underwent three surgeries in the year prior to the hearing. According to Jason, his medical

providers have told him that the issues that led to his second and third surgeries could happen again and that it was "[j]ust a matter of time." Jason testified that over the last year, his medical expenses have been $30,000 or more, which expenses he believed included the cost that was covered by health insurance. Jason offered exhibit 1, which he stated contained his medical bills for the previous 1½ years. According to a typewritten summary page included in the exhibit, Jason's out-of-pocket medical costs from January through June 2014 were $13,734.29. The State objected to exhibit 1 because it included several bills for individuals other than Jason. The district court received exhibit 1 into evidence, stating that it would not take any irrelevant portions of the exhibit into account in reaching its decision. Jason testified that he did not know the limits, deductible, or maximum out-of-pocket expenses under his health insurance policy, as he did not pay attention to any such documentation received from his employer.

At the time of the modification hearing, Jason was current on his child support payments. He did not feel he would be able to pay child support of $712 per month as reflected in the child support calculation submitted by the State, and he testified that his ongoing medical bills would make it difficult for him to pay any amount of retroactive child support. Jason testified that he could possibly afford child support of $176 as reflected in one of his child support calculations.

Stephanie has been a respite provider for the past 5 years, but at the time of trial did not have current employment in that capacity because the individual she had been caring for had been placed in a nursing home. Stephanie earned $11,712 in 2013 and $13,899 in 2012. Stephanie testified that she does not have an illness or disability that prevents her from working full time. She receives public assistance in the form of food stamps, and the parties' children are covered under Medicaid. She has also received some assistance from her parents. She

has a boyfriend who is involved in the children's lives and "helps out."

Stephanie testified about her understanding of the health insurance Jason was providing for the children. According to Stephanie, the insurance became effective April 1, 2014. Based on documentation she received from the insurance company and discussion with Jason, Stephanie testified that the deductible was $4,500 for a family and $2,250 for a person. Stephanie understood the annual out-of-pocket maximum under the insurance plan was $7,000 for a family and $3,500 per person.

On June 24, 2014, the district court entered an order modifying Jason's child support obligation. The court found that since entry of the divorce decree in March 2010, there had been a material change in circumstances as a result of the increase in Jason's income. The court found that the parties were in agreement with respect to their income and earning capacities, and it established Stephanie's earning capacity for child support purposes at $1,257 per month and Jason's income at $2,794 per month. The court found that Jason was entitled to a deduction for his retirement contribution, for the cost of health insurance, and for the support of the one child of his current marriage. The court set the deduction for the child of Jason's current marriage at $234. The court did not allow a deduction for Jason's support of his stepchild. The court noted Jason's serious medical issues, but it observed that his actual income from 2013 was in excess of the amount attributed to him on the parties' child support calculations. The court found that any determination that Jason's past medical problems would cause a future reduction in his income would be speculative. In determining that Jason failed to produce sufficient evidence to rebut the presumption that the child support guidelines should be applied, the court noted that Jason testified he did not know the amount of his deductible, that a number of the medical bills Jason submitted as evidence were for other individuals, that some

of the bills were outside the dates within which they were alleged to have been incurred, and that there was no way to determine what Jason's final liability may have been on such medical bills. The court ordered Jason to pay, commencing on February 1, 2014, child support of $712 per month for three children, $597 per month for two children, and $397 per month for one child. The court also ordered Jason to continue to maintain health and medical insurance on the minor children through his employer if available to him at a reasonable cost and to pay 63 percent of any uninsured health or medical expenses for the minor children in excess of $480 per child per year.

## III. ASSIGNMENTS OF ERROR

Jason asserts, restated, that the district court erred in (1) calculating child support with respect to the amount used as a deduction for regular support for other children, (2) finding insufficient evidence to rebut the strict application of the guidelines and/or failing to allow a deviation for his medical expenses, (3) failing to recognize and apply the correct basic subsistence limitation in calculating child support, (4) entering a child support order in contradiction of public policy and legislative intent that would require Jason to seek public assistance, (5) ordering the payment of retroactive support, (6) allowing evidence of the reason for Jason's previous incarceration, (7) ordering Jason to pay for 63 percent of the unreimbursed health care costs, and (8) denying Jason's application to proceed in forma pauperis.

## IV. STANDARD OF REVIEW

[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. *Schwarz v. Schwarz*, 289 Neb. 960, 857 N.W.2d 802 (2015). A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant

of a substantial right and denying just results in matters submitted for disposition. *Id.*

[3,4] Interpretation of the Nebraska Child Support Guidelines presents a question of law. *Schwarz v. Schwarz, supra.* An appellate court resolves questions of law independently of the lower court's conclusion. *Id.*

[5,6] 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. *Griffith v. Drew's LLC*, 290 Neb. 508, 860 N.W.2d 749 (2015). The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion. *Id.*

## V. ANALYSIS

### 1. Child Support Calculation

[7] A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered. *State on behalf of B.M. v. Brian F.*, 288 Neb. 106, 846 N.W.2d 257 (2014). The modification proceedings in this case were initiated after Stephanie's request for a review by the Department, and Jason's failure to provide adequate financial information created a rebuttable presumption that his income had changed from the time of the decree. See §§ 43-512.12 and 43-512.14.

The district court found a material change in circumstances and modified Jason's child support obligation, increasing it from $96 to $712 per month for three children. In doing so, the court established Stephanie's earning capacity for child support purposes at $1,257 per month and Jason's income at $2,794 per month. It found that Jason was entitled to deductions for his retirement contribution, the cost of health

insurance, and $234 in support for the child of his current marriage. The court did not allow a deduction for Jason's stepchild or a deviation in light of his medical expenses. Although Jason asserts that the district court erred in calculating his child support obligation, he does not dispute that his income has increased since entry of the divorce decree, and he does not assign error to the income amounts used by the court in its calculation. He specifically assigns error to the amount used by the court as a deduction for regular support for other children, the court's finding insufficient evidence to rebut the strict application of the guidelines and/or failure to allow a deviation for his medical expenses, and the court's failure to recognize and apply the correct basic subsistence limitation in calculating child support. He also asserts that the court erred by entering a child support order that would require him to seek public assistance. We address each of these arguments separately below.

### (a) Regular Support for Other Children

The district court allowed a deduction of $234 per month for Jason's subsequently born child. The Nebraska Child Support Guidelines allow for a deduction for biological or adopted children for whom the obligor provides regular support. Neb. Ct. R. § 4-205(E). Jason argues that his stepchild should have also been taken into account in this deduction. Although Jason's support of this child is to be commended, there is no provision in the guidelines that would allow a deduction for a child other than a biological or adopted child.

[8-11] Jason also takes issue with the manner in which the trial court calculated the deduction for his subsequent child. The trial court has discretion to choose whether and how to calculate a deduction for subsequent children. *Schwarz v. Schwarz*, 289 Neb. 960, 857 N.W.2d 802 (2015). No precise mathematical formula exists for calculating child support when subsequent children are involved, but the court must

perform the calculation in a manner that does not benefit one family at the expense of the other. *Id.* The party requesting a deduction for his or her obligation to support subsequent children bears the burden of providing evidence of the obligation, including the income of the other parent of the child. *Id.* A party may raise two separate issues on appeal when a trial court allows a deduction for the obligor's support of subsequent children: (1) whether the court abused its discretion by allowing a deduction and (2) whether the court's method of calculation was an abuse of discretion. *Id.*

In this case, the district court considered Jason's income alone and what his obligation would be for his four biological children and divided that total obligation by four to arrive at an amount per child. The deduction of $234 per month for the subsequently born child was used in the State's child support calculation. The State argues that this formula treats all of Jason's children fairly and does not provide a benefit to either his previous children or his subsequently born child. We agree.

The calculation adopted by the district court treats all of Jason's biological children nearly identically. The court awarded child support of $712 per month for three children, based upon the child support guidelines, which represents 25.48 percent of Jason's gross income of $2,794, or 8.49 percent per child. The deduction of $234 for the child of his current marriage represents 8.38 percent of Jason's gross income. The district court did not abuse its discretion in calculating the deduction allowed for Jason's subsequently born child.

### (b) Deviation for Medical Expenses

Jason asserts that the district court erred in finding insufficient evidence to rebut the strict application of the guidelines and/or failed to allow a deviation for his medical expenses. Neb. Ct. R. § 4-203 (rev. 2011) provides in part:

> The child support guidelines shall be applied as a rebuttable presumption. All orders for child support obligations shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied.

Section 4-203(A) allows for a deviation "[w]hen there are extraordinary medical costs of either parent or child." Jason argues that diverticulitis is a costly and serious medical condition which warranted relief from the strict application of the guidelines.

At the modification hearing, Jason testified about the three surgeries he underwent in the year prior to the modification hearing due to his diverticulitis diagnosis and testified that the issues that led to his second and third surgeries could recur in time. Jason did not present any medical testimony about the nature of his condition, what future problems are likely to occur, or the day-to-day ongoing medical expenses associated with it, extraordinary or otherwise. He testified that he had incurred medical expenses in the previous year totaling over $30,000 or more. He acknowledged, however, that this amount included what was covered by his health insurance. According to the summary page of exhibit 1, Jason incurred uncovered medical expenses totaling $13,734.29 in the first 6 months of 2014. We note, as did the district court, that exhibit 1 includes bills for individuals other than Jason and outside of the 6-month period purportedly covered by the summary page. Jason was unsure about the limits of his health insurance policy, including the amount of his deductible and maximum out-of-pocket expenses. He testified that the health insurance he carried for himself was the same as what he provided for the children in this case. Stephanie testified, based on conversations with Jason and information she received from the insurance company, about the health insurance policy limits, including a family deductible of $4,500,

individual deductible of $2,250, annual family out-of-pocket maximum of $7,000, and annual individual out-of-pocket maximum of $3,500. The court also received into evidence documentation from the health insurance company of the policy limits.

The district court noted that Jason has had serious medical issues that have affected his health, but it observed that his actual income from 2013 exceeded the amount attributed to him in the parties' proposed child support calculations. The court concluded that there was no way to determine Jason's final liability on the medical bills included in exhibit 1. Accordingly, the court concluded that Jason failed to present sufficient evidence to rebut the presumption that the child support guidelines should be applied. We agree. There is conflicting evidence in the record about Jason's medical expenses and nothing beyond speculation to show what his future medical expenses might be. Because Jason did not present sufficient evidence to support a deviation for extraordinary medical expenses, the court did not abuse its discretion in declining to allow such a deviation.

(c) Basic Subsistence Limitation

Jason asserts that the district court erred in failing to recognize and apply the correct basic subsistence limitation in calculating child support. Neb. Ct. R. § 4-218 (rev. 2015) currently provides:

> A parent's support, child care, and health care obligation shall not reduce his or her net income below the minimum of $981 [$973 at the time of the modification hearing in this case] net monthly for one person, or the poverty guidelines updated annually in the Federal Register by the U.S. Department of Health and Human Services under authority of 42 U.S.C. § 9902(2), except minimum support may be ordered as defined in § 4-209.

Jason argues that this section expresses two different basic subsistence limitations. Specifically, he argues that the

limitation of $973 in place at the time of trial is for one person while the poverty guidelines updated annually in the Federal Register based on household size are applicable here. The State argues that the district court properly applied the limitation of $973 in effect at the time of the modification hearing, citing to *Henke v. Guerrero*, 13 Neb. App. 337, 692 N.W.2d 762 (2005).

This court recently addressed the question of application of § 4-218 of the child support guidelines and the proper basic subsistence limitation to apply when an obligor's household consists of more than one person. See *Lasu v. Issak, ante* p. 83, 868 N.W.2d 79 (2015). In that case, we utilized the poverty guidelines for the obligor's entire household as found in the Federal Register as opposed to the figure for one person as a starting point in determining the obligor's child support. In doing so, we distinguished *Henke*. We acknowledged that in *Henke*, although the father-obligor had another family to support, this court did not consider the poverty guidelines for his family of five when reviewing the father's support obligation, and instead appeared to utilize the basic subsistence limitation for one person in determining support for the child at issue in the paternity action. However, as we discussed in *Lasu*, the only assigned error on cross-appeal by the father in *Henke* was application of the poverty guidelines with respect to the retroactive support and the issue of whether to apply the poverty guideline for one person or for the total household in determining the child support award was not raised.

Following our decision in *Lasu*, we agree with Jason that it is appropriate to consider the poverty guidelines as updated in the Federal Register that were in place at the time of this modification proceeding, pertinent portions of which were received as exhibit 4. Utilizing the child support calculation worksheet adopted by the district court, Jason's monthly net income is $1,829, after the $234 deduction allowed for Jason's subsequently born child. After then subtracting the child support obligation of $712 as determined by the district

court, Jason has remaining net monthly income of $1,117. Using the poverty guideline figure for a household of four as set forth in exhibit 4, Jason contends that the guidelines reflect a monthly limitation of $1,987.50, which greatly exceeds his actual remaining net monthly income of $1,117. Thus, Jason asserts that the child support obligation imposed by the district court violates § 4-218.

We first note that utilizing the net monthly income for Jason after giving him credit for his subsequent child and then in turn considering this child in the household for purposes of the basic subsistence limitation essentially gives duplicate consideration for the subsequent child. Thus, we think it appropriate at the outset of our analysis on this issue to add back the $234 deduction allowed for Jason's subsequently born child in the child support calculation, which results in a total of $1,351 remaining net income for Jason's current household after the child support order of $712 is subtracted.

In further applying the poverty guidelines as updated annually in the Federal Register, we are also faced with the question of how to determine the household income and size. The applicable annual update published in the Federal Register and received into evidence as exhibit 4 in this case states:

> Note that this notice does not provide definitions of such terms as "income" or "family," because there is considerable variation in defining these terms among the different programs that use the guidelines. These variations are traceable to the different laws and regulations that govern the various programs. This means that questions such as "Is income counted before or after taxes?", "Should a particular type of income be counted?", and "Should a particular person be counted as a member of the family/household?" are actually questions about how a specific program applies the poverty guidelines. All such questions about how a specific program applies the guidelines should be directed to the entity that

> administers or funds the program, since that entity has the responsibility for defining such terms as "income" or "family," to the extent that these terms are not already defined for the program in legislation or regulations.

Thus, we determine that for purposes of setting child support, the questions of how to define income and how to count a family or household under the poverty guidelines as updated annually in the Federal Register should be determined in a manner consistent with the Nebraska Child Support Guidelines.

Jason's argument regarding § 4-218 focuses only on his income, as his current wife is not working outside the home. We note that in *Lasu v. Issak, ante* p. 83, 868 N.W.2d 79 (2015), both the father and his wife were working, and thus, we used their combined incomes in applying the poverty guidelines contained in the Federal Register. However, in considering application of the poverty guidelines as a mechanism to limit Jason's child support obligation for his three prior children in this case, we also consider whether it is appropriate to impute income to Jason's current wife. As mentioned previously, the poverty guidelines update in the Federal Register does not define "income," but the Nebraska Child Support Guidelines recognize that earning capacity may be considered in lieu of a parent's actual, present income. Neb. Ct. R. § 4-204. In applying the child support guidelines, courts in Nebraska often attribute income to a nonworking parent in calculating child support. See, e.g., *Muller v. Muller*, 3 Neb. App. 159, 524 N.W.2d 78 (1994) (no abuse of discretion found where district court attributed income based on earning capacity to mother who decided not to work to care for children). On the other hand, in *Collins v. Collins*, 19 Neb. App. 529, 808 N.W.2d 905 (2012), we found that the trial court abused its discretion in imputing minimum-wage earning capacity to the nonworking mother where the evidence demonstrated that she could not attain minimum-wage earning capacity by reasonable efforts.

In this case, both parties attributed earning capacity income to Stephanie as if she were working full time and earning minimum wage. Under the circumstances of this case, we conclude that it is appropriate, in applying the poverty guidelines, to likewise attribute earning capacity income to Jason's current wife. The only evidence in the record is that she is a stay-at-home mother; there is no evidence that she could not attain minimum-wage earning capacity by reasonable efforts. By also attributing $1,257 gross monthly income to Jason's current wife (the same as for Stephanie) and using the trial court's worksheet, her net monthly income would be $1,061. If we add that figure to Jason's net income of $1,351 (after the $712 child support is subtracted), we arrive at total household net monthly income of $2,412, which exceeds the basic subsistence limitation of $1,987.50 for a family of four. For the sake of completeness, we considered the household size as four to include Jason's stepson, since we imputed income to Jason's current wife.

In conclusion, we determine that while it was appropriate for the district court to consider the poverty guidelines as updated in the Federal Register for Jason's household, the district court's award of child support ultimately did not violate § 4-218.

(d) Public Policy

[12] Jason asserts that the district court erred in entering a child support order in contradiction of public policy and legislative intent that would require him to seek public assistance. Much of his argument in support of this assignment of error focuses on Stephanie's finances and decisions with respect to employment or is composed of colorful historical references. Although his brief states that his pay is now being garnished to pay child support arrears and that he is trying to qualify for state assistance, this information is outside of the record presented on appeal. An appellate brief generally may not expand the evidentiary record and should limit itself to

arguments supported by the record. *Galaxy Telecom v. SRS, Inc.*, 13 Neb. App. 178, 689 N.W.2d 866 (2004). To the extent that Jason's arguments relate to his assignments of error with respect to retroactive support, the correct basic subsistence limitation, and his requested deviation for his medical expenses, we have addressed those arguments elsewhere in this opinion. This assignment of error is without merit.

(e) Conclusion Regarding Child Support

The district court did not abuse its discretion in determining Jason's child support obligation for the children at issue in this case.

2. Retroactive Modification

Jason asserts that the district court erred in ordering the payment of retroactive support. The complaint for modification in this case was filed in December 2013, and a modification hearing was initially scheduled for February 18, 2014. The hearing, however, was continued three times before finally occurring on June 17. The first continuance was at the State's request to allow for the required 30 days between the time Jason was personally served with the complaint on January 21 and the hearing. Two additional continuances were granted at Jason's request, the first because Jason was undergoing a medical procedure and the second because Jason's counsel needed time to determine whether there was a conflict with her representation of Jason. The court made the modification of Jason's child support obligation retroactive to February 1, 2014.

[13-16] Whether a child support order should be retroactive is entrusted to the discretion of the trial court, and an appellate court will affirm its decision absent an abuse of discretion. *Freeman v. Groskopf*, 286 Neb. 713, 838 N.W.2d 300 (2013). In determining whether to order retroactive support, a court must consider the parties' status, character, situation,

and attendant circumstances. *McDonald v. McDonald*, 21 Neb. App. 535, 840 N.W.2d 573 (2013). As part of that consideration, the court must consider whether the obligated party has the ability to pay the lump-sum amount of a retroactive award. *Id.* Absent equities to the contrary, modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification. *Id.* In the determination of child support, the children and the custodial parent should not be penalized by delay in the legal process, nor should the noncustodial parent gratuitously benefit from such delay. *Id*.

Jason argues that an award of retroactive support will not allow him to meet his child support obligation to the children in this case and support his new family. Jason argues further that the district court should have also taken his extensive medical expenses into consideration. He agrees, however, that February 1, 2014, was the correct date for any retroactive award, given that he was not served with notice of the complaint until January 21.

As discussed above, there was conflicting evidence about Jason's uncovered medical expenses and no evidence to show the extent of any ongoing future medical expenses. The court did take Jason's medical expenses into consideration in making the award retroactive to February 2014 rather than January. Under the circumstances of this case, we find no abuse of discretion in the court's award of retroactive support.

### 3. Evidence of Previous Incarceration

[17,18] Jason asserts that the district court erred in allowing evidence of the reason for his previous incarceration. He argues that he was unfairly prejudiced by the admission of this evidence. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

*Griffith v. Drew's LLC*, 290 Neb. 508, 860 N.W.2d 749 (2015). Neb. Rev. Stat. § 27-402 (Reissue 2008) provides in part that "[e]vidence which is not relevant is not admissible." "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Neb. Rev. Stat. § 27-403 (Reissue 2008). The fact of Jason's incarceration at the time of the decree was relevant to show that there had been a change in his financial circumstances warranting a modification of his child support obligation. While the reason for his incarceration was not relevant to that determination, we see no evidence that the district court placed undue emphasis on or even considered that fact in making its determination with respect to child support. Further, upon a de novo review in an appellate court, incompetent, irrelevant, and immaterial evidence offered in the original trial, which was admitted over proper objections by the adverse party, will be disregarded. *Coffey v. Coffey*, 11 Neb. App. 788, 661 N.W.2d 327 (2003). We have disregarded the reason for Jason's incarceration in our de novo review. This assignment of error is without merit.

### 4. Unreimbursed Health Care Costs

Jason asserts that the district court erred in ordering him to pay for 63 percent of the unreimbursed health care costs. He does not separately argue this assignment of error, only mentioning it as error in connection with his arguments about the correct basic subsistence limitation and award of retroactive support which we have already addressed above. Jason's assertions about unreimbursed health care costs amount to an argument that he cannot afford to pay the award of 63 percent.

Neb. Ct. R. § 4-215(B) (rev. 2011) states in relevant part: "All nonreimbursed reasonable and necessary children's health care costs in excess of $480 per child per year shall be allocated to the obligor parent as determined by the court, but shall not exceed the proportion of the obligor's parental

contribution (worksheet 1, line 6).” Under the district court’s calculations in this case, Jason’s proportion of the parental contribution is 63 percent. We have already found no abuse of discretion in the court’s child support calculation. We also note the evidence shows that the children’s medical expenses are largely covered by Medicaid. Further, there is nothing in the record to show that the children have any unusual or extensive medical expenses. Jason has not shown what impact, if any, the award of 63 percent of the nonreimbursed medical expenses will actually have on his finances. This assignment of error is without merit.

### 5. Application to Proceed In Forma Pauperis

Jason asserts that the district court erred in denying his application to proceed in forma pauperis in prosecuting his appeal from the June 24, 2014, order. Jason filed his notice of appeal on July 18, indicating that he was “delay[ing]” deposit of the docket fee and costs pending a ruling on his in forma pauperis application. The application to proceed in forma pauperis and poverty affidavit was filed on July 22 and was denied by the district court on that same date. The clerk’s certificate in our transcript shows that the docket fee was paid on July 18, and the cash bond was paid on July 22. After the district court denied Jason’s request to proceed in forma pauperis on July 22, he had 30 days to appeal the ruling or proceed by paying the docket fee. See, Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004); *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003). Because Jason chose to pay the docket fee, he cannot now be heard to complain of this issue.

## VI. CONCLUSION

Because we find no abuse of discretion in the district court’s modification of Jason’s child support, we affirm.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# In re Interest of Nathan L., a child under 18 years of age. State of Nebraska, appellee, v. Nathan L., appellant.

870 N.W.2d 159

Filed September 1, 2015. No. A-14-1150.

1. **Juvenile Courts: Appeal and Error.** An appellate court's review of a juvenile court's determination of whether a juvenile has been denied his or her statutory right to a prompt adjudication is made de novo on the record to determine whether there has been an abuse of discretion by the juvenile court.
2. ____: ____. Prompt adjudication determinations are initially entrusted to the discretion of the juvenile court and will be upheld unless they constitute an abuse of discretion.

Appeal from the Separate Juvenile Court of Lancaster County: Linda S. Porter, Judge. Remanded with directions.

Joseph Nigro, Lancaster County Public Defender, and Chelsie Krell for appellant.

Joe Kelly, Lancaster County Attorney, and Ashley Bohnet for appellee.

Irwin, Inbody, and Riedmann, Judges.

Inbody, Judge.

## INTRODUCTION

Nathan L. appeals the order of the separate juvenile court of Lancaster County overruling his motion to dismiss on speedy trial grounds and adjudicating him as a child within

the meaning of Neb. Rev. Stat. § 43-247(3)(b) (Reissue 2008) for being habitually truant from school between August 13, 2013, and May 8, 2014.

## STATEMENT OF FACTS

On May 30, 2014, the State filed a petition alleging that Nathan was a child within the meaning of § 43-247(3)(b) for being habitually truant from school. On July 7, the matter was continued by the State until July 21, for service issues, as neither Nathan nor either of his parents appeared at a hearing held on July 1. On July 21, Nathan appeared at the hearing with his grandfather and requested the appointment of counsel. In a July 23 order, the matter was continued by the court until August 20, and the court appointed the Lancaster County Public Defender to represent Nathan.

On August 20, 2014, Nathan appeared with counsel and entered a denial to the allegations contained within the petition. The matter was set for docket call on September 23 and a formal contested hearing on October 3. On October 3, the matter was continued by the juvenile court to October 24 for "another case on the Court's docket having priority." On October 24, Nathan filed a motion to dismiss the case on speedy trial grounds which alleged that the State failed to bring him to trial within 90 days as required by Neb. Rev. Stat. § 43-278 (Cum. Supp. 2014) and the U.S. and Nebraska Constitutions. That same day, the matter came before the court for formal hearing on the adjudication petition. As to the motion to dismiss, the juvenile court entered an order on November 19, stating that the "Motion to Dismiss on Speedy Trial Grounds filed by counsel for the juvenile was argued by counsel. The Court overruled said Motion." The juvenile court's order went on to find that the State had proved beyond a reasonable doubt that Nathan was habitually truant on the dates alleged in the petition and that exhibit 1, submitted by the State, reflected a pattern of school absences and multiple periods of truancy and tardiness.

## ASSIGNMENTS OF ERROR

On appeal to this court, Nathan assigns that the juvenile court abused its discretion by failing to dismiss the case on speedy trial grounds, by failing to make specific findings on the record of the time excluded, and by failing to consider the right of the juvenile to a prompt and fair adjudication by not considering the appropriate factors.

## STANDARD OF REVIEW

[1,2] An appellate court's review of a juvenile court's determination of whether a juvenile has been denied his or her statutory right to a prompt adjudication is made de novo on the record to determine whether there has been an abuse of discretion by the juvenile court. See *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996). Prompt adjudication determinations are initially entrusted to the discretion of the juvenile court and will be upheld unless they constitute an abuse of discretion. *Id.*

## ANALYSIS

Nathan contends that the juvenile court abused its discretion by failing to dismiss the case on speedy trial grounds in that it failed to make specific findings on the record of the time excluded and failed to consider the right of the juvenile to a prompt and fair adjudication by not considering the appropriate factors.

Section 43-278 provides that "all cases filed under subdivision (3) of section 43-247 shall have an adjudication hearing not more than ninety days after a petition is filed. Upon a showing of good cause, the court may continue the case beyond the ninety-day period."

The Nebraska Supreme Court has held that § 43-278 provides juveniles with a statutory right to prompt adjudication; however, the Supreme Court also held that § 43-278 is discretionary and does not require absolute discharge if the juvenile is not adjudicated within the 90-day time period. See *In re*

*Interest of Brandy M. et al., supra*. The Supreme Court, in *In re Interest of Brandy M. et al.*, specifically held:

> [I]t is within the sound discretion of the juvenile court to determine whether absolute discharge of a juvenile petition is in the best interests of a juvenile, taking into consideration (1) the factors set forth in [Neb. Rev. Stat.] §§ 43-271 [(Reissue 2008)] and 43-278, (2) the right of the juvenile to a prompt and fair adjudication, and (3) the future treatment and rehabilitation of the juvenile in the event of an adjudication. The benchmark of this determination is the protection of the best interests of the juvenile. See *In re Interest of Lisa O.*[, 248 Neb. 865, 540 N.W.2d 109 (1995)].

250 Neb. at 524, 550 N.W.2d at 26.

In the case at hand, there are no specific findings of fact contained within the juvenile court's order as to why the motion was overruled. In open court, the juvenile court stated:

> I just don't think there's any authority that would require the Court to dismiss a truancy proceeding because there's — it's being heard slightly in excess of the 90-day period referenced in the statute you've cited. And we really are just a few days outside of that 90-day period, given the time the juvenile was served and then, if you deduct from that the time that was requested for appointment of counsel, we're well within that 90 days.

The problem with this statement by the juvenile court is that the Nebraska Supreme Court has explicitly directed that the juvenile court must make specific findings on the record. In the case of *In re Interest of Shaquille H.*, 285 Neb. 512, 520, 827 N.W.2d 501, 507 (2013), the Supreme Court stated:

> In this case, the juvenile court did not make such specific findings; the Court of Appeals did those calculations for the juvenile court. The holding in [*State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009),] may have escaped the notice of a juvenile court judge because *Williams* is an adult criminal case. Thus, here, we explicitly extend

> this requirement to the juvenile court. A juvenile court judge must make specific findings on the record regarding any excludable time periods as defined in [Neb. Rev. Stat.] § 29-1207 [(Cum. Supp. 2012)] before making the ultimate determination as to whether discharge would be in the best interests of a child.

The statements of the juvenile court regarding Nathan's case suggest the reasoning for the denial of the motion to dismiss on speedy trial grounds, but there is no specificity and no exact calculation on the record from which we can ascertain the exact reasoning of the juvenile court.

## CONCLUSION

Therefore, we remand the matter to the juvenile court with directions to enter into specific findings pursuant to the Nebraska Supreme Court's directives in *In re Interest of Shaquille H., supra*.

Remanded with directions.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# In re Interest of Danajah G. et al., children under 18 years of age. State of Nebraska, appellee, v. Robyn G., appellee, and Darneil K., intervenor-appellant.

870 N.W.2d 432

Filed September 15, 2015. No. A-14-709.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. 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.
2. **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.
3. **Child Custody: Visitation: Convicted Sex Offender.** Pursuant to Neb. Rev. Stat. § 43-2933(2) (Reissue 2008), no person shall be granted custody, parenting time, visitation, or other access with a child if the person has been convicted under Neb. Rev. Stat. § 28-319 (Reissue 2008) (first degree sexual assault) and the child was conceived as a result of that violation.
4. ____: ____: ____. Neb. Rev. Stat. § 43-2933(2) (Reissue 2008) does not provide for any exception to or discretion in its mandatory language.
5. **Child Custody: Visitation: Convicted Sex Offender: Statutes.** Neb. Rev. Stat. § 43-2933(2) (Reissue 2008) falls under the Parenting Act, Neb. Rev. Stat. § 43-2920 et seq. (Reissue 2008 & Cum. Supp. 2014), and not under the Nebraska Juvenile Code, Neb. Rev. Stat. § 43-245 et seq. (Reissue 2008 & Cum. Supp. 2014).
6. ____: ____: ____: ____. Neb. Rev. Stat. § 43-2933(2) (Reissue 2008) applies to cases under the Nebraska Juvenile Code when

parenting functions are at issue under chapter 42 of the Nebraska Revised Statutes.

7. **Parental Rights.** Parental rights constitute a liberty interest, and a parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one.
8. **Due Process: Notice.** Due process requires that parties at risk of deprivation of liberty interests be provided adequate notice and an opportunity to be heard appropriate to the nature of the proceeding and the character of the rights which may be affected by it.

Appeal from the Separate Juvenile Court of Douglas County: Douglas F. Johnson, Judge. Remanded with directions.

Barbara J. Prince for intervenor-appellant.

Elizabeth McClelland, Deputy Douglas County Attorney, for appellee State of Nebraska.

Kate E. Placzek, of Law Office of Kate E. Placzek, for appellee Robyn G.

Irwin, Riedmann, and Bishop, Judges.

Bishop, Judge.

Darneil K., the father of Danajah G. and an intervenor in these juvenile court proceedings, appeals from an order of the juvenile court which granted a motion to change Danajah's physical placement from Darneil's home to the home of Danajah's mother, Robyn G. We remand the matter back to the juvenile court with directions.

## BACKGROUND

Robyn and Darneil are the parents of Danajah, born in December 2006. On May 2, 2007, Darneil entered a plea of guilty to first degree sexual assault, a Class II felony; Robyn was the child victim (Robyn was 14 or 15 years of age at the time of the offense and Darneil was 21 or 22 years of age). The record suggests that Danajah was conceived as a result of the "statutory rape" of Robyn by Darneil.

Robyn is also the mother of Nadiah G., born in March 2010; Jade G., born in December 2011; and Kaziah G., born in December 2013. Darneil is not the father of Robyn's other children. Because these other children are not affected by this appeal, they will be discussed only as necessary.

On July 18, 2007, the State filed a petition alleging that Danajah was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2006), through no fault of Robyn, in that (1) Robyn was placed into protective custody by law enforcement on July 17, (2) Robyn was placed outside of the parental home, (3) Robyn was "unable to provide proper care and support for [Danajah] with assistance," and (4) due to the above allegations, Danajah was at risk for harm. On November 8, Robyn pled no contest to the allegations in the petition, and, as noted in the court's order filed on November 13, Danajah was adjudicated accordingly.

In its disposition order filed on November 28 or 29, 2007 (the date on the file stamp is difficult to read), the court stated that the permanency objective was family preservation. However, in its order filed on January 20, 2009, the court stated that the permanency objective was reunification with a concurrent plan of adoption. And in its order filed on June 18, the court struck reunification and adopted a permanency plan of adoption; the court noted that Danajah had been in foster care since July 18, 2007. Although Robyn appealed the June 18, 2009, order to the juvenile review panel, the review panel affirmed the order of the juvenile court.

Also in the June 18, 2009, order, the juvenile court noted that putative father Darneil appeared and requested DNA testing, which the court ordered. After obtaining DNA testing, Darneil filed a complaint on December 8 to intervene. In an order filed on January 14, 2010, the court granted Darneil's complaint to intervene. Also on January 14, the court placed Danajah with Robyn, who was at "Family Works" for residential drug treatment. The court stated that the permanency objective was adoption with a concurrent plan of

reunification, provided that Robyn successfully completed treatment at Family Works and maintained consistent therapeutic progress.

In an order filed on September 15, 2010, the court found that the permanency objective was ongoing family preservation and struck the alternative plan of adoption. The court relieved the Nebraska Department of Health and Human Services (DHHS) of all responsibility in the matter. The court retained jurisdiction as to the custody issue between Robyn and Darneil.

On December 22, 2011, the State filed a supplemental petition alleging that Danajah and her two sisters, Nadiah and Jade, were children within the meaning of § 43-247(3)(a) (Reissue 2008) because Robyn and newborn Jade tested positive for PCP. Also on December 22, the State filed a motion for immediate custody of all three children, which motion was granted by the juvenile court; thus, all three children were placed in the temporary custody of DHHS.

On February 16, 2012, Darneil filed a motion for placement of Danajah, which was granted on March 9 over the objection of Robyn and the guardian ad litem.

In its order filed on March 23, 2012, the court noted that the adjudication and disposition hearing was held on March 22; however, those proceedings do not appear in our record. As noted in the order, Robyn pled no contest to the portion of the supplemental petition alleging that her use of alcohol or controlled substances placed her children at risk for harm; and the court adjudicated Danajah and her sisters accordingly. In a separate order of that same date, the court noted it was reported to the court that Danajah said Darneil whips her and that when "questioned further," Danajah would "shut down" and give only one-word answers. The court ordered that Danajah was to be immediately removed from Darneil's home to undergo a forensic interview.

On May 17, 2012, Darneil filed a "Motion for Detention Review and Early Review" due to Danajah's continuing

out-of-home placement without any filing by the State against Darneil. Also on May 17, the guardian ad litem filed an ex parte motion to change visitation, requesting that Robyn's visitation change from unsupervised to supervised due to her having tested positive for PCP; the court granted the guardian ad litem's motion that same day. On May 24, the court ordered that Danajah be returned to Darneil "within 48 hours unless there are further filings or charges" (emphasis omitted). No filings or charges were made against Darneil, and Danajah was subsequently placed with Darneil.

On July 27, 2012, Robyn filed a motion for placement requesting that Danajah be placed with her and Danajah's siblings at Family Works. In an order filed on August 1, the court ordered that Danajah was to remain in the custody of DHHS, but placed with Darneil. The court also changed the permanency plan for Danajah to family preservation with Darneil. Darneil was ordered to undergo a "Nebraska Safe Start Assessment" and participate in child-parent psychotherapy. Robyn was ordered to successfully complete residential inpatient treatment; undergo random drug testing a minimum of twice per week; not possess or ingest alcohol or controlled substances unless prescribed by a licensed, practicing physician; participate in family therapy with Danajah; participate in unsupervised and overnight visitation when sufficient therapeutic progress had been made and upon the recommendation of Danajah's therapist; undergo a Nebraska Safe Start Assessment; and participate in child-parent psychotherapy. The court further ordered that Robyn and Darneil "shall address placement and custody of . . . Danajah . . . through alternative dispute resolution" (emphasis omitted).

In its review and permanency planning order filed on December 21, 2012, the court stated that the permanency plan for Danajah was ongoing family preservation with Darneil. Robyn was ordered to continue to participate in her substance abuse treatment, undergo random drug testing a minimum of once per week, not possess or ingest alcohol or controlled

substances unless prescribed by a doctor, participate in family therapy with Danajah, and participate in unsupervised and overnight visitation with Danajah.

In its review and permanency planning order filed on June 12, 2013, the court stated that the permanency objective was ongoing family preservation. The court ordered Robyn and Darneil to participate in alternative dispute resolution regarding custody issues and a parenting plan. In a status check order filed on August 9, the court noted that Robyn attended the scheduled alternative dispute resolution, but that Darneil did not. The court again ordered both parents to attend and participate in alternative dispute resolution.

In its review and permanency planning order filed on November 22, 2013, the court stated that the permanency objective was ongoing family preservation. The court ordered Robyn and Darneil to undergo "random, frequent, observed drug testing" upon the request of DHHS or Nebraska Families Collaborative (NFC). We note that the review and permanency hearing was held on November 21, but that the order was not filed until November 22. Darneil was drug tested on November 21 and tested positive for marijuana. Robyn was also tested on November 21, and her test came back negative for all substances.

On February 19, 2014, Janaye P., Darneil's live-in girlfriend, physically assaulted Robyn in the presence of all of Robyn's children. The assault took place in front of Darneil's home, and Darneil was present during the assault.

On March 13, 2014, Robyn filed a motion to show cause against DHHS and NFC. She also filed a motion for change of placement of Danajah from Darneil's home to Robyn's home. The court ordered the parties, and the parties agreed, to obtain testimony by deposition and submit written arguments.

We now summarize the deposition testimony. Jamise Williams is a family permanency specialist with NFC and was assigned to this case in early 2012. In her deposition, she testified that Danajah had been placed with Darneil since

May 26, 2012. Williams ran a full background check on Darneil prior to placement and was aware that he was a registered sex offender and aware of his criminal history regarding drugs (including "intent to deliver crack cocaine"). Williams stated that Darneil lived with his girlfriend Janaye and that the two "frequently h[e]ld themselves out to be married."

Williams testified that when a report of child abuse or neglect is made to a child abuse hotline and has been accepted for investigation by hotline personnel, NFC is informed, but the case is assigned to a DHHS initial assessment worker. If the report is not accepted for investigation by hotline personnel, then NFC will follow up on the allegation. Williams testified that both Robyn and Darneil called to inform her of the February 19, 2014, incident between Robyn and Janaye. Prior to being notified that a report had been made to the child abuse hotline and that it had been accepted for investigation by DHHS, Williams interviewed Robyn, Darneil, Janaye, and Danajah. Williams also spoke with Danajah's therapist, Machaela Hackendahl, regarding the incident.

Williams testified that Robyn told her she went to Darneil's home to pick up Danajah, but was a little late. Prior to arriving, Robyn received text messages from Darneil and Janaye saying that she was a bad mother and drug addict and that she did not care about Danajah. When Robyn arrived at Darneil's home, he told her to get out of the car, they were arguing, and then Darneil told Janaye to "whip Robyn's ass." Robyn stated that she was still in the car and that Janaye reached through the open car window and hit Robyn in the face and pulled Robyn's hair. Danajah got in the car, and Robyn drove off. The incident occurred in front of Danajah, as well as Robyn's other children, who were also in the car. When Williams saw Robyn on February 20, Robyn had visible injuries; Robyn's lips were swollen, and three patches of her hair were missing. Williams testified that Danajah told her the same story as Robyn did, almost word for word. Williams had concerns that Danajah might have been coached, but she did not know

for sure; she agreed it was possible that Danajah's story was the same because it recounted what happened. Danajah told Williams that she did not want to go back to Darneil's house and that she did not feel safe there. Danajah also reported that Darneil smoked "weed" around her "all of the time"; Darneil was drug tested 1 week later and tested negative. Williams also testified that Danajah had a history of telling "fibs" about each parent.

Williams spoke with Darneil and Janaye, who both reported that when Robyn arrived to pick up Danajah, Robyn got out of her car, "got in Darneil's face," and made gestures with her arms as if she wanted to hit him. Darneil and Janaye told Williams that Janaye stepped in to defend Darneil and hit Robyn. Neither Darneil nor Janaye said that Robyn hit anyone.

On February 20, 2014, Darneil and Janaye filed petitions and affidavits to obtain protection orders against Robyn. Their affidavits contained accounts of the February 19 incident similar to the accounts they reported to Williams and made no mention of Robyn's hitting anyone during the incident. The petitions were ultimately dismissed.

Jennifer White was the DHHS assessment worker assigned to investigate the February 19, 2014, incident between Robyn and Janaye. White testified that Danajah told her that Robyn "pulled up" and Darneil yelled at Robyn to "get her ass" out of the car, Janaye punched Robyn, and then Robyn drove away. White testified that Danajah did not act frightened or scared. White testified Danajah also told her that all of the "nice stuff" she said about Darneil was not true and that all of the "mean stuff" she said about Robyn was not true; White thought Danajah was referring to statements Danajah made during a November 2013 investigation. White was also concerned about coaching, because Danajah said Robyn told her that she might go to foster care and that she should tell White "what had happened"; White did not clarify with Danajah whether this meant to tell the truth.

When White spoke to Darneil and Janaye about the February 19, 2014, incident, they both reported that when Robyn arrived to pick up Danajah, Robyn got out of her car, approached Darneil, and made gestures with her arms as if she wanted to hit him. They both said that Janaye stepped in between Robyn and Darneil, Robyn hit Janaye twice, and then Janaye hit Robyn back two or three times. Robyn then went back to her car and left with Danajah and her other children. When White spoke with Robyn, Robyn reported that Janaye hit her twice in the head and pulled her hair. Robyn stated that she never got out of her car and that she never hit Janaye. Robyn stated that she went to a dental clinic and was sent to the emergency room for her injuries.

Hackendahl, a clinical therapist, is Danajah's individual therapist and is the family therapist for Danajah and Darneil. She spoke with Danajah the day after the February 19, 2014, incident between Robyn and Janaye. Danajah told Hackendahl that Robyn and Janaye got into a fight; Danajah did not say anything else.

White determined that Danajah was not physically neglected. Williams testified that Danajah was put into respite care for the weekend and then allowed to return to Darneil's home because Danajah was determined to be safe. A family permanency supervisor with NFC testified that NFC did not want Danajah removed from Darneil's home based on her having witnessed one incident between Robyn and Janaye. Arrangements were made so that Robyn and Darneil would not need to see each other for future parenting time exchanges.

Deposition testimony was also received regarding other aspects of Robyn's and Darneil's parenting abilities. Evidence was presented that Darneil was convicted of possessing less than 1 ounce of marijuana (and sentenced to pay a fine) after Danajah was placed with him. He also tested positive for marijuana in November 2013. However, Williams testified that there was no evidence that Darneil's drug use occurred in front of Danajah or had any effect on her. Williams testified

that Danajah was safe with Darneil and Janaye, and Williams had no concerns about Darneil's parenting. Williams testified that over the course of the case, Janaye had tried to keep the peace between Robyn and Darneil; that she had never known Janaye to be aggressive until the incident on February 19, 2014; and that Janaye "knows it was wrong." Williams testified that there was currently a district court custody matter on file involving the parties. She preferred not to change Danajah's placement, if matters could be addressed with services.

Hackendahl testified that she provided individual therapy for Danajah and family therapy for Danajah and Darneil from April 2012 to August 2013, at which point they "graduated" due to meeting their goals. Hackendahl testified that Janaye was part of the family therapy. Hackendahl resumed individual therapy with Danajah in November 2013 due to Danajah's "escalating" behaviors at school. Hackendahl was providing weekly individual therapy to Danajah; family therapy skills were worked on the first and last 10 minutes of each session. Hackendahl testified that Danajah's general anxiety disorder stemmed from a lack of permanency and that Robyn and Darneil needed to work on coparenting. Hackendahl testified that she would have concerns about changing Danajah's placement at the time because custody had not been decided. Hackendahl was worried that a lot of changes and moves could increase Danajah's symptoms of anxiety. Hackendahl testified that it was not in Danajah's best interests to change placement at the time.

Hackendahl testified that she knew from the beginning that Darneil was convicted of the statutory rape of Robyn, but that he had done his time and had gotten placement of Danajah. Hackendahl was also minimally aware of Darneil's past drug use; she knew that he tested positive for marijuana in November 2013, but was not aware of his specific criminal history related to drugs or that he admitted to the social use of marijuana. Hackendahl had no concerns about Danajah's

continuing presence in Darneil's home. She testified that Danajah and Darneil are attached and bonded.

Hackendahl testified that Danajah would sometimes say that she did not want to go to Robyn's house. And on several occasions, Danajah said that if Robyn put "her high heels on," Danajah knew that Robyn would go out and get drunk. On a couple occasions, Danajah said that Robyn would hit her with a belt that had spikes on the end of it if Danajah came out of her room when Robyn had people over. Hackendahl testified that there would be several months where Danajah made no reports about Robyn, and then there would be a month where Danajah was reporting on Robyn weekly. Hackendahl testified that Darneil tried to get Danajah excited for her visits with Robyn and that he was positive about the visits.

Hackendahl had never met or spoken to Robyn. Hackendahl initially received a referral for Danajah and Darneil, so that was how she established therapy. When Hackendahl first started therapy with Danajah, she called Robyn a few times to get information, but Robyn never responded. Hackendahl felt it would be therapeutically detrimental to bring Robyn into her sessions with Danajah and Darneil at that point. She also felt that it would be a conflict of interest, because she was working with Darneil and Janaye, and that it could be tricky keeping things confidential between different aspects of the family. However, Hackendahl did consult with Hillary Chaney, who was currently providing family therapy for Robyn and Danajah.

According to Williams, Robyn had been "clean and sober" since entering Family Works in May 2012; she was successfully discharged in November or December 2012. Robyn was having unsupervised visits with Danajah for over a year. Her current visitation schedule with Danajah was every Wednesday overnight until Thursday morning and every other weekend from after school on Friday until Sunday at 4 p.m. Robyn had stable housing large enough for all of her children and "generally always has a job." Nadiah and Jade are placed with

Robyn. Kaziah has never been a ward of the State and has always lived with Robyn.

Williams testified that in early 2013, she arranged family therapy between Robyn and Danajah with a therapist who was also to do outpatient treatment with Robyn for Family Works aftercare. However, Robyn was discharged for missing appointments. Williams offered to do another referral, but Robyn did not think that she and Danajah needed family therapy at that time. Robyn resumed family therapy with Danajah in March 2014 with Chaney.

Chaney testified that she had six sessions with Robyn and Danajah; Robyn canceled three other sessions. During the first session, Danajah got upset and ran out of the room; Robyn had to be prompted to go after Danajah. Also, at one of the early sessions, Danajah had gotten "in a little bit of trouble" during the session and said she was afraid to go home because she was going to be "in big trouble." Robyn reported to Chaney that she yells at Danajah a lot, so they are working on more positive discipline. Chaney testified that Robyn has implemented at least a little bit of positive praise each session. Chaney testified that they are working on family connectedness; she usually gives a goal 6 months before reassessing.

In its order filed on July 30, 2014, the court overruled the motion to show cause. However, the court sustained Robyn's motion to change placement and ordered that Danajah be placed in Robyn's home. The court also ordered that Darneil's visitation was to be supervised and to occur in a neutral location. The court found "credible evidence" that Darneil told Janaye to "'whip [Robyn's] ass'" and that Janaye did assault Robyn, causing serious injuries to Robyn. The court found that the assault occurred while children were present, causing them "emotional trauma." The court stated that Darneil and Janaye were not credible in their recitation of the facts and changed their version of the assault multiple times. The court also stated:

> It also continues to be of great concern to the Court that [Darneil] was convicted of First Degree Sexual Assault of a Child [sic], that the child victim was [Robyn], and that Danajah . . . was conceived as a result of the sexual assault. In spite of this [Darneil] reports that conviction as "consensual sex with a minor[.]"

Darneil appeals.

## ASSIGNMENTS OF ERROR

Darneil assigns that the juvenile court erred (1) in granting Robyn's motion to change placement and finding that it is in Danajah's best interests to change placement, (2) in removing Danajah from Darneil's home and ordering that Darneil have only supervised visitation in a neutral location, (3) in finding there was credible evidence that Darneil told Janaye to "'whip [Robyn's] ass'" or that the fight caused Danajah emotional trauma, and (4) because its order changing Danajah's placement and ordering supervised visitation was contrary to the evidence and minimum due process standards were not met.

## 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. 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. *In re Interest of Joseph S. et al.*, 288 Neb. 463, 849 N.W.2d 468 (2014).

## ANALYSIS

[2] At the outset of our review, we must address an issue of plain 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. *In re Interest of Justine J. & Sylissa J.*, 288 Neb. 607, 849 N.W.2d 509 (2014).

[3] In its order, the juvenile court stated that it "continues to be of great concern to the Court that [Darneil] was convicted of First Degree Sexual Assault of a Child [sic], that the child victim was [Robyn], and that Danajah . . . was conceived as a result of the sexual assault." Although the juvenile court provided no statutory reference when making these statements, we note that Neb. Rev. Stat. § 43-2933(2) (Reissue 2008) states that "[n]o person shall be granted custody, parenting time, visitation, or other access with a child if the person has been convicted under section 28-319 and the child was conceived as a result of that violation." Neb. Rev. Stat. § 28-319 (Reissue 2008) is the statute for first degree sexual assault. Neither the court nor the parties raised § 43-2933(2) anywhere in the record before us or in briefing. (The State did not submit a brief on appeal.)

[4] However, the record before us does suggest that Darneil pled guilty to first degree sexual assault pursuant to § 28-319(1)(c) (the actor is 19 years of age or older and the victim is at least 12 years of age but less than 16 years of age), that Robyn was the victim of that sexual assault, and that Danajah was conceived as a result of the violation. The record also reflects that Darneil was required to register as a sex offender under the Sex Offender Registration Act (SORA). See Neb. Rev. Stat. §§ 29-4001 to 29-4014 (Reissue 2008 & Cum. Supp. 2014). Section 43-2933(2) does not provide for any exception to or discretion in its mandatory language, whereas § 43-2933(1)(a) and (b) provide discretion to the court to consider whether a registered sex offender is a significant risk to the child. We set forth § 43-2933 in its entirety:

> (1)(a) No person shall be granted custody of, or unsupervised parenting time, visitation, or other access with, a child if the person is required to be registered as a sex offender under [SORA] for an offense that would make it contrary to the best interests of the child for such access or for an offense in which the victim was a minor or if the person has been convicted under *section 28-311*,

> *28-319.01*, *28-320*, *28-320.01*, or *28-320.02*, unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record.
>
> (b) No person shall be granted custody of, or unsupervised parenting time, visitation, or other access with, a child if anyone residing in the person's household is required to register as a sex offender under [SORA] as a result of a felony conviction in which the victim was a minor or for an offense that would make it contrary to the best interests of the child for such access unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record.
>
> (c) The fact that a child is permitted unsupervised contact with a person who is required, as a result of a felony conviction in which the victim was a minor, to be registered as a sex offender under [SORA] shall be prima facie evidence that the child is at significant risk. When making a determination regarding significant risk to the child, the prima facie evidence shall constitute a presumption affecting the burden of producing evidence. However, this presumption shall not apply if there are factors mitigating against its application, including whether the other party seeking custody, parenting time, visitation, or other access is also required, as the result of a felony conviction in which the victim was a minor, to register as a sex offender under [SORA].
>
> (2) No person shall be granted custody, parenting time, visitation, or other access with a child if the person has been convicted under *section 28-319* and the child was conceived as a result of that violation.
>
> (3) A change in circumstances relating to subsection (1) or (2) of this section is sufficient grounds for modification of a previous order.

(Emphasis supplied.) Based upon the record before us, specifically the information and sentencing order, it appears Darneil was convicted under § 28-319(1)(c), first degree

sexual assault (sexual penetration) when the actor is 19 years of age or older and the victim is at least 12 years of age but less than 16 years of age. First degree sexual assault under this statute is a Class II felony, which provides for a minimum prison sentence of 1 year and a maximum of 50 years. A conviction pursuant to § 28-319(1)(c) is not listed as an offense under § 43-2933(1)(a), which would allow a court discretion in determining access to a child. Therefore, pursuant to § 43-2933(2), a conviction under § 28-319 operates as an absolute bar to Darneil's access to Danajah.

In contrast, we note that Neb. Rev. Stat. § 28-319.01 (Cum. Supp. 2014) (first degree sexual assault of a child) is an offense listed under § 43-2933(1)(a) and that a conviction under § 28-319.01 gives a court discretion in allowing access to a child. Section 28-319.01 is similar to § 28-319(1)(c) in that it also requires sexual penetration, but § 28-319.01 applies when (1) the actor is 19 years of age or older and the victim is under 12 years of age or (2) the actor is 25 years of age or older and the victim is at least 12 years of age but less than 16 years of age. First degree sexual assault of a child is classified as a more serious Class IB felony, with a mandatory minimum sentence of 15 years in prison for the first offense. § 28-319.01(2). A Class IB felony has a maximum sentence of life imprisonment. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014). So although a conviction under § 28-319.01 has been determined by the Legislature to be a more serious Class IB felony offense, the Legislature nevertheless gives discretion to the courts to determine the appropriateness of parental access to a child who may have been conceived as a result of such an offense. With a mandatory minimum sentence of 15 years, clearly contact with the child would be limited but, nevertheless, permitted.

On the other hand, since our record suggests that Darneil was convicted under § 28-319(1)(c), pursuant to the nondiscretionary language of § 43-2933(2), Darneil is prohibited from having any custody of, parenting time or visitation with, or

other access to Danajah whatsoever. While we note this somewhat inconsistent treatment of a conviction under § 28-319 versus § 28-319.01 with regard to access to a child, not to mention the severe outcome of absolute denial of Darneil's access to Danajah after having been involved in her parenting for almost 2 years, those differences and outcomes are legislative matters and are not issues before us in this appeal. For purposes of our review, we consider only whether the Parenting Act, specifically § 43-2933(2), applies to actions brought under the Nebraska Juvenile Code and, if so, whether due process requires a remand for further proceedings before Darneil's access to Danajah can be absolutely barred.

*Does Parenting Act Apply to Nebraska Juvenile Code?*

[5,6] Section 43-2933(2) falls under the Parenting Act, Neb. Rev. Stat. § 43-2920 et seq. (Reissue 2008 & Cum. Supp. 2014), and not under the Nebraska Juvenile Code, Neb. Rev. Stat. § 43-245 et seq. (Reissue 2008 & Cum. Supp. 2014), pursuant to which the present proceeding was brought. Therefore, in considering whether § 43-2933 applies to this case, we start with § 43-2924, which states:

> (1) The Parenting Act shall apply to proceedings or modifications filed on or after January 1, 2008, in which parenting functions for a child are at issue (a) under Chapter 42, including, but not limited to, proceedings or modification of orders for dissolution of marriage and child custody and (b) under sections 43-1401 to 43-1418. The Parenting Act may apply to proceedings or modifications in which parenting functions for a child are at issue under Chapter 30 or 43.
>
> (2) The Parenting Act does not apply in any action filed by a county attorney or authorized attorney pursuant to his or her duties under section 42-358, 43-512 to 43-512.18, or 43-1401 to 43-1418, the Income Withholding for Child Support Act, the Revised Uniform

> Reciprocal Enforcement of Support Act before January 1, 1994, or the Uniform Interstate Family Support Act for purposes of the establishment of paternity and the establishment and enforcement of child and medical support. A county attorney or authorized attorney shall not participate in the development of or court review of a parenting plan under the Parenting Act. If both parents are parties to a paternity or support action filed by a county attorney or authorized attorney, the parents may proceed with a parenting plan.

As stated above, application of the Parenting Act is mandatory when parenting functions are at issue under chapter 42 (husband and wife), but it "may apply" to proceedings when parenting functions are at issue under chapter 30 (decedents' estates; protection of persons and property) and chapter 43 (infants and juveniles). § 43-2924(1). There are specific matters excluded from the Parenting Act when brought by a county attorney as set forth in § 43-2924(2); however, notably, there is no exclusion for matters brought pursuant to the Nebraska Juvenile Code. Our Supreme Court has held that even when an action was brought by the State to establish paternity and child support pursuant to Neb. Rev. Stat. §§ 43-1401 through 43-1408 (Reissue 2008), which action would be excluded from the Parenting Act under § 43-2924(2), the Parenting Act can nevertheless apply if certain conditions are met. See *State ex rel. Amanda M. v. Justin T.*, 279 Neb. 273, 777 N.W.2d 565 (2010) (when both parents become parties to action and proceedings become those in which custody and parenting functions are at issue, Parenting Act applies). We also note that Neb. Rev. Stat. § 43-1411.01(2) (Cum. Supp. 2014) (paternity action) states that "[w]henever termination of parental rights is placed in issue in any case arising under sections 43-1401 to 43-1418, the Nebraska Juvenile Code and the Parenting Act shall apply to such proceedings."

In matters pertaining to parenting and children, it certainly makes sense that issues addressed within the Nebraska

Juvenile Code, Parenting Act, and paternity, guardianship, and divorce statutes will have relevant applications between them and, in some instances, contain specific references to and rely upon language from other statutory sections. For example, in *In re Interest of Cassandra B. & Moira B.*, 290 Neb. 619, 628, 861 N.W.2d 398, 405 (2015), our Supreme Court noted that "[u]nder the Nebraska Juvenile Code, '[l]egal custody' has the same meaning as under the Parenting Act," citing to §§ 43-245(13) and 43-2922(13). That would be true regarding physical custody as well. See §§ 43-245(20) ("[p]hysical custody has the same meaning as in section 43-2922") and 43-2922(21) (defines physical custody). We also observe that there is substantial interplay between statutes contained in chapters 42 (husband and wife) and 43 (infants and juveniles) when considering the best interests of a child. For example, Neb. Rev. Stat. § 42-364(5) (Cum. Supp. 2014) provides that whenever termination of parental rights is placed in issue, a trial court shall transfer jurisdiction to a juvenile court established pursuant to the Nebraska Juvenile Code unless a showing is made that a county or district court is a more appropriate forum. Furthermore, in considering the best interests of a child under a termination of parental rights for abandonment under the Nebraska Juvenile Code pursuant to Neb. Rev. Stat. § 43-292(1) (Cum. Supp. 2014), our Supreme Court looked to the definition of best interests as set forth in the Parenting Act at § 43-2923. See *Kenneth C. v. Lacie H.*, 286 Neb. 799, 839 N.W.2d 305 (2013).

Given the apparent relevant applications between the Nebraska Juvenile Code and the Parenting Act when addressing the custody and best interests of a child, and further, since the Nebraska Juvenile Code is not specifically excluded from the Parenting Act, § 43-2924(1) tells us that if parenting functions are at issue, the Parenting Act "may" apply.

There is no question that parenting functions are at issue in this case. "Parenting functions means those aspects of the relationship in which a parent or person in the parenting role

makes fundamental decisions and performs fundamental functions necessary for the care and development of a child." § 43-2922(18). Such functions include, among other things, maintaining a safe, stable, consistent, and nurturing relationship with the child; feeding and clothing the child; attending to the child's health and medical needs and emotional stability; and attending to adequate education for the child. *Id*. The matter before us clearly involves parenting functions; accordingly, the Parenting Act and, specifically in this case, § 43-2933(2) "may" apply. Since "may" is not mandatory, we next consider whether the Parenting Act was intended to apply to circumstances such as those presented to us in this juvenile court proceeding.

Statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State v. Hall*, 269 Neb. 228, 691 N.W.2d 518 (2005). The word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. *Id*. 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. *State v. Norman*, 282 Neb. 990, 808 N.W.2d 48 (2012). Also, 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 that statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose. *Id*. It is the duty of a court to give a statute an interpretation that meets constitutional requirements if it can reasonably be done. *Id*. Accordingly, in considering whether § 43-2933(2) of the Parenting Act should be applied to proceedings under the Nebraska Juvenile Code, we look to the legislative findings related to the Parenting Act as set forth at § 43-2921, which states, in relevant part:

> The Legislature . . . finds that it is in the best interests of a child to have a safe, stable, and nurturing environment. The best interests of each child shall be paramount and consideration shall be given to the desires and wishes of the child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning.
>
> In any proceeding involving a child, the best interests of the child shall be the standard by which the court adjudicates and establishes the individual responsibilities, including consideration in any custody, parenting time, visitation, or other access determinations as well as resolution of conflicts affecting each child. The state presumes the critical importance of the parent-child relationship in the welfare and development of the child and that the relationship between the child and each parent should be equally considered unless it is contrary to the best interests of the child.
>
> Given the potential profound effects on children from witnessing child abuse or neglect or domestic intimate partner abuse, as well as being directly abused, the courts shall recognize the duty and responsibility to keep the child or children safe when presented with a preponderance of the evidence of child abuse or neglect or domestic intimate partner abuse, including evidence of a child being used by an abuser to establish or maintain power and control over the victim. In domestic intimate partner abuse cases, the best interests of each child are often served by keeping the child and the victimized partner safe and not allowing the abuser to continue the abuse. When child abuse or neglect, domestic intimate partner abuse, or unresolved parental conflict prevents the best interests of the child from being served in the parenting arrangement, then the safety and welfare of the child is paramount in the resolution of those conflicts.

From these legislative findings, it is apparent that the best interests of a child are paramount under the Parenting Act. It is also evident that the Parenting Act considers domestic intimate partner abuse (which includes sexual assault) and unresolved parental conflict to be significant factors in considering a child's best interests. The significant common denominator shared by the Parenting Act and the Nebraska Juvenile Code is consideration of a child's best interests. And the only way to read § 43-2933(2) is that the Legislature has determined that it is in a child's best interests, when the child was born as a result of "statutory rape" (or other first degree sexual assault situations), to have absolutely no contact with the parent (male or female) who perpetrated and was convicted of such an act. This is so regardless of (1) any alleged consensual nature of the act, (2) consent to parenting time with the child by the victim or victim's parent or guardian, or (3) a court's determination that parental contact may be desirable and appropriate. Presumably, a woman could be convicted of statutory rape under § 28-319(1)(c) for a sexual act involving an underage male victim and, if that sexual act results in the conception and birth of a child, have no right to any access whatsoever to that child. Section 43-2933(2) states, "No person shall be granted custody, parenting time, visitation, or other access with a child if the person has been convicted under section 28-319 and the child was conceived as a result of that violation." Although it is questionable whether § 43-2933(2) promotes a child's best interests by such a strict prohibition against parental access no matter the circumstances, we cannot say that it has no application in the Nebraska Juvenile Code and therefore this case. It would not achieve the statute's purpose if it were only mandatorily applied in situations arising under chapter 42 (husband and wife) and not in situations like the one before us. Accordingly, we conclude § 43-2933(2) applies to cases under the Nebraska Juvenile Code when parenting functions are at issue.

*Deprivation of Liberty Interest Requires Due Process.*

[7,8] In light of our determination that § 43-2933(2) applies to the juvenile court proceeding before us, we now consider whether the record is sufficient for this court to impose the absolute prohibition against Darneil's parental access to Danajah in accordance with that statute. We conclude that our record is not sufficient and that due process requires that Darneil have an opportunity to be heard and present evidence before his access to Danajah can be terminated. It is well established that parental rights constitute a liberty interest, and a parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one. *Kenneth C. v. Lacie H.*, 286 Neb. 799, 839 N.W.2d 305 (2013). Due process requires that parties at risk of deprivation of liberty interests be provided adequate notice and an opportunity to be heard appropriate to the nature of the proceeding and the character of the rights which may be affected by it. *State v. Norman*, 282 Neb. 990, 808 N.W.2d 48 (2012).

In *State v. Norman, supra*, our Supreme Court noted that registration under SORA implicates a liberty interest and that procedures pertaining to SORA must comply with constitutional mandates for procedural due process. Before a defendant can be ordered to be subject to SORA, a court must make a finding, based upon clear and convincing evidence, whether the defendant committed an act of sexual penetration or sexual contact. *State v. Norman, supra*. Since a liberty interest is implicated in the making of this finding, the court must provide procedural due process when it makes this finding after providing the defendant proper notice and a meaningful opportunity to be heard. See *id*.

In *Norman*, the defendant pled no contest to third degree assault and was sentenced to 2 years' probation and 30 days in jail. (The defendant had initially been charged with third degree sexual assault of a child.) The district court also ordered the defendant to register under SORA. SORA

provided that for offenses not sexual in nature, including third degree assault, the court shall have found evidence of sexual penetration or sexual contact. At the sentencing hearing, the district court discussed the recent amendment to SORA that a person convicted of an offense that is not a sex offense may still have to register pursuant to SORA. The district court considered the factual basis used for the conviction and determined the defendant had to register pursuant to SORA. The defendant appealed that portion of his sentence ordering him to register under SORA, on the basis that he was denied due process. The defendant claimed he was denied procedural due process in connection with the order to register under SORA. Our Supreme Court found merit to that argument, because although the defendant had a sentencing hearing, the court did not consider evidence adduced at the hearing and instead made its determination based upon the statements contained in the State's factual basis for the plea. Our Supreme Court reversed the SORA reporting portion of the defendant's sentence and remanded the matter to the district court to make a specific finding, based on all the evidence in the record, including evidence from the hearing, to determine whether the defendant was subject to SORA.

Similar to our Supreme Court in *Norman, supra*, wherein the court remanded for a specific finding as to whether the defendant was subject to SORA after notice and hearing, we do the same here. Because neither the juvenile court nor the parties specifically raised the application of § 43-2933(2) to the proceedings below, and because a liberty interest is at issue, Darneil must be afforded proper notice and a meaningful opportunity to be heard before his contact with Danajah can be terminated pursuant to § 43-2933(2).

The juvenile court did not make a specific factual finding as to the application of § 43-2933(2) to the proceedings before it. Although the judge noted it "continues to be of great concern" that Darneil was convicted of first degree sexual assault, that the victim was Robyn, and that Danajah was conceived as a result, and was troubled by Darneil's report that it was

consensual sex with a minor, this was not a factual finding made upon the presentation of any specific evidence, at least not upon evidence presented at this particular hearing, which is the subject of the present appeal.

Our record reveals that this matter originated on July 18, 2007, when the State filed a petition alleging Danajah was a child within the meaning of § 43-247(3)(a) (Cum. Supp. 2006), with all allegations relating to Robyn, but that Darneil did not file to intervene until December 8, 2009. In an order filed on January 14, 2010, the court granted Darneil's complaint to intervene. We cannot tell from the record before us whether any objection was made to Darneil's intervention, nor whether any hearing took place during which the propriety of Darneil's access to Danajah was considered. On February 16, 2012, Darneil filed a motion for placement of Danajah, which was granted on March 9 over the objection of Robyn and the guardian ad litem. Our record is likewise devoid of any hearing pertaining to this change of placement.

Therefore, because the application of § 43-2933(2) was not specifically addressed by the juvenile court and the parties were not provided an opportunity to be heard on this issue, we remand the matter back to the juvenile court for further proceedings.

Because we remand the matter back to the juvenile court for an evidentiary hearing and specific findings regarding § 43-2933(2) and Darneil's parental rights of access to Danajah, we need not address Darneil's actual assignments of error. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *In re Interest of Nicole M.*, 287 Neb. 685, 844 N.W.2d 65 (2014).

## CONCLUSION

For the reasons stated above, we remand the matter back to the juvenile court for an evidentiary hearing and specific findings regarding § 43-2933(2) and Darneil's parental rights of access to Danajah.

Remanded with directions.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Stacy M. Bolles, Personal Representative of the Estate of Gregory L. Bolles, deceased, appellant, v. Midwest Sheet Metal Co., Inc., appellee.

869 N.W.2d 717

Filed September 15, 2015. No. A-14-830.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' 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. **Res Judicata: Appeal and Error.** The applicability of claim preclusion is a question of law.
3. **Workers' Compensation: Appeal and Error.** Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions.
4. **Judgments: Res Judicata.** Claim preclusion bars the relitigation of a claim that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
5. **Res Judicata.** Claim preclusion bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action.
6. ____. Claim preclusion rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause.

7. **Workers' Compensation.** The Nebraska Workers' Compensation Act is construed liberally to carry out its spirit and beneficent purposes.
8. **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 Workers' Compensation Court: John R. Hoffert, Judge. Reversed and remanded for further proceedings.

John C. Fowles, of Fowles Law Office, P.C., L.L.O., and John F. Vipperman, of Anderson, Vipperman & Kovanda, for appellant.

Darla S. Ideus, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

Inbody, Pirtle, and Bishop, Judges.

Per Curiam.

Stacy M. Bolles, personal representative of the estate of Gregory L. Bolles, has appealed from the order of the Nebraska Workers' Compensation Court that sustained the motion to dismiss filed by Midwest Sheet Metal Co., Inc. (Midwest). For the reasons stated herein, we reverse, and remand for further proceedings.

## BACKGROUND

Following the death of Gregory in 2011, his spouse, Stacy, filed an action in the Workers' Compensation Court in her own behalf and on behalf of other dependents pursuant to the Nebraska Workers' Compensation Act. See Neb. Rev. Stat. § 48-122 et seq. (Reissue 2010 & Cum. Supp. 2014) (pertaining to injuries resulting in death). The trial court found that Gregory's death occurred in the course and scope of his employment with Midwest, a finding affirmed by this court in *Bolles v. Midwest Sheet Metal Co.*, 21 Neb. App. 822, 844 N.W.2d 336 (2014) (*Bolles I*). The underlying facts of this case are set out in detail in *Bolles I* and need not be repeated

here except to the extent necessary for our analysis of the issue presented in the current appeal.

The more pertinent facts to this appeal are procedural in nature. In July 2013, while the appeal in *Bolles I* was pending, Stacy filed a petition in the Workers' Compensation Court in her capacity as personal representative of Gregory's estate. In the petition, Stacy acknowledged that the findings of liability and causation raised in *Bolles I* were binding in the instant case under the doctrine of res judicata. The sole claim raised in the present petition was the reasonableness and necessity of Gregory's medical expenses totaling $18,869.44. In response, Midwest filed a motion to stay or dismiss the matter. The matter was stayed in the trial court pending this court's decision in *Bolles I.*

Upon lifting the stay in May 2014, a hearing was held at which time the trial court took judicial notice of the pleadings from *Bolles I* and listened to arguments of counsel on the applicability of the doctrine of claim preclusion as to the issue of Gregory's medical expenses. Stacy contended that § 48-122 does not provide for payment of medical expenses to a surviving spouse or other dependents and that a separate action must be filed by a personal representative to recover such benefits.

On August 21, 2014, the trial court sustained Midwest's motion to dismiss. The court noted that the plaintiffs in *Bolles I* were awarded various benefits but "noticeably absent" was any request or award for funeral or medical expenses. In rejecting the contention that a surviving spouse is not eligible for an award of medical expenses, the trial court cited *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007), concluding that the case recognized that a surviving spouse may seek and obtain an award of medical expenses under § 48-122. The court further noted that a different result would violate the spirit of the Nebraska Workers' Compensation Act, which was designed to be efficient, uncomplicated, and speedy. In summary, the trial court found that the present

claim could have been litigated in *Bolles I* and, thus, was now barred by the doctrine of claim preclusion. Stacy has timely appealed from this order.

## ASSIGNMENTS OF ERROR

Stacy asserts, summarized and restated, that the trial court erred in finding that claim preclusion was applicable between *Bolles I* and the present appeal, granting Midwest's motion to dismiss without finding that her petition failed to state a cause of action, failing to allow her to file an amended petition, and failing to give a reasoned opinion as required by Workers' Comp. Ct. R. of Proc. 11(A) (2011).

## STANDARD OF REVIEW

[1] A judgment, order, or award of the Workers' 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. *Deleon v. Reinke Mfg. Co.*, 287 Neb. 419, 843 N.W.2d 601 (2014).

[2,3] The applicability of claim preclusion is a question of law. See *Hara v. Reichert*, 287 Neb. 577, 843 N.W.2d 812 (2014). Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions. See *id.*

## ANALYSIS

The crux of Stacy's argument before the trial court and on appeal is that the claims asserted in *Bolles I* and the present appeal are distinct and involve different causes of action, requiring different plaintiffs. The plaintiffs in *Bolles I* were Gregory's dependents who, according to Stacy, invoked their rights under §§ 48-122 to 48-124, which statutes provide

benefits to the dependents of an employee who died through a work-related accident. She further argues that the provision in Neb. Rev. Stat. § 48-120 (Cum. Supp. 2014) for recovery of medical expenses is a benefit that belongs only to the employee or, in this case, his estate. Stacy argues that she was therefore unable to assert a claim for medical expenses as Gregory's dependent. She points to her pretrial statement in *Bolles I* in which she marked as "Not applicable" the subject of medical expenses.

[4-6] The trial court based much of its analysis of Stacy's claims in the present appeal on the doctrine of claim preclusion. The Nebraska Supreme Court has recently reviewed the principles of claim preclusion and issue preclusion, prefacing its discussion by noting that courts and commentators have moved away from the terminology of res judicata and collateral estoppel. See *Hara v. Reichert, supra*. Claim preclusion bars the relitigation of a claim that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. *Id.* The doctrine bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action. *Id.* The doctrine rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause. *Id*.

The trial court concluded that Stacy could have litigated the claim for medical expenses in *Bolles I* but did not do so. We disagree. Stacy was not appointed personal representative of Gregory's estate until April 4, 2013, well after the October 26, 2011, filing of the petition in *Bolles I*. The fourth required "prong" for the applicability of the doctrine of claim preclusion is not present in this case, i.e., the same parties or their privies are not involved in both actions. Although the defendant in both actions is the same, the action in *Bolles I*

invoked § 48-122 et seq. and was filed by Stacy as Gregory's wife and on behalf of his other dependents, while the action in the present appeal invoked § 48-120 and was filed by Stacy solely in her capacity as personal representative and the successor in interest to the rights of the deceased. Section 48-120 provides for medical, surgical, and hospital expenses *of the employee*, while §§ 48-122 through 48-124 provide for *dependent benefits*, typically intended to replace the employee's weekly wage, when an employee dies in a work-related accident.

We note that § 48-122(3) provides:

> Upon the death of an employee, resulting through personal injuries as defined in section 48-151, whether or not there are dependents entitled to compensation, the reasonable expenses of burial, not exceeding ten thousand dollars, without deduction of any amount previously paid or to be paid for compensation or for medical expenses, shall be paid to his or her dependents, or if there are no dependents, then to his or her personal representative.

This subsection was discussed in *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007), a case involving a workers' compensation award to the deceased's wife for weekly indemnity benefits, burial expenses, and medical expenses. Among other things, the defendant employer argued that § 48-122 did not provide for payment of medical expenses to a surviving spouse.

While we acknowledge that *Olivotto* recognized an ongoing obligation on the part of an employer to pay medical expenses to a dependent following the death of an employee, we also recognize that the employee in that case died several months after filing his workers' compensation claim, at a time when his petition for benefits, including medical benefits, remained pending. Upon the employee's death, his employer subsequently entered into a stipulation that the petition could be amended to reflect his death and substitute his wife as the

named plaintiff. When the employer complained on appeal that the workers' compensation statutes did not provide the employee's wife with a basis upon which to recover his medical expenses, the Nebraska Supreme Court disagreed under the facts of that case, grounding its holding in the principle that the employer could not complain about the issue on appeal when it had stipulated at trial that the employee's wife could be substituted as the named plaintiff.

In contrast to the situation described in *Olivotto*, Gregory collapsed at work and subsequently died on the same day. There was, of course, no already-pending workers' compensation petition at the time of his death, nor was there any subsequent stipulation between the parties with regard to the claim for Gregory's medical expenses. In addition, the plaintiffs in *Bolles I* explicitly left undecided the issue of Gregory's medical expenses, since Stacy indicated that medical expenses were "Not applicable" in her pretrial statement. As summarized, the relief sought in the present appeal was outside the scope of the previously entered award in *Bolles I*. We conclude that, under the facts of this case, the doctrine of claim preclusion does not bar the claims asserted in the present appeal and that, because of its distinctive procedural facts, *Olivotto v. DeMarco Bros. Co., supra*, is not controlling in the instant case.

[7] The Nebraska Workers' Compensation Act is construed liberally to carry out its spirit and beneficent purposes. *Tapia-Reyes v. Excel Corp.*, 281 Neb. 15, 793 N.W.2d 319 (2011). We conclude it would be contrary to the spirit and beneficent purposes of the act to forever bar the personal representative of Gregory's estate from recovering his medical expenses based on the doctrine of claim preclusion.

[8] Because we have determined that the trial court's dismissal of the claim in the present appeal based on the doctrine of claim preclusion was in error, we need not address the remaining assignments of error. An appellate court is not obligated to engage in an analysis that is not necessary to

adjudicate the case and controversy before it. *Carey v. City of Hastings*, 287 Neb. 1, 840 N.W.2d 868 (2013).

## CONCLUSION

For the foregoing reasons, we reverse the judgment of the trial court and remand the cause for further proceedings.

Reversed and remanded for further proceedings.

Inbody, Judge, concurring.

I agree with the majority that the trial court erred in dismissing Stacy's claim; however, in my opinion, the trial court erred for a different reason. In the present case, Midwest's motion did not refer to an affirmative defense of res judicata or claim preclusion, nor did it clearly identify any defect in her petition or otherwise state that the petition failed to state a cause of action. Further, at the hearing on Midwest's motion to dismiss, not only did the trial court take judicial notice of a number of exhibits related to *Bolles I*, but there is nothing in the record to show that Stacy had received notice of Midwest's planned affirmative defense of claim preclusion prior to the hearing.

*Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 282 Neb. 762, 810 N.W.2d 144 (2011), was an appeal from an order of the district court granting, without comment, the defendants' motion to dismiss for failure to state a claim. On appeal, the defendants contended that the motion to dismiss should have been granted on the bases of judicial estoppel, collateral estoppel, and res judicata. The Nebraska Supreme Court stated that a complaint is subject to dismissal for failure to state a claim when its allegations indicate the existence of an affirmative defense that will bar the award of any remedy. *Id*. For that to occur, the applicability of the defense has to be clearly indicated and must appear on the face of the pleading to be used as the basis for the motion. *Id.* The court recognized that "'while the Nebraska Rules of Pleading in Civil Actions . . . have a liberal pleading requirement for both causes of

action and affirmative defenses, the touchstone is whether fair notice was provided.'" *Id.* at 766, 810 N.W.2d at 148, citing *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005). However, the court found that the motion filed by the defendants was generic in nature and did not provide fair notice to the plaintiff of the affirmative defenses that the defendants planned to rely on.

Applying the dictates of *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra*, to the instant case, Midwest's motion was insufficient to provide fair notice to Stacy that Midwest intended to raise an affirmative defense to her claim for medical expenses. Additionally, to the extent the motion to dismiss can be said to have converted into a summary judgment motion, the trial court failed to give the parties notice of the changed status of the motion and a reasonable opportunity to present all material pertinent to such a motion. See, e.g., *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007). Thus, in my opinion, the trial court erred in dismissing Stacy's complaint due to Midwest's failure to provide fair notice to Stacy that it intended to raise an affirmative defense to her claim for medical expenses. I would reverse the decision of the trial court and remand the cause for further proceedings on this basis.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Joseph Hunt, appellant, v. Pick's Pack-Hauler, Inc., and Great West Casualty Company, Inc., appellees.

869 N.W.2d 723

Filed September 15, 2015. No. A-14-937.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Workers' Compensation.** Lump-sum settlements, in the context of workers' compensation, are governed by Neb. Rev. Stat. §§ 48-139, 48-140, and 48-141 (Reissue 2010).
3. ____. Every lump-sum settlement approved by order of the Workers' Compensation Court shall be final and conclusive unless procured by fraud.
4. ____. Upon paying the lump-sum settlement amount approved by the Workers' Compensation Court, the employer shall be discharged from further liability on account of the injury and shall be entitled to a duly executed release.
5. **Workers' Compensation: Releases.** Upon filing the duly executed release, the liability of the employer under any agreement, award, finding, or decree shall be discharged of record.
6. **Workers' Compensation.** Any lump-sum settlement by agreement of the parties pursuant to Neb. Rev. Stat. § 48-139 (Reissue 2010) shall be final and not subject to readjustment if the settlement is in conformity with the Nebraska Workers' Compensation Act, unless the settlement is procured by fraud.
7. ____. All amounts paid by an employer or by an insurance company carrying such risk, as the case may be, and received by the employee

or his or her dependents by lump-sum payments pursuant to Neb. Rev. Stat. § 48-139 (Reissue 2010) shall be final and not subject to readjustment if the lump-sum settlement is in conformity with the Nebraska Workers' Compensation Act, unless the settlement is procured by fraud.

8. ____. Neb. Rev. Stat. §§ 48-139, 48-140, and 48-141 (Reissue 2010) indicate that in the area of workers' compensation, lump-sum settlements are final and not subject to readjustment unless the settlement is procured by fraud.
9. ____. Neb. Rev. Stat. §§ 48-139, 48-140, and 48-141 (Reissue 2010) emphasize the finality of a lump-sum settlement and only contemplate readjustment if the settlement itself is procured by fraud, and the statutes do not speak to readjusting underlying awards allegedly procured by fraud.
10. **Workers' Compensation: Judgments: Time: Appeal and Error.** The Workers' Compensation Court may modify or change its findings, order, award, or judgment at any time before appeal and within 14 days after the date of such findings, order, award, or judgment.
11. **Workers' Compensation: Jurisdiction: Statutes.** As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.
12. **Workers' Compensation.** A party's allegations of fraud to readjust a lump-sum settlement must pertain to the procurement of the lump-sum settlement itself.

Appeal from the Workers' Compensation Court: Laureen K. Van Norman, Judge. Affirmed.

Rolf Edward Shasteen, of Shasteen & Morris, P.C., L.L.O., for appellant.

Jason A. Kidd, of Engles, Ketcham, Olson & Keith, P.C., for appellees.

Moore, Chief Judge, and Pirtle and Bishop, Judges.

Bishop, Judge.

In August 2000, Joseph Hunt injured his right arm in the course and scope of his employment as a truckdriver with Pick's Pack-Hauler, Inc. The parties entered into a lump-sum

settlement agreement in accordance with an award of benefits entered by the Nebraska Workers' Compensation Court following trial; the compensation court approved the settlement in 2003. Pick's Pack-Hauler paid Hunt pursuant to the settlement, and Hunt filed a satisfaction and release of Pick's Pack-Hauler's liability in June 2003.

In 2013, Hunt filed a petition in the compensation court seeking to set aside the lump-sum settlement on the basis of constructive fraud, alleging that his treating physician had incorrectly determined that he had reached maximum medical improvement (MMI) at the time of the 2003 settlement. The compensation court granted the motion for summary judgment of Pick's Pack-Hauler and its insurer, Great West Casualty Company, Inc. (Great West), and dismissed Hunt's petition. Hunt now appeals; we affirm.

## BACKGROUND

On August 30, 2000, Hunt (age 34 at the time) injured his right arm while securing a trailerload during his employment with Pick's Pack-Hauler. He first sought treatment from his family doctor on September 5 and was prescribed anti-inflammatory medication and shown exercises to relieve pain "'in his right biceps area.'" Hunt did not seek medical treatment again until April 6, 2001, when he returned to his family doctor with complaints of pain in his right shoulder. Hunt was referred to Dr. Gary Chingren, an orthopedic doctor. In a letter dated April 21, 2001, Dr. Chingren noted that Hunt's injury would be a "long term problem" and stated that it could take "6 to 9 months for things to get well."

In September 2001, due to Hunt's continued pain, an MRI was taken of his right shoulder. Dr. Chingren noted the MRI reflected a "full thickness rotator cuff tear." Hunt filed a petition in the Workers' Compensation Court on September 24.

After undergoing additional conservative care, Dr. Chingren performed right shoulder surgery on Hunt on October 10, 2001. Hunt continued to see Dr. Chingren for postoperative

checkups through February 2002. At this February appointment, Dr. Chingren noted that Hunt reported that his arm ached and hurt, but that medication helped. Dr. Chingren noted that Hunt may have ruptured his right biceps tendon "at some point in time."

In a letter dated November 1, 2002, Dr. Chingren stated that at Hunt's 1-year postoperative visit in October, his examination was "essentially the same as it was in July," and that Hunt had made "very satisfactory progress." Dr. Chingren determined Hunt had a 14-percent impairment rating for his right upper extremity.

Trial on Hunt's petition was held on January 14, 2003. The court entered an award on March 14. The court found that Hunt sustained a right arm injury as the result of an accident arising out of and in the course of his employment with Pick's Pack-Hauler. The court found that as a result of Hunt's work accident and injury, he was temporarily and totally disabled from October 9, 2001, to January 9, 2002, which was when Dr. Chingren released Hunt to work light duty. Thereafter, the court found that Hunt sustained a 14-percent permanent partial impairment to his right arm, in accordance with Dr. Chingren's impairment rating. The court determined Hunt's average weekly wage was $775.02, entitling him to temporary total disability benefits of $487 per week for 13⅔ weeks, and $487 per week for 30.1 weeks for his 14-percent permanent partial disability to his right arm. The award also ordered Pick's Pack-Hauler to pay for certain medical bills incurred by Hunt and to reimburse Hunt's insurance company and Medicare. The court did not award Hunt future medical treatment, concluding that Hunt had not submitted evidence suggesting it would be required.

On April 23, 2003, the parties filed an "Application for Approval of Final Lump Sum Settlement" in the Workers' Compensation Court. The settlement application stated that the settlement was

> intended to cover all injuries, ailments, and diseases, both physical and mental, and the aggravation of pre-existing conditions, of whatsoever kind or character arising out of or in any way connected with the [August 20, 2000,] accident alleged herein and resultant injuries, including future developments thereof, whether now known or hereafter to become known.

The settlement application provided that the parties had reached a final lump-sum settlement agreement wherein Pick's Pack-Hauler agreed to pay the lump-sum amount of $22,128.84, which constituted all the indemnity and medical benefits awarded to Hunt in the court's March 14, 2003, award, plus $1,000 in additional consideration in full satisfaction of all of Hunt's claims resulting from his August 30, 2000, accident. The settlement application stated that Hunt had considered the "possibility of future developments of said accident and injuries, the extent and nature of which, however, at the present time are unknown to [Hunt] and which cannot be ascertained."

On June 18, 2003, the compensation court entered an order approving the parties' settlement application. On June 23, Hunt filed a satisfaction of lump-sum settlement and released Pick's Pack-Hauler from further liability.

More than 10 years later, on November 7, 2013, Hunt filed a petition to set aside the lump-sum settlement on the basis of fraud pursuant to Neb. Rev. Stat. § 48-139(2)(c) (Reissue 2010). Hunt alleged that the settlement "failed, through no intent of the parties, to completely disclose all of the salient medical facts and circumstances necessary for the court to develop a fully informed opinion as to the advisability of approval." Specifically, Hunt alleged that the "true medical condition of [his] right shoulder at the time of settlement was actually and, in fact, unknown."

Pick's Pack-Hauler and Great West filed a motion to dismiss Hunt's petition on December 6, 2013. The court entered an order on January 9, 2014, overruling Pick's Pack-Hauler and

Great West's motion, concluding that Hunt was entitled to a hearing to determine if the allegations of fraud in his petition entitled him to relief.

Pick's Pack-Hauler and Great West filed a motion for summary judgment on June 3, 2014, alleging that Hunt failed to establish that the lump-sum settlement constituted a constructive fraud upon the court. A hearing on the motion was held on June 25.

According to evidence submitted at the summary judgment hearing, in November 2011, Hunt sustained a subsequent injury to his right shoulder while employed by Rosen's Diversified, also known as Gibbon Packing (Gibbon Packing). Medical evidence from Hunt's workers' compensation claim against Gibbon Packing reflected that he was treated by Scott Franssen, D.O., subsequent to his November accident. In January 2012, Dr. Franssen stated his medical opinion that Hunt's "right shoulder current symptomatology is an aggravation of a pre-existing condition." Dr. Franssen stated Hunt had "advanced posttraumatic osteoarthritic [changes and] a full thickness tear of his rotator cuff" that "has severe retraction," noting that an "outside orthopod [Dr. Chingren]" had previously repaired it in 2000-2001. Dr. Franssen recommended conservative care, but thought Hunt "probably" would need a total shoulder arthroplasty "down the road."

Dr. Brent Adamson performed an independent medical evaluation (IME) on August 23, 2012. Dr. Adamson concluded that Hunt's diagnosis was "chronic retracted rotator cuff tear of right shoulder, degenerative arthritis of right shoulder." Dr. Adamson opined that the etiology of Hunt's symptoms at the time of the IME were related to his August 30, 2000, injury and concluded that Hunt had temporarily aggravated a preexisting condition as a result of his November 2011 accident. Dr. Adamson concluded that Hunt did not suffer from any permanent partial disability of his right shoulder over and above the 14 percent that was rated in 2001, and Dr. Adamson said he would not recommend surgery.

According to Hunt, he entered into a release of liability with Gibbon Packing, which release was filed in the Workers' Compensation Court in January 2013. Such release did not provide for future medical care of his right shoulder. No other terms of Hunt's settlement with Gibbon Packing appear in our record.

Through Hunt's interrogatories entered into evidence at the summary judgment hearing in the instant case, he clarified that his claim for constructive fraud was based on his reliance on Dr. Chingren's opinion in 2002 that Hunt was at MMI. Hunt believed that the opinions of Drs. Franssen and Adamson given in 2012 indicate Hunt's right shoulder condition had gotten worse and that therefore Dr. Chingren falsely, though unintentionally, represented that Hunt had reached MMI in 2002.

The compensation court in the instant case entered an order on September 29, 2014, sustaining Pick's Pack-Hauler and Great West's motion for summary judgment. The court stated that Hunt was represented by counsel, participated in trial, and obtained an award based in part on the opinion of his own treating physician, and that the subsequent settlement was based upon a fully litigated award. The court concluded that "[t]o argue nearly 10 years later that a doctor's opinion which may or may not have been incorrect at the time it was offered is not constructive fraud" for purposes of setting aside the lump-sum settlement. The court therefore granted Pick's Pack-Hauler and Great West's motion for summary judgment and dismissed Hunt's petition.

Hunt timely appeals.

## ASSIGNMENT OF ERROR

Hunt assigns two errors on appeal, which we summarize and consolidate as one: The Workers' Compensation Court erred in granting summary judgment based on its conclusion that Dr. Chingren's opinion that Hunt had reached MMI did not constitute constructive fraud.

## STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Marcuzzo v. Bank of the West*, 290 Neb. 809, 862 N.W.2d 281 (2015).

## ANALYSIS

[2-8] Hunt sought to set aside the parties' lump-sum settlement approved by the compensation court in 2003 on the basis of constructive fraud. Hunt's petition in the instant case claimed that the application for lump-sum settlement submitted to the court in 2003 was inaccurate and perpetrated a constructive fraud on the court within the meaning of § 48-139. Hunt filed this action to set aside the lump-sum settlement itself, so we begin by examining the relevant statutes. Lump-sum settlements, in the context of workers' compensation, are governed by § 48-139 and Neb. Rev. Stat. §§ 48-140 and 48-141 (Reissue 2010). Section 48-139(2)(c) provides in relevant part:

> Every such lump-sum settlement approved by order of the compensation court shall be final and conclusive *unless procured by fraud*. Upon paying the amount approved by the compensation court, the employer (i) shall be discharged from further liability on account of the injury . . . and (ii) shall be entitled to a duly executed release. Upon filing the release, the liability of the employer under any agreement, award, finding, or decree shall be discharged of record.

(Emphasis supplied.) Section 48-140 provides in part: "Any lump-sum settlement by agreement of the parties pursuant to section 48-139 shall be final and not subject to readjustment if the settlement is in conformity with the Nebraska Workers' Compensation Act, *unless the settlement is procured*

*by fraud*." (Emphasis supplied.) Finally, § 48-141 provides in relevant part:

> All amounts paid by an employer or by an insurance company carrying such risk, as the case may be, and received by the employee or his or her dependents by lump-sum payments pursuant to section 48-139 shall be final and not subject to readjustment if the lump-sum settlement is in conformity with the Nebraska Workers' Compensation Act, *unless the settlement is procured by fraud* . . . .

(Emphasis supplied.) The language used in §§ 48-139, 48-140, and 48-141 indicate that in the area of workers' compensation, lump-sum settlements are final and not subject to readjustment "unless the settlement is procured by fraud." In Hunt's petition, he claimed that the "contents of the Application for Lump Sum Settlement developed by the parties and submitted to the court was inaccurate and operated in such a manner as to perpetrate a constructive fraud upon the court within the meaning of . . . § 48-139." Hunt further claimed that

> the Lump Sum Settlement Application failed, through no intent of the parties, to completely disclose all of the salient medical facts and circumstances necessary for the court to develop a fully informed opinion as to the advisability of approval. Specifically, the parties so failed because the true medical condition of [Hunt's] right shoulder at the time of settlement was actually and, in fact, unknown.
>
> . . . Without true and correct information about the condition of [Hunt's] right shoulder, the Court was deprived of the opportunity to fairly and accurately evaluate the representations contained in the Application for Lump Sum Settlement, and, accordingly, it approved [the] same on medical representations which were inaccurate, but not known to be so, at the time they were made.

While Hunt argues that the "Court was deprived of the opportunity to fairly and accurately evaluate the representations"

made in the lump-sum settlement application and that the "medical representations . . . were inaccurate," it is significant to remember that the "representations" contained in the lump-sum settlement in this case were derived from actual trial court findings set forth in the March 14, 2003, award. The terms of the lump-sum settlement were not the result of any party misrepresenting Hunt's medical information to induce a settlement through pretrial negotiations; rather, the terms flowed directly from the compensation court's award following trial. There is no dispute that the parties relied upon the compensation court's March 14 award when entering into the lump-sum settlement. The total amount paid to Hunt, $22,128.84, constituted all the indemnity and medical benefits awarded to Hunt in the court's March 14 award, plus $1,000 in additional consideration.

[9-12] Hunt makes no allegation that any party engaged in fraudulent action to procure the lump-sum settlement itself; rather, his allegations of "fraud" pertain solely to allegedly erroneous medical evidence offered and accepted by the compensation court at trial in 2003. Hunt is apparently asking us to conclude that there is a genuine issue of material fact sufficient to overcome summary judgment with regard to his argument that (1) certain trial evidence was constructively "fraudulent" in this case, and therefore, (2) such "fraudulent" information was then relied upon in the lump-sum agreement, and therefore, (3) the lump-sum agreement was "procured by fraud" as contemplated by the lump-sum settlement statutes set forth previously. We do not read the lump-sum settlement statutes to provide a mechanism for challenging the evidence upon which an award is based; rather, we read the statutes as being limited to challenging lump-sum settlements which may have been procured by fraud. Sections 48-139, 48-140, and 48-141 emphasize the finality of a lump-sum settlement and only contemplate "readjustment" if the "settlement" itself is procured by fraud; the statutes do not speak to readjusting underlying "awards" allegedly procured by fraud. And, while

the compensation court may modify or change its findings, order, award, or judgment at any time before appeal and within 14 days after the date of such findings, order, award, or judgment, see Neb. Rev. Stat. § 48-180 (Cum. Supp. 2014), and may modify as set forth in § 48-141, Hunt's position does not fall within either of those statutes. Nor does Hunt point us to any authority that would allow the compensation court to set aside or modify a fully litigated award more than 10 years after its entry on the basis of alleged constructive fraud occurring during trial. As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute. *Cruz-Morales v. Swift Beef Co.*, 275 Neb. 407, 746 N.W.2d 698 (2008). Because Hunt's allegations of fraud do not pertain to the procurement of the lump-sum settlement as contemplated by §§ 48-139 to 48-141, but instead pertain only to trial evidence upon which the court's March 14, 2003, award was made, the compensation court properly dismissed Hunt's petition to set aside the lump-sum settlement.

For the sake of completeness in addressing the arguments advanced by Hunt, even if we were to accept his position that constructive fraud occurring at the trial level could carry over to the lump-sum settlement made in accordance with the trial court's award, Hunt's argument still fails. Our courts have never determined whether constructive fraud, if properly proved, would be sufficient to reopen or readjust a lump-sum settlement under §§ 48-139 to 48-141. However, we need not determine that issue at this time, because we conclude the record in the instant case affirmatively demonstrates that the lump-sum settlement itself was not procured by fraud, constructive or otherwise.

Hunt refers to Professor Larson's treatise to support his argument that a physician's mistake constitutes "'constructive fraud'" sufficient to reopen a lump-sum settlement. Brief for appellant at 9. According to Professor Larson, courts have

found constructive fraud sufficient to justify reopening a settlement where an innocent misrepresentation has been made by a physician chosen by the employer or its insurer, and those representations have been relied on by the claimant. Professor Larson continues, "If, however, claimant has relied on the representations of her own physician, there has been no fraud." 13 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 131.05[1][b] at 131-48 (2015). Therefore, even if we did adopt Professor Larson's position, as Hunt urges us to do, it would not support the reopening of the parties' lump-sum settlement in this case. Hunt alleges the basis of the constructive fraud was that Dr. Chingren incorrectly placed him at MMI in 2002. Dr. Chingren was Hunt's own physician, not a physician chosen by Pick's Pack-Hauler and Great West. According to Professor Larson, if a claimant relied on representations of his own physician, there has been no fraud. Therefore, according to Hunt's own cited authority, he would not be entitled to reopen the lump-sum settlement on the basis of constructive fraud.

Furthermore, the record before us affirmatively refutes Hunt's factual allegations of constructive fraud. Hunt argues that summary judgment was inappropriate because "there is a question of fact as to whether Dr. Chingren's representation that . . . Hunt's condition became permanent and therefore that he reached MMI in November 1, 2002[,] constituted constructive fraud." Brief for appellant at 10. Hunt goes on to assert:

> [I]f the statement of Dr. Chingren, although made without an evil intent, was false, it had a tendency to deceive . . . Hunt, his attorney, and the court, both during the trial and when the court approved the lump sum settlement. Had the truth about the seriousness of . . . Hunt's condition been known at the time, . . . Hunt would not have filed his application for lump sum settlement, and the court would not have approved it. Therefore, there is a genuine issue of material fact as to whether this

> statement constitutes constructive fraud and provides a basis for the lump sum settlement to be set aside.

*Id*. at 10-11.

In support of his argument, Hunt relies on the medical evidence from his November 2011 work injury with Gibbon Packing to suggest that Dr. Chingren's opinion was false when it was made. Hunt cites to Dr. Adamson's IME conducted in August 2012 (nearly 10 years after Dr. Chingren placed Hunt at MMI), in which Dr. Adamson opined that "[a]ll of [Hunt's] current disability is related to his original injury of 2000." In looking at the entirety of Dr. Adamson's IME report, however, he clearly states that Hunt temporarily aggravated a preexisting condition as a result of his November 2011 work accident; such aggravation lasted 2 months; and after that 2-month period, Hunt again reached MMI. Dr. Adamson concluded that once Hunt reached MMI after the temporary aggravation, he did not suffer from any permanent partial disability of his right shoulder over and above the 14 percent that Dr. Chingren had previously rated him. Hunt had reported to Dr. Adamson that "his shoulder is no worse than it was three or four years ago" and "he can do everything now that he could do prior to the injury he sustained at Gibbon Packing." Dr. Adamson's report, therefore, actually supports Dr. Chingren's permanency rating provided to Hunt in 2002. Dr. Franssen likewise was of the opinion that Hunt's "right shoulder current symptomatology is an aggravation of a pre-existing condition"; Dr. Franssen did not opine or suggest that Hunt was not at MMI until his November 2011 work accident.

The evidence in our record reflects that subsequent to Dr. Chingren's permanency rating in 2002, Hunt continued to work for various employers in a variety of capacities for the next nearly 10 years. There is no evidence in our record that Hunt sought medical treatment for his right shoulder until the November 2011 work accident with Gibbon Packing, wherein he aggravated his preexisting shoulder condition. The facts in

this case simply do not support a claim of constructive fraud for purposes of reopening or readjusting a lump-sum settlement, even assuming such a claim could be made based upon the alleged erroneous opinion of a claimant's own physician more than 10 years after the matter was fully litigated.

## CONCLUSION

For the foregoing reasons, we affirm the Workers' Compensation Court's order granting summary judgment in favor of Pick's Pack-Hauler and Great West and dismissing Hunt's petition.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Capital One Bank (USA), N.A., appellee and cross-appellant, v. Nelseena J. Lehmann, appellant and cross-appellee.

869 N.W.2d 917

Filed September 22, 2015. No. A-14-1109.

1. **Courts: Appeal and Error.** The district court and higher appellate courts generally review appeals from the county court for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. ____: ____. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are reviewed de novo on the record.
4. **Pleadings.** "Special appearances" have been abolished in Nebraska; however, all pleadings shall be construed as to do substantial justice.
5. **Judgments: Jurisdiction.** A judgment entered without personal jurisdiction is void.
6. **Judgments: Time.** Every court possesses the inherent power to vacate a void judgment, either during the term at which it was rendered or after its expiration.
7. **Judgments: Jurisdiction.** If it appears that no jurisdiction was acquired over a defendant in the manner required by law, a judgment rendered against him is void.
8. **Judgments: Jurisdiction: Time.** Where a judgment is void for want of jurisdiction over the person of the defendant, the latter may wait until an effort is made to enforce the judgment, before instituting proceedings to have such judgment voided or set aside; the lapse of time is not a bar to the granting of the motion.
9. **Judgments.** A proceeding to vacate and set aside a judgment for the reason that it is void must be brought in the court in which the judgment was rendered.

10. **Jurisdiction: Service of Process: Waiver.** Proper service, or a waiver by voluntary appearance, is necessary to acquire personal jurisdiction over a defendant.
11. **Service of Process.** An individual party may be served by certified mail.
12. **Notice: Service of Process.** Although Neb. Rev. Stat. § 25-505.01 (Cum. Supp. 2014) does not require service to be sent to the defendant's residence or restrict delivery to the addressee, due process requires notice to be reasonably calculated to apprise interested parties of the pendency of the action and to afford them the opportunity to present their objections.

Appeal from the District Court for Red Willow County, David Urbom, Judge, on appeal thereto from the County Court for Red Willow County, Anne Paine, Judge. Judgment of District Court affirmed.

Bert E. Blackwell for appellant.

Karl von Oldenburg, of Brumbaugh & Quandahl, P.C., L.L.O., for appellee.

Moore, Chief Judge, and Pirtle and Bishop, Judges.

Bishop, Judge.

Capital One Bank (USA), N.A. (Capital One), obtained a default judgment against Nelseena J. Lehmann for unpaid credit card charges. Several years later, Lehmann filed a "Motion of Special Appearance" and claimed that the county court lacked personal jurisdiction over her when it entered the default judgment; in her affidavit, Lehmann averred that the certified mail containing the complaint was signed for by her estranged husband, who did not inform her of the lawsuit. The county court for Red Willow County determined that notice by certified mail, signed for by Lehmann's husband, was sufficient notice to enter default judgment. The county court further determined that Lehmann did not use the appropriate procedure to vacate a default judgment. The county court denied Lehmann's motion for "special appearance." On appeal,

the district court for Red Willow County affirmed. We affirm, but for different reasons.

## BACKGROUND

Capital One filed a complaint in county court, case No. CI 09-685, alleging that Lehmann failed to make payments on a credit card account and owed Capital One $2,942.37 as of November 23, 2009, plus accrued and accruing interest. The "Service Return" shows that the complaint was sent via certified mail to Lehmann at an address in McCook, Nebraska. Because the file stamps on various pleadings in the transcript are difficult to read, we rely on the undisputed factual findings of the Red Willow County Court, which were as follows:

> The pleadings show that the Complaint was filed on November 30, 2009[,] and a Service Return was filed with the Court on December 24, 2009, showing a certified mail proof [of] service with receipt signed by Kurt Lehmann on December 7, 2009. A Motion and Affidavit for Default Judgment was filed February 1, 2010[,] and the Court entered Default Judgment against [Lehmann] on February 10, 2010.

Capital One thereafter began garnishment proceedings in case No. CI 09-685. In November 2013, Capital One filed an "Affidavit and Praecipe for Summons in Garnishment After Judgment," asking the clerk of the Red Willow County Court to issue summons in garnishment upon Lehmann Saddle Company in McCook, upon the belief that the company had property of and was indebted to Lehmann, the judgment debtor. A "Summons and Order of Garnishment in Aid of Execution" was sent to Lehmann Saddle Company via certified mail on that same date. Similar affidavits, as well as summons and orders of garnishment, were filed and sent in January 2014 (to a bank in Omaha, Nebraska,) and May 2014 (to a bank in McCook). It does not appear that Capital One was successful in its garnishment attempts.

On June 27, 2014, Lehmann filed a "Motion of Special Appearance" in case No. CI 09-685 stating:

> Without waiving her objection to the jurisdiction of this Court, or this person, . . . Lehmann, says:
>
> 1. During all times relevant to the allegation in [Capital One's] Petition, . . . Lehmann was a resident and citizen of the State of Oklahoma, having moved to Blackwell, Oklahoma[,] on September 30, 2009[,] and not returning to Danbury, Nebraska[,] until June 1, 2011, and this Court had no jurisdiction over her person. By this motion, [Lehmann] specifically preserves and reasserts her special appearance herein, and does not waive her right to object and raise the issue of the jurisdiction of this Court over her person.
>
> 2. Subjecting [Lehmann] to the jurisdiction of this court is a denial of due process of law and equal protection of the laws in violation of the Constitution of the United States of America and the Constitution of the State of Nebraska.
>
> WHEREFORE, . . . Lehmann, requests that her special appearance be sustained.

Also on June 27, 2014, Lehmann filed an affidavit, wherein she stated:

> 1. Affiant states that she is the defendant in the above entitled case.
>
> . . . .
>
> 3. Affiant was living in McCook, Nebraska[,] until she moved to Blackwell, Oklahoma[,] on September 30, 2009.
>
> [4]. On June 1, 2011[,] Affiant moved back to Danbury, Nebraska[,] where she now resides.
>
> [5]. Affiant states that she did not receive a bill concerning the above matter.
>
> [6]. Affiant has never received a summons in the above entitled case because, due to her separation from her husband who sign [sic] for the certified mail, he did not

> inform her, and affiant was never afforded notice of the proceedings and given an opportunity to be heard.
>
> [7]. Affiant states that she did not know about the above entitled lawsuit until she received notice of interrogatories on 6-12-14.

A hearing on Lehmann's "Motion of Special Appearance" was held on July 15, 2014. Capital One did not appear at the hearing, but the record shows that it did receive notice of the hearing. The court received into evidence (1) the "Service Return" filed with the court on December 24, 2009, showing a certified mail receipt signed by Kurt Lehmann on December 7 and (2) Lehmann's affidavit, filed with the court on June 27, 2014. No testimony was given at the hearing, and the court gave "both parties" 14 days to submit letter briefs or other case law they wished the court to consider. Lehmann submitted her brief to the court on July 25, wherein she argued that because there had never been any service against her, Capital One's default judgment was void.

In its order filed on August 1, 2014, the county court found that Lehmann was legally married to Kurt Lehmann on the date he signed the certified mail receipt and that all requirements of service by certified mail were met. See Neb. Rev. Stat. § 25-505.01(1)(c) (Cum. Supp. 2014). The court found it had jurisdiction over Lehmann for purposes of entering judgment. The court went on to note that the default judgment was entered on February 10, 2010, more than 4 years prior, and that any action to vacate or modify a judgment entered in 2010 would require compliance with the statutory procedures for setting aside a judgment after the term of court; the county court specifically cited to Neb. Rev. Stat. § 25-2002 (Reissue 2008) (proceedings to vacate or modify judgment). Finding that Lehmann failed to comply, the court denied Lehmann's special appearance motion.

Lehmann appealed the county court's denial of her "Motion of Special Appearance" to the district court. In its order filed on November 13, 2014, the district court affirmed the

decision of the county court, finding that the county court's decision was correct in all respects.

Lehmann now appeals to this court.

## ASSIGNMENTS OF ERROR

Lehmann assigns that the district court erred in affirming the decision of the county court denying her special appearance.

Capital One, on cross-appeal, assigns that its due process rights would be violated if the default judgment is vacated as requested by Lehmann.

## STANDARD OF REVIEW

[1,2] The district court and higher appellate courts generally review appeals from the county court for errors appearing on the record. *Centurion Stone of Neb. v. Whelan*, 286 Neb. 150, 835 N.W.2d 62 (2013). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*.

[3] However, 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*.

## ANALYSIS

Lehmann assigns and argues that the district court erred in affirming the decision of the county court denying her special appearance. In her "Motion of Special Appearance," Lehmann claimed that the county court lacked personal jurisdiction over her when it entered the default judgment; in her affidavit, Lehmann averred that the certified mail with the complaint was signed for by her estranged husband who did not inform her of the lawsuit.

[4-6] First, we point out that "special appearances" have been abolished in Nebraska. Pursuant to Neb. Rev. Stat. § 25-801.01(2)(c) (Reissue 2008), for all civil actions filed on or after January 1, 2003, "special appearances shall not

be used." However, "[a]ll pleadings shall be construed as to do substantial justice." § 28-801.01(2)(d). Lehmann's motion essentially claimed that the county court lacked personal jurisdiction over her at the time Capital One filed its complaint in November 2009 and through the entry of default judgment on February 10, 2010. The Nebraska Supreme Court has stated that a judgment entered without personal jurisdiction is void. *Johnson v. Johnson*, 282 Neb. 42, 803 N.W.2d 420 (2011). A void judgment may be attacked at any time in any proceeding. *Id*. "A void judgment is in legal effect nothing. Such a judgment may be vacated at any time on motion for that purpose. A court may at any time clear its records of unauthorized and illegal entries." *Foster v. Foster*, 111 Neb. 414, 417, 196 N.W. 702, 703 (1923). Accordingly, and in order to construe Lehmann's pleading as to do substantial justice, we treat Lehmann's "Motion of Special Appearance" as a motion to vacate an allegedly void judgment. We note that if Lehmann had filed her motion for "special appearance" before entry of a final order, we would have treated it as a motion to dismiss pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(2) (lack of personal jurisdiction). However, because a judgment had already been entered in this case, we treat Lehmann's motion for "special appearance" as a motion to vacate the allegedly void judgment. See, generally, *Ehlers v. Grove*, 147 Neb. 704, 24 N.W.2d 866 (1946) (every court possesses inherent power to vacate void judgment, either during term at which it was rendered or after its expiration).

In *Ehlers v. Grove, supra*, William A. Ehlers received a default judgment against Harvey J. Grove in the municipal court of the city of Omaha in 1934. Nine years later, an execution was issued out of the district court for Douglas County on the judgment; the execution was levied on Grove's property. Thereafter, Grove filed a motion in the municipal court to vacate and set aside the judgment for the reason that no service of summons or notice of pendency of the action had ever been had upon him. After a hearing, the municipal court

overruled Grove's motion. Grove appealed to the district court. After a hearing, the district court decreed that there was a total failure of service of process or notice of the pendency of the action upon Grove and that the municipal court was therefore without jurisdiction to render a judgment against him; therefore, the 1934 judgment of the municipal court entered against Grove should be vacated and set aside. Ehlers appealed the district court's order. The Nebraska Supreme Court affirmed the district court's order.

[7-9] In its opinion, the Nebraska Supreme Court set forth the controlling legal principles:

> "Although generally a judgment may be taken by default where it appears that the process has been duly served as by statute required, it is the fact of service rather than the proof of service that gives the court jurisdiction." . . .
>
> "If it appears that no jurisdiction was acquired over a defendant in the manner required by law, a judgment rendered against him is void." . . . "[A] judgment rendered by a court without jurisdiction of the parties is absolutely void. . . ." . . .
>
> "Every court possesses inherent power to vacate a void judgment, either during the term at which it was rendered or after its expiration." . . . "'A court may at any time clear its records of unauthorized and illegal entries therein.' . . ." . . .
>
> "Where a judgment is void for want of jurisdiction over the person of the defendant, the latter may wait until an effort is made to enforce the judgment, before instituting proceedings to have such judgment voided or set aside." . . .
>
> "'In such a case the lapse of time is not a bar to the granting of the motion.'" . . .
>
> "An action to set aside a judgment must be brought in the court which rendered the judgment, otherwise the records of one court would be under the control of other

> courts of co-ordinate jurisdiction. A judgment is a matter of record, and can only be changed, set aside or modified by the court by whose authority the record is made, or by the direction of a court of higher jurisdiction in proceedings to review the judgment. If this were not so, chaos would result. . . .” . . .
>
> “A proceeding to vacate and set aside a judgment for the reason that it is void must be brought in the court in which the judgment was rendered.” . . . Nor is it necessary that a meritorious defense be shown on the part of the defendant. . . .
>
> “A void judgment may be set aside at any time upon motion made to the court.” . . .
>
> “It is the settled law of this state that a false return of service of process may be impeached by extrinsic evidence, and that where the attempted service fails to reach the party to be served in any way, a judgment founded thereon is absolutely void and open to collateral attack.” . . .
>
> “Proceedings taken in courts of general jurisdiction are presumed to be regular and in conformity with law, but when it is made to appear that no jurisdiction was acquired over the defendant, then the judgment rendered is void, and its invalidity may be shown in any action in which it may be called in question. . . .”

*Ehlers v. Grove*, 147 Neb. 704, 706-08, 24 N.W.2d 866, 868-69 (1946) (citations omitted).

Pursuant to *Ehlers v. Grove, supra*, the county court has the inherent power to vacate a void judgment, either during the term at which it was rendered or after its expiration, upon motion to the court; lapse of time is not a bar to such motion. Because the county court has the inherent power to vacate a void judgment, the statutory procedures for vacating or modifying a judgment after the term of court are inapplicable. See, Neb. Rev. Stat. § 25-2001 (Reissue 2008); § 25-2002; Neb. Rev. Stat. § 25-2008 (Reissue 2008); Neb.

Rev. Stat. § 25-2720.01 (Cum. Supp. 2014). We therefore turn to the merits of Lehmann's motion to vacate the allegedly void judgment.

[10] In her motion, Lehmann claimed that the county court lacked personal jurisdiction over her when it entered the default judgment. More specifically, in her affidavit, Lehmann averred that the certified mail with the complaint was signed for by her estranged husband who did not inform her of the lawsuit. Proper service, or a waiver by voluntary appearance, is necessary to acquire personal jurisdiction over a defendant. *Johnson v. Johnson*, 282 Neb. 42, 803 N.W.2d 420 (2011). And a judgment entered without personal jurisdiction is void. *Id.*

[11,12] An individual party may be served by certified mail. See Neb. Rev. Stat. § 25-508.01 (Cum. Supp. 2014). Section 25-505.01(1)(c) governs service by certified mail and states:

> (1) Unless otherwise limited by statute or by the court, a plaintiff may elect to have service made by any of the following methods:
>
> . . . .
>
> (c) Certified mail service which shall be made by (i) within ten days of issuance, sending the summons to the defendant by certified mail with a return receipt requested showing to whom and where delivered and the date of delivery, and (ii) filing with the court proof of service with the signed receipt attached[.]

The record reflects that the summons was issued on November 30, 2009; Capital One, on December 2, sent the summons by certified mail to Lehmann in McCook; the return receipt was signed by Kurt Lehmann on December 7; and the proof of that service was filed with the county court on December 24. The Nebraska Supreme Court has stated:

> Unlike many state statutes that permit certified mail service, § 25-505.01 does not require service to be sent to the defendant's residence or restrict delivery to the addressee. But due process requires notice to be

> reasonably calculated to apprise interested parties of the pendency of the action and to afford them the opportunity to present their objections.

*Doe v. Board of Regents*, 280 Neb. 492, 508, 788 N.W.2d 264, 280 (2010). Capital One complied with all of the requirements of § 25-505.01. The question now is whether the certified mail service was reasonably calculated to apprise Lehmann of the pendency of the action.

In the instant case, Capital One's complaint and praecipe for summons were filed on November 30, 2009. The praecipe for summons requested the clerk of the Red Willow County Court to issue summons for service via certified mail to Lehmann at her "place of residence" at an address in McCook. The record reflects that the summons was issued on November 30. On December 2, Capital One sent the summons by certified mail to Lehmann in McCook. In her affidavit, Lehmann states that she was living in McCook until September 30, when she moved to Oklahoma; this was 2 months before Capital One filed its complaint. The record does not demonstrate that Lehmann gave Capital One, with whom she had a credit card account, her forwarding address, or even made Capital One aware that she was moving. Lehmann also claims that she did not receive the summons because of her "separation" from her husband at the time the complaint and summons were served; however, it is unclear how Lehmann's temporary marital or living status affects Capital One's reasonable reliance on, presumably, an address provided to them by Lehmann for the purpose of her maintaining an account. Accordingly, when Capital One sent the summons via certified mail on December 2, it sent the summons to Lehmann's place of residence as known to Capital One; and on December 7, the return receipt was signed by Kurt Lehmann, Lehmann's legal husband.

Unlike *Ehlers v. Grove*, 147 Neb. 704, 24 N.W.2d 866 (1946), where there was a total failure of service of process, under the circumstances of this case, Lehmann's right to due

process was not offended because notice was reasonably calculated to apprise her of the pendency of the action and to afford her the opportunity to present her objections. See *Doe v. Board of Regents, supra*. Because there was proper service, the county court did have personal jurisdiction over Lehmann, the default judgment was not void for lack of personal jurisdiction, and Lehmann's motion to vacate an allegedly void judgment on the basis of lack of personal jurisdiction (premised upon insufficient service of process) should have been denied. Because our analysis was of a motion to vacate a void judgment, rather than a "special appearance," we affirm, for different reasons, the decision of the district court, which affirmed the decision of the county court. See *Doe v. Board of Regents*, 283 Neb. 303, 809 N.W.2d 263 (2012) (appellate court will affirm lower court's ruling which reaches correct result, albeit based on different reasoning).

Because we are not vacating the default judgment, we need not address Capital One's cross-appeal. See *Lang v. Howard County*, 287 Neb. 66, 840 N.W.2d 876 (2013) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

## CONCLUSION

Because the county court had personal jurisdiction over Lehmann, the default judgment was not void for lack of personal jurisdiction. Accordingly, we affirm the decision of the district court, which affirmed the decision of the county court denying Lehmann's motion.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v.
Troy E. Grimes, appellant.
870 N.W.2d 162

Filed September 29, 2015. No. A-14-181.

1. **Motions to Suppress: Confessions: Constitutional Law: Appeal and Error.** In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.
2. **Confessions.** To be admissible, a statement or confession of an accused must have been freely and voluntarily made.
3. **Confessions: Due Process.** The Due Process Clause of U.S. Const. amend. XIV and the due process clause of Neb. Const. art. I, § 3, preclude admissibility of an involuntary confession.
4. **Confessions.** Whether a confession or statement was voluntary depends on the totality of the circumstances.
5. **Confessions: Police Officers and Sheriffs: Due Process.** Coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the 14th Amendment.
6. **Confessions: Proof: Appeal and Error.** The State has the burden to prove that a defendant's statement was voluntary and not coerced. In making this determination, an appellate court applies a totality of the circumstances test.
7. **Confessions: Appeal and Error.** Factors to consider in determining whether a defendant's statement was voluntary and not coerced include the atmosphere in which the interrogation took place, the demeanor of the interrogation, the interrogator's tactics, the details of the interrogation, the presence or absence of warnings, physical treatment, prior

history with the police, age, intelligence, education, background, and any characteristic of the accused that might cause his or her will to be easily overborne.

8. **Confessions.** A confession must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.

Appeal from the District Court for Douglas County: Gary B. Randall, Judge. Affirmed.

W. Patrick Dunn for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

Irwin, Inbody, and Pirtle, Judges.

Inbody, Judge.

## I. INTRODUCTION

Troy E. Grimes appeals his jury-based conviction of possession of a firearm by a prohibited person. He contends that the district court erred in allowing the State to adduce evidence of statements, made by him in his postarrest interrogation, obtained in violation of his constitutional rights. Specifically, he contends police threatened to arrest his mother in order to obtain inculpatory statements from him.

## II. STATEMENT OF FACTS

On January 17, 2013, at approximately 9 a.m., three Omaha police officers went to contact Grimes, who was living at his mother's house, based on information obtained in a separate and unrelated investigation. Present at the house at the time officers arrived were Grimes; his mother, Barbara Grimes; Grimes' girlfriend; and a friend of Grimes', who was allowed to leave the home after it was determined that he did not have any outstanding warrants. Barbara granted the officers' request to search the house. During the search, an unregistered gun was found in the basement of the house, wrapped in a black

bag and placed in an old, unused furnace. The gun had eight live rounds inside the magazine and chamber. Grimes was arrested and transported to the police station and taken to an interview room where Steven Kult, an officer with the Omaha Police Department's child victim unit, conducted an interview of Grimes. A video recording was made of this interview which was received into evidence during the suppression hearing, and a redacted copy of the interview was received into evidence at trial.

A review of the video recording establishes that Kult began interviewing Grimes at 10:47 a.m. The interview began with Kult asking Grimes questions about his medical status, education, alcohol and drug use, amount of sleep the previous night, work, and hobbies. At 10:51, Kult advised Grimes of his *Miranda* rights, which Grimes waived. At 10:53, Kult explained to Grimes that the reason for the interview was an allegation by Grimes' two daughters of child sexual abuse and Kult informed Grimes that the police were not proceeding with that investigation; however, Kult informed Grimes that during the children's interviews regarding the abuse, the children talked about marijuana use in the home and described seeing Grimes with a gun in the home. Kult told Grimes that because of these disclosures, the police had to follow up at Grimes' home, and that these disclosures are what led to the finding of the gun. At 10:56, the following colloquy occurred between Kult and Grimes:

> [Kult:] So, I guess that I'd like to talk to you a little bit about the gun, 'cause what I don't want to end up happening is anything going back on mom, 'cause the gun's in a common area of the house, so I'll just ask you straight up: Was it your gun?
>
> [Grimes:] No, but I'm not gonna let my mom take the rap for it.
>
> [Kult:] OK.
>
> [Grimes:] If it—you know—if it comes to that then, fuck that, then I'll take it.

[Kult:] Well, they're gonna—right now the crime lab's pulling the gun out and they're gonna do DNA. You know your DNA's on file, and are we going to find your DNA on the gun?

[Grimes:] You shouldn't.

[Kult:] I mean it's gotta be straight up yes or no, 'cause they're gonna know, you know.

[Grimes:] No, I'm sayin' you shouldn't.

[Kult:] I mean if you ever even touched the gun, it's gonna be on there for years.

[Grimes:] Oh. Um, I don't know. Why, we'll just say yes.

[Kult:] Come on, I mean, your girls weren't trying to throw you under the bus or nothing. They, they weren't trying to fuck you and put you in this position. They were just telling a story, man.

[Grimes:] Yeah, it's cool, you know. Like I said, man. Just, I don't know, just leave my mom out of it, man.

[Kult:] I would, I want to leave your mom out of it.

[Grimes:] All right.

[Kult:] But we, you and I got to establish who's the gun belong to.

[Grimes:] It's mine, it's mine.

[Kult:] OK. I'm not trying to hem you up. But I am trying to keep your mom out . . . of it.

[Grimes:] Well, we're trying to do the same thing, you know. Just leave my mom out of it . . . .

[Kult:] 'Cause your mom's a sweetheart. I'm sorry she had to go through all of this today.

[Grimes:] It's cool, man.

. . . .

[Grimes:] So what it is, is this, man like, my mother took [undecipherable] 'cause you said this is a common area, my mom [undecipherable] I'll say that it's mine. . . .

. . . .

> [Grimes:] So, what I'm saying, is though like, . . . so, say my DNA ain't on it, man, and you know what I mean, it's just not, and then, so, you all would try to say it's my mom's, then, right, 'cause it was found in her house. That's where I'm going with this. So somebody has to be responsible for that gun.
>
> [Kult:] Someone's gotta be responsible for the gun 'cause it didn't grow legs or just . . . walk into your house.
>
> [Grimes:] That's what I'm saying.
>
> . . . .
>
> [Grimes:] But even let's just say that even that, I'm just saying though, if my DNA wasn't on there, but it was found in my mom's house, so what, they would try . . . .
>
> [Kult:] We gotta . . . something's gotta happen with the gun.
>
> [Grimes:] Right. So someone has to. That's what I'm saying, someone has to be responsible for the gun.
>
> . . . .
>
> [Kult:] Is it fair to say that, I mean, that it's . . . your gun . . . for protection, or is it your gun that you, I mean, you just, if you like guns, or are you holding it for someone?
>
> [Grimes:] I mean, that's what I'm saying though, you're asking about at this point it don't matter, and I'm just saying that 'cause my mom's not going down for that gun and so I'm saying its mine. That's what it is.

During the interview, Kult also explained that the gun may be associated with another crime and Grimes told Kult that he had been holding the gun for a friend named "Scooby" for a little over a year. Kult and Grimes took a break from 11:09 through 11:20 a.m., after which time Grimes signed a waiver for the collection of a DNA sample. Another break was taken between 11:23 and 11:29, after which a DNA swab was collected from Grimes. At 11:43, Grimes was transported to jail, concluding the interview and the recording.

Although Grimes was in the interview room for about an hour, the actual interview lasted for about 20 minutes. During the interview, Grimes did not ask Kult to stop the questioning and did not ask for an attorney. On February 8, 2013, Grimes was charged with possession of a deadly weapon by a prohibited person, a Class ID felony, in violation of Neb. Rev. Stat. § 28-1206 (Cum. Supp. 2014).

In April 2013, Grimes filed a motion to suppress any statements made by him to law enforcement personnel during the January 17, 2013, custodial interrogation. He alleged (1) that law enforcement personnel interrogated him with the intent to elicit incriminating responses without first having advised him of his *Miranda* rights; (2) that law enforcement personnel employed tactics of coercion and duress to obtain incriminating information from him and offered improper inducements and used threats of incarceration in order to obtain incriminating information from him and that thus, his statements were not freely, voluntarily, and intelligently given; and (3) that his statements were obtained in violation of the U.S. and Nebraska Constitutions.

A suppression hearing was held on May 20, 2013. At the start of the hearing, Grimes' counsel made an oral motion to suppress a second, subsequent statement made by Grimes during a followup interview by Omaha police officer Scott Beran. The State had prepared to address both statements by Grimes, and the district court determined that the record was clear the suppression hearing was addressing both statements made by Grimes and that it was unnecessary for Grimes to file an amended motion to suppress. Kult and Beran, who had conducted the second interview of Grimes, testified at the suppression hearing.

Kult testified that he became involved in an investigation of Grimes when Grimes' 8-year-old and 6-year-old daughters were brought in by their maternal grandmother regarding allegations of sexual abuse. During the forensic interviews of the children, they disclosed that Grimes had a firearm in the

house. As a result of this disclosure, Kult, along with parole officers and two uniformed officers, contacted Grimes at his house; the firearm was located; and thereafter, Grimes was arrested and transported to the police station, where he was interviewed by Kult. Kult admitted that he never had any intention of arresting Grimes' mother and that a statement he had made concerning her was a line of questioning in the interview. Kult stated that although his questioning was not designed to be a threat, he let Grimes believe that his mother was still a suspect and might be arrested. A video recording of the interview was received into evidence.

Beran, a firearms task force officer, testified that on January 24, 2013, at approximately 9:46 a.m., he interviewed Grimes regarding the firearm found in Grimes' home. At the time of this interview, Grimes was still in custody and was interviewed in a room at a Douglas County correctional facility. There was no audio or video recording equipment in the room, so the 9-minute interview was not recorded. After Grimes waived his *Miranda* rights, Beran questioned Grimes about where he obtained the gun and attempted to obtain information about "Scooby"; Beran testified that Grimes had told Kult in the initial interview that he had obtained the firearm from "Scooby" in 2011. Grimes admitted that he did not have a friend named "Scooby" and that he gave a statement naming such individual because he did not want his mother to get in trouble. During the interview, Grimes did not ask for an attorney, and when he asked to go back to his cell, Beran ended the interview and no further questions were asked of Grimes after that time.

On May 28, 2013, the district court denied Grimes' motion to suppress. The district court found that Kult testified that he was assigned to investigate Grimes regarding a sexual assault and that during this investigation, Grimes' daughters testified that their "'father'" had a gun. The court noted that Grimes was specifically advised of his *Miranda* rights prior to being interviewed. The court then noted that at the opening of the

video-recorded interview, Kult stated to Grimes, "'What I don't want to end up happening is anything going back on Mom, because the gun was found in a common area of the house.'" Grimes denied the gun belonged to him but stated he would "take the charge," based on his not wanting to involve his mother in the investigation or in charges resulting from the unregistered gun's being in the home. During the interview, similar questions and answers were given. The district court found, in reviewing all of the evidence, that Kult's tactics in interviewing Grimes were not coercive, that there was no evidence Grimes' will was overborne, and that Grimes' action in originally lying about where he obtained the gun further raised credibility questions regarding the statements provided by Grimes. Additionally, regarding Grimes' statement to Beran on January 24, the district court found that Beran provided Grimes with his *Miranda* rights, rejected the proposition that Grimes' statement during the followup interview should be suppressed as fruit of the poisonous tree of the original statement given to Kult, and denied Grimes' oral motion to suppress this second statement to law enforcement.

Trial was held in early November 2013. The State and Grimes stipulated that Omaha police found a "Hi Point Model CF380 semiautomatic .380 auto caliber" pistol at Grimes' home on January 17; that an Omaha crime laboratory technician examined and test-fired the firearm, which resulted in a finding that the firearm operates as designed and will "fire live rounds of .380 Auto caliber ammunition in semiautomatic fashion." The parties further stipulated that Grimes had previously been convicted of a felony "on and before January 17, 2013." Kult's trial testimony did not discuss the sexual assault investigation or Grimes' children's statements. Instead, Kult testified that he began the current investigation after receiving information in an unrelated investigation that criminal activity was occurring at Grimes' home and then provided generally the same testimony as he provided at the suppression hearing. Likewise, Beran testified generally as

to the same facts as he did at the suppression hearing, but he also testified that during the second interview, Grimes did not provide names of any other individuals who may have placed the firearm in the furnace. Grimes preserved his objections to his two statements as previously raised and considered at the suppression hearing.

Barbara, Grimes' mother, testified in his defense. Barbara testified that on January 17, 2013, Grimes was living at her home. Also living at the house at that time were Grimes' girlfriend, who is the mother of two of Barbara's grandchildren, and both of those grandchildren. According to Barbara, several people had access to her home, including her brother; Grimes' male friend whom the officers allowed to leave; and her 24-year-old grandson. Barbara testified that she had never seen the gun that was recovered before it was shown to her at trial, had never seen Grimes with a gun, did not know the gun was in her home, and did not put the gun there.

The jury found Grimes guilty of the offense of being a felon in possession of a firearm, and thereafter, the court sentenced Grimes to 5 to 14 years' imprisonment with credit for 260 days served.

## III. ASSIGNMENT OF ERROR

Grimes' sole assignment of error is that the trial court erred in allowing the State to adduce evidence of statements, obtained in violation of his constitutional rights, which were made in his postarrest interrogation. In his brief, he assigned as error that police employed tactics of coercion, duress, threats, offers of inducements, and improper influence to obtain said inculpatory statements; however, he argued only that Kult's threats to arrest his mother were coercive, threatening, and improper influence.

## IV. STANDARD OF REVIEW

[1] In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, an appellate court applies a two-part standard of review. With regard to

historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination. *State v. Turner*, 288 Neb. 249, 847 N.W.2d 69 (2014); *State v. Seberger*, 279 Neb. 576, 779 N.W.2d 362 (2010).

## V. ANALYSIS

Grimes contends that the trial court erred in allowing the State to adduce evidence of statements made by Grimes in his postarrest interrogation, because police employed tactics of coercion, threats, and improper influence to obtain those statements, in violation of his constitutional rights. He argues that under the totality of the circumstances, the tactics employed by the police, especially the repeated threat from Kult to arrest Grimes' mother if Grimes did not accept responsibility for possession of the gun, constituted coercive conduct, threats, or improper influence, rendering his confession involuntary.

### 1. Nebraska Law

[2-7] To be admissible, a statement or confession of an accused must have been freely and voluntarily made. *State v. Seberger, supra*. The Due Process Clause of U.S. Const. amend. XIV and the due process clause of Neb. Const. art. I, § 3, preclude admissibility of an involuntary confession. *State v. Turner, supra*. Whether a confession or statement was voluntary depends on the totality of the circumstances. *Id.*; *State v. Seberger, supra*. Coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the 14th Amendment. *State v. Turner, supra*; *State v. Seberger, supra*. The State has the burden to prove that a defendant's statement was voluntary and not coerced. *State v. Turner, supra*; *State v. Seberger, supra*. In making this determination, we apply a totality of the circumstances test. *State v. McClain*, 285 Neb.

537, 827 N.W.2d 814 (2013). Factors to consider in determining whether a defendant's statement was voluntary and not coerced include the atmosphere in which the interrogation took place, the demeanor of the interrogation, the interrogator's tactics, the details of the interrogation, the presence or absence of warnings, physical treatment, prior history with the police, age, intelligence, education, background, and any characteristic of the accused that might cause his or her will to be easily overborne. See, *id.*; *State v. Erks*, 214 Neb. 302, 333 N.W.2d 776 (1983).

In *State v. McClain, supra*, the Nebraska Supreme Court considered the defendant's claim that his confession was inadmissible because it was involuntary. In applying a totality of the circumstances test, the court noted that the defendant was interviewed in what appeared to be a standard interrogation room, the interrogator's questioning techniques were not improper even though he used the phrase "'cold blooded killer,'" the confession was just 1½ hours long, and the video showed that the defendant was "intelligent and thoughtful, that he was aware of why he was in the room, and that he too was trying to get information, specifically the extent of the interrogator's knowledge about the crimes." *Id.* at 548, 827 N.W.2d at 825-26. The court stated, "After viewing the interrogation . . . we conclude that McClain's will was not overborne and that his confession was voluntary." *Id.* at 547, 827 N.W.2d at 825.

[8] Moreover, "a confession must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *State v. Erks*, 214 Neb. at 305-06, 333 N.W.2d at 779. One such threat or promise is one against a third party, generally a defendant's close relative or family member. For example, in *State v. Erks, supra*, the Nebraska Supreme Court affirmed the district court's suppression of a portion of the statements made by the defendant, who was accused of a crime of a sexual nature, which statements were

made after indications that the police who sought to get help for him would also protect him and his family from embarrassment. The Supreme Court found that the defendant could easily have been influenced to confess by those indications by police and that the district court was not clearly wrong in finding that the statements made subsequently to the inducements were not made voluntarily.

Another case in which the Nebraska Supreme Court considered threats against a third party, albeit in the context of a Fourth Amendment consent to search, is *State v. Walmsley*, 216 Neb. 336, 344 N.W.2d 450 (1984). In *Walmsley*, a sheriff was investigating a report of "'strange looking weeds'" growing behind the defendant's house and, upon arriving at that house, threatened to arrest the defendant's wife. 216 Neb. at 336, 344 N.W.2d at 451. The trial court found that the sheriff's comments constituted duress or coercion of a psychological nature and to such an extent that the defendant's consent to the search was impossible under the circumstances. In upholding the trial court's grant of the defendant's motion to suppress, the Nebraska Supreme Court stated that the threat of "[i]ncarceration of a wife and concern at separation from children while their parents are in custody has to produce a mental state gravely and adversely affecting one's ability to make decisions." *Id*. at 341, 344 N.W.2d at 454.

### 2. Case Law From Other Jurisdictions

Although the case law in Nebraska is limited on the issue of the impact of threats or promises against a close relative of a defendant on a confession, many more federal and state cases have considered the issue. We include some of those cases. For an extensive list, see Annot., 51 A.L.R.4th 495 (2011).

In *Lynumn v. Illinois*, 372 U.S. 528, 534, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963), the U.S. Supreme Court found that it was "abundantly clear" that the defendant's oral confession was not voluntary where it "was made only after the police had told her

that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate'" with officers. Similarly, in *United States v. Tingle*, 658 F.2d 1332, 1334 (9th Cir. 1981), the defendant's confession was involuntary where it was made after law enforcement told her that a lengthy prison term could be imposed, that she had a lot at stake, and that she would not see, or might not see, her child "for a while" if she refused to cooperate. See, also, *Rogers v. Richmond*, 365 U.S. 534, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961) (defendant's confession made after interrogating officer threatened to bring defendant's wife in for questioning was reversed because lower court had applied wrong standard in analyzing admissibility of confession).

More specific to the facts involved in the instant case are those cases which analyze threats to arrest an accused's family member or close relative. These cases can generally be classified into three groups: (a) those where the threats are not found to be coercive, (b) those where the threats are found to be coercive, and (c) those where the law enforcement officer has offered the defendant a "good deal."

(a) Threats Were Not Coercive

It is widely accepted that a threat by law enforcement to arrest an accused's family member is not coercive if there is probable cause to arrest the family member. *U.S. v. Ortiz*, 943 F. Supp. 2d 447 (S.D.N.Y. 2013); *U.S. v. Johnson*, 351 F.3d 254 (6th Cir. 2003) (threat to arrest suspect's sister was not coercive where police had probable cause to arrest sister); *Thompson v. Haley*, 255 F.3d 1292 (11th Cir. 2001) (threat to arrest suspect's girlfriend did not render suspect's confession involuntary where police had probable cause to do so); *Allen v. McCotter*, 804 F.2d 1362 (5th Cir. 1986) (threat to arrest defendant's wife did not render defendant's confession involuntary where police had probable cause to arrest her). See, also, *U.S. v. Ortiz*, 499 F. Supp. 2d 224, 232-33 (E.D.N.Y. 2007) ("[i]t is not coercive to threaten a suspect's

family member with arrest to secure a *Miranda* waiver from the suspect if, [sic] there is probable cause to arrest the family member"); *People v. LaDuke*, 206 A.D.2d 859, 614 N.Y.S.2d 851 (1994) (it is not necessarily improper tactic for police to capitalize on defendant's reluctance to involve his family in pending investigation especially where police have valid legal basis to carry out their threats to arrest defendant's wife and father); *State v. Garcia*, 143 Idaho 774, 152 P.3d 645 (2006) (defendant's consent to search was not coerced even after officer told him that if defendant handed over marijuana, he and his coworkers would be cited and released, but that if he did not, they would be arrested, where there was probable cause to do so).

In *U.S. v. Jackson*, 918 F.2d 236 (1st Cir. 1990), the First Circuit Court of Appeals held that the defendant's confession was voluntary where police informed him that his sister had been arrested for a gun violation. The court noted that there was no evidence the defendant was subjected to direct threats or promises and that even if police did use an implied "'threat' or 'promise'" that his sister might be caused or spared harm, depending on whether or not the defendant made admissions, the court still could not conclude the defendant's will had been overborne. *Id.* at 242. The court noted that "any psychological pressure exerted on [the defendant] related to an adult sibling, not a child," and that there was no evidence that the defendant and his sister had an especially close relationship or that the defendant was "unusually susceptible to psychological coercion on that account or any other, particularly in light of [the defendant's] very substantial previous experience with the criminal justice system." *Id*. Considering the totality of these circumstances, the First Circuit Court of Appeals held that the defendant "did not lose volitional control, nor was his will overborne." *Id*.

(b) Threats Were Coercive

However, where a threat by law enforcement to arrest an accused's close relative or family member is made without

probable cause to do so, the threat is coercive. *U.S. v. Finch*, 998 F.2d 349 (6th Cir. 1993) (information defendant provided to police concerning location of drugs was involuntary where it was provided after police threatened to arrest his mother and girlfriend unless he confessed, where no probable cause to carry out threat existed); *U.S. v. Munoz*, 987 F. Supp. 2d 438 (S.D.N.Y. 2013) (defendant's consent to search was involuntary where police told defendant that other occupants of his apartment, including his father and brother, would be arrested if firearm was located in apartment he shared with them unless defendant consented to search, where police had no probable cause to arrest other occupants); *U.S. v. Ortiz*, 943 F. Supp. 2d 447 (S.D.N.Y. 2013) (defendant's statements were involuntary where police threatened to arrest defendant's mother and elderly aunt but lacked probable cause to do so); *U.S. v. Andrews*, 847 F. Supp. 2d 236 (D. Mass. 2012) (threat to arrest suspect's elderly, ill mother rendered suspect's confession involuntary where there was no probable cause to arrest her); *U.S. v. Guzman*, 724 F. Supp. 2d 434 (S.D.N.Y. 2010) (threat that defendant's girlfriend would be arrested until he consented to search rendered consent and subsequent statements by defendant involuntary); *State v. Schumacher*, 136 Idaho 509, 517, 37 P.3d 6, 14 (Idaho App. 2001) ("threats to prosecute a defendant's loved one when there is no legitimate basis to do so may be coercive and can render a confession involuntary"); *State v. Corns*, 310 S.C. 546, 552, 426 S.E.2d 324, 327 (S.C. App. 1992) (defendant's confession was involuntary due to "veiled threats" made by officers against defendant's family, i.e., that his wife could be arrested and that their children could be taken from them); *State v. Davis*, 115 Idaho 462, 767 P.2d 837 (Idaho App. 1989) (confession was involuntary where prosecutor told defendant that defendant's mother was being held due to defendant's refusal to confess and where charges against mother were later dismissed for lack of evidence); *People v. Rand*, 202 Cal. App. 2d 668, 21 Cal. Rptr. 89 (1962) (defendant's

confession was involuntary where it was obtained after officer threatened to arrest defendant's wife and put his children in juvenile hall); *People v. Matlock*, 51 Cal. 2d 682, 697, 336 P.2d 505, 512 (1959) (recognizing that confession coerced by threat to "'bring the rest of the [defendant's] family in'" was involuntary).

For example, in *Harris v. South Carolina*, 338 U.S. 68, 69 S. Ct. 1354, 93 L. Ed. 1815 (1949), the defendant's statement was involuntary based on a totality of the circumstances including the threat by a sheriff to arrest the defendant's mother. In response to the threat, the defendant replied, "'Don't get my mother mixed up in it and I will tell you the truth.'" *Id.*, 338 U.S. at 70. In finding the defendant's statement to be involuntary, the U.S. Supreme Court relied upon the "systematic persistence of interrogation, the length of the periods of questioning, the failure to advise the [defendant] of his rights, the absence of friends or disinterested persons, and the character of the defendant," who was illiterate and was not informed of his *Miranda* rights. *Harris v. South Carolina*, 338 U.S. at 71.

Further, even if the threat is phrased in the language of promise, it remains an implied threat and renders the defendant's statement involuntary. *United States v. Bolin*, 514 F.2d 554 (7th Cir. 1975). In *Bolin*, the Seventh Circuit Court of Appeals found that the defendant's consent to search his home made after his arrest and during custodial interrogation was involuntary where the defendant signed a consent form only after officers told him that "'if he signed the search waiver,'" they would not arrest his girlfriend. 514 F.2d at 559. The court recognized that although the officers' statement concerning the potential arrest of the defendant's girlfriend, whom officers did not have probable cause to arrest, was "phrased in the language of promise, there is no question that it was in fact an implied threat that if the consent were not signed the woman would be arrested," and that the defendant understood the statement as a threat. *Id*. at 560.

Similarly, in *People v. Trout*, 54 Cal. 2d 576, 354 P.2d 231, 6 Cal. Rptr. 759 (1960), *overruled on other grounds, People v. Cahill*, 5 Cal. 4th 478, 853 P.2d 1037, 20 Cal. Rptr. 2d 582 (1993), the defendant's confession was involuntary where it was obtained after the police made either express or implied threats or promises that if he confessed, his wife, whom they had no grounds to hold, would be released from custody to care for their children.

> Before a confession may be used against a defendant the prosecution has the burden of showing that it was voluntary and was not the result of any form of compulsion or promise of reward, and it is immaterial whether the pressure or inducement was physical or mental and whether it was express or implied.

*Id*. at 583, 354 P.2d at 235, 6 Cal. Rptr. at 763.

(c) "Good Deal"

However, offering a "'good deal,'" such as a loved one's freedom from arrest, does not automatically render a statement involuntary. *U.S. v. Munoz*, 987 F. Supp. 2d 438, 445 (S.D.N.Y. 2013). Courts have considered a defendant's statement to be voluntary where it is given in exchange for a promise that police will not arrest or pursue charges against a family member or close relative whom they have probable cause to arrest or where the defendant's statement is motivated by a desire to protect or by concern for another. See, *U.S. v. Memoli*, 333 F. Supp. 2d 233 (S.D.N.Y. 2004) (upheld defendant's consent to search given in exchange for promise that police would not arrest or pursue charges against defendant's girlfriend, whom they had probable cause to arrest); *Allen v. McCotter*, 804 F.2d 1362 (5th Cir. 1986) (defendant's confession was voluntary where defendant was told that charges could be filed against his wife and defendant was motivated by his desire to prevent good faith arrest of his wife); *United States v. Jordan*, 570 F.2d 635 (6th Cir. 1978) (statements made by defendant which were motivated by desire to protect

pregnant common-law wife whose name was on arrest warrant were held to be voluntary); *United States v. Culp*, 472 F.2d 459 (8th Cir. 1973) (defendant's consent to search was voluntary where defendant refused to cooperate in search until promised that his wife, who had been arrested with him, would be treated leniently); *United States v. McShane*, 462 F.2d 5 (9th Cir. 1972) (defendant's confession was voluntary where it was motivated by his desire to spare his girlfriend ordeal of questioning and confinement); *Vogt v. United States*, 156 F.2d 308 (5th Cir. 1946) (defendant's confession was not rendered involuntary by officers' telling defendant they were going to bring his wife to jail for questioning); *State v. Schumacher*, 136 Idaho 509, 517, 37 P.3d 6, 14 (2001) ("a suspect's confession is not involuntary merely because it was motivated by the desire to prevent a good faith arrest of a loved one"); *People v. Steger*, 16 Cal. 3d 539, 546 P.2d 665, 128 Cal. Rptr. 161 (1976) (defendant's confession was voluntary where defendant's speaking to police was motivated by her desire to free her husband); *People v. Montano*, 184 Cal. App. 2d 199, 7 Cal. Rptr. 307 (1960) (defendant's confession was voluntary where motivated by concern for his girlfriend and pregnant sister-in-law); *People v. Mellus*, 134 Cal. App. 219, 25 P.2d 237 (1933) (defendant, who was charged with stealing chickens, made involuntary confession after officers told him that if he refused to make statement, they would lock up his mother and accuse her of being implicated in thefts).

For example, in *United States v. Charlton*, 565 F.2d 86 (6th Cir. 1977), the Sixth Circuit Court of Appeals held that a father's confession motivated by anger at the arrest of his 20-year-old son and desire to protect his son was not coerced. The court stated, "Obviously anyone who knows his rights and determines to confess does so for a reason. That the defendant's reason was to protect his son does not, in our judgment, render his confession involuntary or necessitate a finding that he was coerced or that his will was overborne." *Id.* at 89. Additionally, in *People v. Barker*, 182 Cal. App. 3d 921, 227

Cal. Rptr. 578 (1986), a defendant's confession was voluntary where a detective agreed not to charge the defendant's girlfriend in exchange for the defendant's truthful testimony, after the defendant initiated the subject of leniency and where the detective never told the defendant that he would arrest the defendant's girlfriend if the defendant did not cooperate. The court rejected the defendant's argument that the detective's failure to expressly tell the defendant that he did not intend to charge the defendant's girlfriend constituted an implied threat to charge her.

More factually similar to the instant case is *People v. Abbott*, 156 Cal. App. 2d 601, 319 P.2d 664 (1958), wherein the Second District Court of Appeal held that even if the defendant, who was charged with theft, had a choice between making a statement that might result in the release of a woman with whom he had been living and remaining silent and leaving her under suspicion as an accomplice, the defendant's confession was voluntary where the defendant's principal motive for the confession had been that it would probably result in her exoneration and where officers offered the defendant no bargain and had not threatened to prosecute the woman if he refused to make a statement.

### 3. Application to Instant Case

In the instant case, Kult did not tell Grimes that if he did not confess, his mother would be arrested; nor did he tell Grimes that if he did confess, his mother would not be arrested. When Kult told Grimes that he was "trying to keep [Grimes'] mom out . . . of it," Grimes responded, "[W]e're trying to do the same thing . . . ." Where there was no threat by Kult to arrest Grimes' mother if Grimes did not confess, nor a statement that Grimes' mother would not be arrested if he did confess, Grimes' confession was clearly motivated by his desire to protect his mother. Thus, the factual situation presented in the instant case is most similar to those cases where the defendant's primary motive was to protect a third

party. See *People v. Abbott, supra* (defendant's confession was voluntary where defendant's principal motive was exoneration of another person suspected of complicity in offense and officers offered defendant no bargain and had not threatened to prosecute third party if defendant refused to make statement). "The fact that an accused undertakes to shoulder the entire burden in order to exculpate someone else does not, of itself, render his confession involuntary and invalid." *Vogt v. United States*, 156 F.2d 308, 312 (5th Cir. 1946).

Further, under a totality of the circumstances analysis, we consider that Grimes had a previous history with the police, he has a diploma through the GED program, and he agreed to talk with Kult after being advised of his *Miranda* rights. He was interviewed in a standard interrogation room, the interview lasted about 20 minutes, and Grimes was in the interview room for a total of about 1 hour. Grimes was allowed to use the restroom during the interview and was given water. The video of the interrogation showed that Grimes was aware of why he was in the room and that he was trying to get information from Kult. The atmosphere of the interrogation was conversational, not confrontational. All of these factors indicate that the interrogation techniques used by Kult were not so coercive as to overbear Grimes' will, see *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013), and that Grimes' confession was made voluntarily.

## VI. CONCLUSION

After considering the totality of the circumstances, we conclude that Grimes' statements were voluntary and, thus, were properly admissible at trial. Consequently, we affirm his conviction and sentence.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# In re Interest of Angeleah M. and Ava M., children under 18 years of age. State of Nebraska, appellee, v. D'Angelo E., appellant.

871 N.W.2d 49

Filed October 6, 2015. No. A-15-176.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **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. 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.
3. **Jurisdiction: Judgments: Appeal and Error.** If a lower court does not have subject matter jurisdiction and, therefore, has no power to entertain the proceedings or decide a question, an appellate court lacks jurisdiction to review or evaluate an evidentiary determination for an act outside the jurisdiction of the court whose judgment or order is appealed.
4. ____: ____: ____. Although an extrajurisdictional act of a lower court cannot vest the appellate court with jurisdiction to review or evaluate an evidentiary determination involved in such act, an appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power to enter the judgment or final order sought to be reviewed.
5. **Juvenile Courts: Jurisdiction: Appeal and Error.** Once an appeal has been perfected to an appellate court, the trial court is divested of its jurisdiction to hear a case involving the same matter between the same parties. However, there is statutory authority allowing the juvenile court to retain or continue jurisdiction while appeals are pending.
6. **Juvenile Courts: Jurisdiction: Parental Rights.** Neb. Rev. Stat. § 43-295 (Reissue 2008) generally provides a juvenile court with

continuing jurisdiction over a juvenile and empowers the court to order a change in the custody or care of any such juvenile if at any time it is made to appear to the court that it would be for the best interests of the juvenile to make such change.

7. **Juvenile Courts: Jurisdiction: Appeal and Error.** Although a juvenile court retains jurisdiction over a juvenile while an appeal is pending, such continuing jurisdiction is not without limits; orders regarding the juvenile pending the resolution of an appeal should be made on a temporary basis.
8. **Juvenile Courts: Jurisdiction: Visitation.** Neb. Rev. Stat. § 43-295 (Reissue 2008) provides for the court's continuing jurisdiction over the custody or care of that child, which includes visitation.
9. **Juvenile Courts: Final Orders: Parental Rights.** An order in a juvenile special proceeding is final and appealable if it affects a parent's substantial right to raise his or her child.
10. **Child Custody: Visitation: Final Orders: Appeal and Error.** Orders which temporarily suspend a parent's custody and visitation rights do not affect a substantial right and are therefore not appealable.

Appeal from the Separate Juvenile Court of Lancaster County: Roger J. Heideman, Judge. Appeal dismissed.

Matt Catlett, of Law Office of Matt Catlett, for appellant.

Joe Kelly, Lancaster County Attorney, and Shellie D. Sabata for appellee.

Moore, Chief Judge, and Pirtle and Bishop, Judges.

Bishop, Judge.

D'Angelo E. appeals from the decision of the separate juvenile court of Lancaster County temporarily suspending his visitation with his daughters, Angeleah M. and Ava M. D'Angelo argues that the juvenile court did not have jurisdiction to enter an order suspending his visitation when there was an appeal pending. He also argues that there was no evidence that suspension of visitation was in the children's best interests. We find that the juvenile court had continuing jurisdiction to temporarily suspend D'Angelo's visitation while an appeal was pending. However, we also find that the temporary

order was not a final, appealable order, and we therefore dismiss this appeal for lack of jurisdiction.

## BACKGROUND

D'Angelo is the father of Angeleah, born in 2008, and Ava, born in 2009. In November 2013, the girls were adjudicated under Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2013), due to the faults or habits of D'Angelo, and D'Angelo's parental rights to the girls were terminated. D'Angelo appealed the termination of his parental rights. In a memorandum opinion, *In re Interest of Angeleah M. & Ava M.*, No. A-13-1060, 2014 WL 3489846 (Neb. App. July 15, 2014) (selected for posting to court Web site), this court reversed the termination of D'Angelo's parental rights, but affirmed the adjudication; we remanded the matter back to the juvenile court for further proceedings.

In September 2014, the juvenile court issued a disposition order stating that the primary permanency plan was reunification with an alternative plan for adoption. Angeleah and Ava were to remain in the temporary legal custody of the Nebraska Department of Health and Human Services (DHHS) and were to remain in their foster home placement. In addition to ordering D'Angelo to cooperate with therapeutic visitation, the juvenile court ordered D'Angelo to sign releases of information as requested by DHHS, not use or possess drugs or alcohol, cooperate in a parenting assessment and cooperate with a pretreatment assessment, cooperate with random drug and alcohol testing, cooperate with all service providers, inform DHHS of any change in address or telephone number, and maintain appropriate housing and a legal means of support for himself and his children. D'Angelo appealed the dispositional order. In case No. A-14-860, an unpublished memorandum opinion filed on April 27, 2015, this court affirmed the dispositional order of the juvenile court.

On February 13, 2015, while the dispositional order was on appeal to this court, DHHS filed a motion in the juvenile court to suspend D'Angelo's visitation with Angeleah and Ava. On

February 17, the juvenile court entered an order temporarily suspending D'Angelo's visits pending further hearing on the matter. A hearing was held on February 18.

At the hearing on February 18, 2014, various exhibits were received into evidence and testimony was given. Heather Post, the girls' DHHS caseworker, testified regarding DHHS' recommendation that continuing therapeutic visitation was not in the children's best interests. Post testified that she had attempted to contact D'Angelo on numerous occasions, but that he failed to respond.

Post stated that D'Angelo continues to have a relationship with Claire M., the girls' mother, who previously relinquished her parental rights, despite D'Angelo's denying having contact with her. Post testified that the two have had multiple law enforcement contacts together since at least September 2014. Exhibits received into evidence show that in February 2015, D'Angelo was charged with "Domestic Assault, 3rd degree - subsq offense" for an incident occurring in January in which Claire was the victim; in December 2014, police were contacted when Claire and D'Angelo failed to return a vehicle to an automobile dealership after a "'test drive'"; and also in December 2014, police were contacted regarding damage to a hotel room when D'Angelo and Claire got into an argument.

Post testified that there were concerns about what appeared to be ongoing marijuana use by D'Angelo. In Claire's police report regarding the January 2015 domestic assault, she stated that D'Angelo used and sold narcotics. At a February 2015 therapeutic visitation with the girls, their therapist confronted D'Angelo about an odor of marijuana about his person; D'Angelo denied he had been smoking marijuana. Also in February 2015, during a traffic stop of D'Angelo's vehicle, an officer noted an odor of marijuana emanating from the vehicle and a marijuana "'blunt'" was subsequently found in the vehicle; a passenger in the vehicle claimed that the blunt was his.

Post testified that D'Angelo had canceled two of the last three visits. One of those visits, which was to occur on February 12, 2015, was canceled because D'Angelo was in jail; it was Post's understanding that D'Angelo's brother, pretending to be D'Angelo, called to cancel the visit saying he had to work late. Post testified that other than attending therapeutic visitation, D'Angelo had not participated in any ordered services to reunify with his daughters.

Post testified that the girls' therapist had concerns about D'Angelo's continuing to see the girls while he was not engaged in services and that the therapist believed it was necessary for D'Angelo to be involved in services that would enable him to gain placement of the girls in order to continue visits.

D'Angelo challenged Post's testimony through cross-examination, and he argued to the juvenile court that the motion to suspend visitation was punitive. D'Angelo's position was that there was no evidence D'Angelo was in custody and therefore no evidence to indicate he could not have visitation. Further, D'Angelo argued that he had missed only three visits in 5 months and that there was no evidence that the children were actually at risk of harm from having supervised therapeutic visitation 1 hour per week.

At the conclusion of the hearing on February 18, 2015, the juvenile court stated it was ordering the "temporary suspension" of therapeutic visitation, pending the outcome of a parenting assessment and psychological evaluation. And in its order filed on February 19, the juvenile court sustained DHHS' motion and suspended the therapeutic visitation between D'Angelo and the girls "pending further order of the Court." It is from this order that D'Angelo now appeals.

## ASSIGNMENTS OF ERROR

D'Angelo assigns (1) the juvenile court did not have jurisdiction to suspend his visitation and (2) there was no evidence that suspension of visitation was in the children's best interests.

## STANDARD OF REVIEW

[1] A jurisdictional issue that does not involve a factual dispute presents a question of law. *In re Interest of Octavio B. et al.*, 290 Neb. 589, 861 N.W.2d 415 (2015).

[2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *Id*. 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*.

## ANALYSIS

D'Angelo argues that the juvenile court did not have jurisdiction to suspend his visitation with the children because at the time that order was made, an appeal of the juvenile court's dispositional order was pending and the order suspending visitation did not pertain to the children's custody or care. The State argues that the juvenile court retained jurisdiction to enter an order suspending visitation during the pendency of an appeal of the initial dispositional order. The State also argues that the order suspending visitation on a temporary basis does not affect a parent's substantial right and is therefore not a final, appealable order.

[3,4] If a lower court does not have subject matter jurisdiction and, therefore, has no power to entertain the proceedings or decide a question, an appellate court lacks jurisdiction to review or evaluate an evidentiary determination for an act outside the jurisdiction of the court whose judgment or order is appealed. *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986). However, although an extrajurisdictional act of a lower court cannot vest the appellate court with jurisdiction to review or evaluate an evidentiary determination involved in such act, an appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power to enter the judgment or final order sought to be reviewed. *Id*. Accordingly, we must initially determine

whether the juvenile court had jurisdiction to enter the order suspending D'Angelo's visitation.

*Did Juvenile Court Have Jurisdiction to Enter Order?*

D'Angelo challenges the juvenile court's jurisdiction to enter an order suspending his visitation with his daughters while D'Angelo's appeal of the dispositional order was pending.

[5,6] Nebraska case law generally holds that once an appeal has been perfected to an appellate court, the trial court is divested of its jurisdiction to hear a case involving the same matter between the same parties. *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998). However, there is statutory authority allowing the juvenile court to retain or continue jurisdiction while appeals are pending. Neb. Rev. Stat. § 43-295 (Reissue 2008) provides:

> Except when the juvenile has been legally adopted, the jurisdiction of the court shall continue over any juvenile brought before the court or committed under the Nebraska Juvenile Code and the court shall have power to order a change in the custody or care of any such juvenile if at any time it is made to appear to the court that it would be for the best interests of the juvenile to make such change.

And Neb. Rev. Stat. § 43-2,106 (Reissue 2008) provides that the county court, acting as a juvenile court, shall continue to exercise supervision over the juvenile until a hearing is had in the appellate court and the appellate court enters an order making other disposition. Although this statute does not specifically set forth that same authority for a separate juvenile court, our Supreme Court has addressed that omission. In *In re Interest of Jedidiah P.*, 267 Neb. 258, 263, 673 N.W.2d 553, 557 (2004), the Nebraska Supreme Court found no reason to treat differently a county court sitting as a juvenile court and a separate juvenile court, and held that "a separate juvenile court continues to exercise supervision of

the juvenile during an appeal until the appellate court enters an order making other disposition."

[7] Although a juvenile court retains jurisdiction over a juvenile while an appeal is pending, as discussed above, such continuing jurisdiction is not without limits. For example, the continuing jurisdiction of a juvenile court pending an appeal does not include the power to terminate parental rights. See *In re Interest of Joshua M. et al.*, 4 Neb. App. 659, 548 N.W.2d 348 (1996), *reversed in part on other grounds* 251 Neb. 614, 558 N.W.2d 548 (1997). Similarly, pending an appeal from an adjudication, the juvenile court does not have the power to enter a permanent dispositional order; any order regarding the disposition of a juvenile pending the resolution of an appeal of the adjudication can only be made on a temporary basis upon a finding by the court that such disposition would be in the best interests of the juvenile. *In re Interest of Jedidiah P., supra*. As stated by the Nebraska Supreme Court, "The extent of the court's jurisdiction must be determined by the facts of each case." *Id.* at 263, 673 N.W.2d at 557. Accordingly, we must determine whether the juvenile court had continuing jurisdiction to suspend D'Angelo's visitation while appeal of the disposition order was pending.

Section 43-295 generally provides a juvenile court with continuing jurisdiction over a juvenile and empowers the court to "order a change in the custody or care of any such juvenile if at any time it is made to appear to the court that it would be for the best interests of the juvenile to make such change." In *In re Interest of Joshua M. et al.*, 4 Neb. App. at 670, 548 N.W.2d at 356, this court said that "[s]ection 43-295 is a statutory analog to Neb. Rev. Stat. § 42-351 (Reissue 1993), which authorizes a district court, in dissolution proceedings, to exercise jurisdiction regarding minor children 'to provide for such orders regarding custody, *visitation*, or support or other appropriate orders in aid of the appeal process.'" (Emphasis supplied.) See, also, *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986); *In re Interest of Juan L.*, 6 Neb. App. 683,

577 N.W.2d 319 (1998). We note that Neb. Rev. Stat. § 42-351 (Reissue 2008) has been amended numerous times since 1993, the version of the statute relied on in *In re Interest of Joshua M. et al., supra*. However, the amendments have expanded, not limited, the types of orders over which the lower court retains jurisdiction to enter in aid of the appeal process. Further, at all times, § 42-351 has provided courts with continuing jurisdiction to protect the best interests of children, including the authority to enter orders regarding visitation.

In the area of divorce law, this court has stated that § 42-351(2) allows lower courts to retain jurisdiction to enter visitation orders despite the pendency of an appeal. See *Bayliss v. Bayliss*, 8 Neb. App. 269, 592 N.W.2d 165 (1999) (§ 42-351(2) allows district court to enter support and visitation orders pending appeal, but it does not grant authority to hear and determine anew those very issues then pending on appeal and to enter permanent orders addressing these issues during appeal process); *Eisenmann v. Eisenmann*, 1 Neb. App. 138, 488 N.W.2d 587 (1992) (implicitly stating district court retains jurisdiction for orders regarding custody or visitation notwithstanding fact that support issue was on appeal).

[8] D'Angelo argues that § 43-295 provides for jurisdiction over only "custody or care" of the juvenile and that DHHS' motion did not seek a change in "custody or care"; rather, it sought to suspend visitation. D'Angelo is apparently suggesting that since the word "visitation" is not specifically stated in § 43-295, the juvenile court has no authority to modify a parent's visitation if an appeal is otherwise pending. We are unwilling to construe the statute in a way that would prevent a juvenile court from acting on matters affecting the best interests of children as the statute otherwise permits it to do. Section 43-295 states that a juvenile court has continuing jurisdiction over a juvenile and authorizes the court to "order a change in the custody or care of any such juvenile if at any time it is made to appear to the court that it would be for the best interests of the juvenile to make such change." If a juvenile

court is presented evidence "at any time" demonstrating that the best interests of the children may be adversely impacted unless parental visitation is temporarily suspended, § 43-295 provides for the court's continuing jurisdiction over the "custody or care" of that child, which we determine includes visitation. As previously discussed, we have held that § 43-295 is a statutory analog to § 42-351, and § 42-351 allows lower courts to retain jurisdiction to enter visitation orders despite the pendency of an appeal in dissolution proceedings. It follows that § 43-295 also allows lower courts to retain jurisdiction to enter visitation orders despite the pendency of an appeal in juvenile proceedings. Accordingly, the juvenile court in the instant case had continuing jurisdiction to temporarily suspend D'Angelo's visitation while appeal of the disposition order was pending. See, *In re Interest of Jedidiah P.*, 267 Neb. 258, 673 N.W.2d 553 (2004); *Bayliss v. Bayliss, supra*.

*Do We Have Jurisdiction to Review Juvenile Court's Order?*

Having established that the juvenile court had continuing jurisdiction to temporarily suspend D'Angelo's visitation while appeal of the disposition order was pending, we must now determine whether such order of suspension was a final, appealable order.

[9] 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 Octavio B. et al.*, 290 Neb. 589, 861 N.W.2d 415 (2015). 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. *Id*. Juvenile court proceedings are special proceedings under Neb. Rev. Stat. § 25-1902 (Reissue 2008), and an order in a juvenile special proceeding is final and appealable if it affects a parent's substantial right to raise his or her child. *In re Interest of Octavio B. et al., supra*.

[10] The Nebraska Supreme Court has already held that orders which temporarily suspend a parent's custody and visitation rights do not affect a substantial right and are therefore not appealable. See, *In re Interest of Danaisha W. et al.*, 287 Neb. 27, 840 N.W.2d 533 (2013); *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009); *In re Interest of Nathaniel P.*, 22 Neb. App. 46, 51, 846 N.W.2d 681, 685 (2014) ("use of the word 'suspend' denotes its temporary nature"). See, also, *In re Interest of Cassandra B. & Moira B.*, 290 Neb. 619, 861 N.W.2d 398 (2015) (when neither language of order nor context in which it was entered denotes temporary interruption of parent's substantial right, order may be final and appealable). In this case, the juvenile court's oral pronouncement on February 18, 2015, and its written order on February 19 temporarily suspended D'Angelo's therapeutic visitation with Angeleah and Ava, pending the outcome of a parenting assessment and psychological evaluation, and was not a final, appealable order. Accordingly, we dismiss this appeal for lack of jurisdiction.

## CONCLUSION

For the reasons stated above, we find that the juvenile court had continuing jurisdiction to temporarily suspend D'Angelo's visitation while appeal of the disposition order was pending. However, the juvenile court's order temporarily suspending D'Angelo's visitation was not a final order affecting a substantial right. Accordingly, we dismiss this appeal for lack of jurisdiction.

Appeal dismissed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Arthur and Linda Lamprecht, appellants, v. Brent Schluntz and Gerald Schluntz, appellees.

870 N.W.2d 646

Filed October 20, 2015. No. A-14-995.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **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.
4. **Rules of Evidence: Appeal and Error.** When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
5. **Negligence: Presumptions.** The doctrine of res ipsa loquitur is an exception to the general rule that negligence cannot be presumed. Res ipsa loquitur is a procedural tool that, if applicable, allows an inference of a defendant's negligence to be submitted to the fact finder, where it may be accepted or rejected.
6. **Negligence: Proof.** The essence of res ipsa loquitur is that the facts speak for themselves and lead to a proper inference of negligence by the fact finder without further proof.
7. ____: ____. There are three elements that must be met for res ipsa loquitur to apply: (1) The occurrence must be one which would not, in

the ordinary course of things, happen in the absence of negligence; (2) the instrumentality which produces the occurrence must be under the exclusive control and management of the alleged wrongdoer; and (3) there must be an absence of explanation by the alleged wrongdoer.

8. **Negligence: Evidence.** When deciding whether res ipsa loquitur applies, a court must determine whether evidence exists from which reasonable persons can say that it is more likely than not that the three elements of res ipsa loquitur have been met. If such evidence is presented, then there exists an inference of negligence which presents a question of material fact, and summary judgment is improper.
9. **Negligence: Proof.** The court should not weigh the evidence to determine whether res ipsa loquitur applies. Instead, the court must determine whether there is sufficient evidence from which reasonable persons could find that it is more likely than not that the three elements of res ipsa loquitur have been proved and that it is therefore more likely than not that there was negligence associated with the event.
10. **Negligence: Presumptions: Proof.** As a general rule, the mere occurrence of a fire, with resultant damage, does not raise a presumption of negligence, although the circumstances under which a fire occurs may sometimes be such as to justify the application of the doctrine res ipsa loquitur and impose upon the defendant the burden of proving his freedom from fault.
11. **Negligence.** Res ipsa loquitur does not apply where the occurrence alone, without more, rests on conjecture, or where the accident was just as reasonably attributable to other causes as to the negligence of the defendant.
12. **Negligence: Presumptions.** Liability cannot result from an inference upon an inference or from a presumption upon a presumption; an inference of negligence could arise only from an established foundation fact and not from a further inference.
13. **Negligence.** The doctrine of res ipsa loquitur is of limited and restricted scope and should ordinarily be applied sparingly.
14. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.
15. **Affidavits.** Under the terms of Neb. Rev. Stat. § 25-1334 (Reissue 2008), affidavits offered for the truth of a particular fact (1) shall be made on personal knowledge, (2) shall set forth such facts as would be admissible into evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein.
16. **Trial: Witnesses.** The opinion of a lay witness, formed without personal knowledge, would be inadmissible at trial and, therefore, would not satisfy the requirements of Neb. Rev. Stat. § 25-1334 (Reissue 2008).

Appeal from the District Court for Furnas County: David Urbom, Judge. Affirmed.

Tony Brock, of Brock Law Offices, P.C., for appellants.

James B. Luers and Krista M. Carlson, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellees.

Moore, Chief Judge, and Pirtle and Bishop, Judges.

Bishop, Judge.

Arthur Lamprecht and his wife, Linda Lamprecht, brought this action against Brent Schluntz and his brother, Gerald Schluntz, seeking compensation for property damage that the Lamprechts sustained from a fire that originated on Brent's farm during a wheat harvest. The Lamprechts' sole theory of recovery was premised on the doctrine of res ipsa loquitur. The district court for Furnas County granted summary judgment in favor of the Schluntzes, and the Lamprechts now appeal. We affirm.

## BACKGROUND

On a hot and windy day in June 2012, Brent, Gerald, and their employee, Christopher Joppa, were harvesting wheat on Brent's real property in Furnas County. As part of the harvesting operation, Joppa was operating a Case 9260 tractor with a grain cart attached. Brent and Gerald were operating combines. Brent and Gerald jointly owned the wheat, tractor, and combines, and Gerald was the sole owner of the grain cart.

According to Brent, he, Gerald, and Joppa were doing "back-landing" in the wheatfield; Brent was operating a combine and was heading west, Gerald was in a combine heading east, and Joppa was in the tractor with the attached grain cart heading to unload Gerald's combine. Brent testified that "as soon as the grain cart pulled up," he saw a "flash . . . underneath the tractor." Brent testified that he "pulled out and tried to wave at those guys, because they couldn't see it, to get out and try to stomp it out or get out of there, but it just exploded." Brent called the fire department immediately, and

he, Gerald, and Joppa drove their respective pieces of farm equipment to the road. Brent testified the fire spread "like gasoline" although they attempted to "disk" the fields to create firebreaks to stop the fire. Several firefighters and other personnel responded to the fire around 3:30 p.m. Joe Kresser, the Stamford, Nebraska, fire chief, testified that when he arrived on the scene, the fire was in the wheatfield east of Brent's house.

Brent's property was located approximately 2 miles south and half a mile west of the Lamprechts' farm in Oxford, Nebraska, where Arthur raised corn, wheat, beans, and cattle. On the day of the fire, Arthur and his son were harvesting on Arthur's property and had gone to Holdrege, Nebraska, to pick up Arthur's truck from the repair shop. When they returned to Arthur's farm around 4:30 p.m., Arthur saw smoke coming in their direction from the south. When Arthur got to where the fire was located, his wheat stubble was on fire and it had burned through a couple neighboring fields. Arthur attempted to shred his crops to make a firebreak or "disk out the fire." Arthur testified that the fire came so fast he "couldn't get in front of it" and that it went into his pasture. Arthur continued to disk lengthwise to the fire so it would not burn sideways, and one of his neighbors also helped disk with his tractor. Arthur testified that there were "lots of people there from the fire departments and the neighbors" trying to put the fire out.

Kresser testified that when he first arrived at Brent's property to put out the fire, he spoke to Brent to get his opinion about what caused the fire. Kresser testified that a field fire can sometimes start when a "bearing" "go[es] out or get[s] hot or something of that sort, and somebody can drive in a field, an exhaust pipe can start it." Kresser recalled that Brent at that time thought the fire was caused by an electrical short on the tractor. Kresser did not examine the tractor because by the time the fire was under control enough to where he felt comfortable leaving the scene, the tractor was no longer in the field and Brent "wasn't around."

Kresser authored a fire log the day after the fire. According to the fire log, the fire burned approximately 1,200 acres and was driven by high winds from the south and temperatures in excess of 100 degrees Fahrenheit. The fire log notes that the property owner, Brent, suspected the cause of the fire was an electrical short on the tractor pulling the grain cart and that upon inspection there was a "burnt wire" on the tractor.

According to Brent, he asked Joppa what started the fire, but "[h]e didn't know, either." Brent told Joppa he saw "[the fire] come down from underneath the tractor." Brent recalled that he told Kresser that he saw a "burnt wire" underneath the tractor, but he did not know "if it was from the fire coming up on it." None of the farm equipment, including the tractor, were "burn[ed] up" in the fire.

Brent testified that when he called his insurance company, "they found an expert to come out to examine the tractor," but Brent did not recall who the expert was and did not testify as to what the expert's conclusion was. When Brent was asked if he agreed that wheatfields do not typically spontaneously combust, he agreed that "[u]sually something starts everything." Brent had never personally seen a wheatfield spontaneously combust and did not know anyone who had seen a wheatfield spontaneously combust.

Joppa testified that all he remembers about the start of the fire was that he was getting ready to unload Brent's or Gerald's combine, when he saw one of them waving and signaling him to get out. Joppa looked in the mirror above the steering wheel of the tractor and saw flames, and he then "took off out of the field." Joppa did not see the fire start and did not know for sure what started the fire, but "we were looking at the tractor." Joppa recalled that the Schluntzes' mechanic told him that "the insurance adjuster was coming down to look at the equipment . . . that I was using" and that "they were looking at . . . the differentials. Something to do with the differentials." Joppa explained that, in a four-wheel-drive tractor (like the type he was driving), a differential

switch box "locks your differential so you can pull — all four tires can pull at the same time."

Joppa testified that he grew up in North Dakota on a farm and that during his life, he had seen two wildfires start during harvest; Joppa testified that one of those fires was started by a bearing that "went out in the combine" and "[o]verheated and started the fire." Joppa agreed that fires in wheatfields are not normal occurrences, although "they do have spontaneous combustions" caused by too much heat. However, Joppa then testified, "I know that didn't happen that day," followed by his statement that "it could have happened that day, I guess. I mean, I don't think it would have. I know it was really hot."

Although Joppa is not a mechanic and has no training as a mechanic, he has experience changing oil and filters, and greasing farm equipment, and he testified that he had previously changed the oil and greased the tractor at issue. Joppa testified that their farm equipment is "serviced every morning." Joppa stated that he had no reason to believe that the tractor he was driving was dangerous or unsafe on the day of the fire and that he had no reason to believe there was a mechanical defect in the tractor he was driving.

Arthur did not know what started the fire, other than what he read in the fire log authored by Kresser.

The Lamprechts filed a complaint against Brent on May 30, 2013. The Lamprechts initially alleged two theories of recovery: negligence for failure to properly maintain and repair the farming machinery and res ipsa loquitur.

Brent filed a motion for summary judgment on January 31, 2014.

On March 10, 2014, the Lamprechts filed a motion for leave to file an amended complaint, which leave the court granted on March 20. The Lamprechts filed an amended complaint on March 31, containing the same allegations as the first complaint, but adding Gerald as a defendant.

The Lamprechts filed a motion for leave to file a second amended complaint on September 25, 2014, which leave the

court granted on October 27. The Lamprechts filed a second amended complaint the same day, alleging that "[t]his action arises out of the negligent maintenance and/or operation of farm equipment that started a fire which damaged the property of [the Lamprechts]. The matter is being prosecuted on the theory of res ipsa loquitur."

A summary judgment hearing was held on September 29, 2014. Depositions of Brent, Arthur, Kresser, and Joppa were received into evidence. The Lamprechts offered an affidavit from Arthur into evidence, in which he stated that he had been farming in Nebraska for over 50 years and that he has operated and maintained tractors and other equipment used to harvest wheat. Arthur averred that in his experience, farm equipment will not start a fire unless it is negligently maintained and/or operated. Arthur further averred that tractors and combines are universally used to harvest wheat, and fires and explosions caused by that equipment does not in the ordinary course of things happen unless there was negligence by the owners and/or operators of that equipment. The Schluntzes objected to Arthur's affidavit on the bases that "[Arthur] is a farmer as alleged in his affidavit, but [Neb. Rev. Stat. §] 27-701 [(Reissue 2008)] require[s] experts to render opinions like [Arthur] is trying to do in this case"; that Arthur's affidavit "offer[ed] a legal opinion with regards to whether there was negligence"; that Arthur did not base his opinion on firsthand observation or knowledge; that there was insufficient foundation, method, or basis for how Arthur arrived at his conclusion; and that Arthur's opinion "even contradicts his own expert, . . . Kresser," and also contradicted Joppa's testimony. The court reserved ruling on the receipt of Arthur's affidavit.

On October 28, 2014, the court entered an order on the summary judgment motion. The court stated that "[t]he [Schluntzes'] objection to the receipt of [Arthur's affidavit] is sustained and [Arthur's affidavit] is not received." The court's order then made various factual findings, including the following: The tractor ignited the fire, the Schluntzes "properly

maintained and kept their equipment in good repair," and "[t]he equipment was serviced every morning before harvesting started."

The court concluded that the instant case resembled the case of *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.*, 157 Neb. 923, 62 N.W.2d 127 (1954), wherein the Nebraska Supreme Court concluded res ipsa loquitur did not apply where a building was damaged by smoke from a fire in a lunchroom that housed a Coca-Cola vending machine. The district court in the instant case concluded that based upon the evidence received, there was "not sufficient evidence from which reasonable persons could find it more likely than not that there was negligence on the part of the [Schluntzes]." The court found that no genuine issue of material fact existed and that the Schluntzes were entitled to judgment as a matter of law. Summary judgment was granted in favor of the Schluntzes; the district court dismissed the Lamprechts' second amended complaint.

The Lamprechts now appeal.

## ASSIGNMENTS OF ERROR

The Lamprechts assign as error, summarized and restated, that the district court erred (1) in granting summary judgment based on its conclusion that res ipsa loquitur did not apply, (2) in making certain findings of fact, and (3) in excluding Arthur's affidavit.

## STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *O'Brien v. Bellevue Public Schools*, 289 Neb. 637, 856 N.W.2d 731 (2014). In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was

granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id*.

[3,4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *Griffith v. Drew's LLC*, 290 Neb. 508, 860 N.W.2d 749 (2015). When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion. *Erickson v. U-Haul Internat.*, 278 Neb. 18, 767 N.W.2d 765 (2009).

## ANALYSIS

[5,6] The Lamprechts initially alleged two theories of recovery: (1) negligence for failure to properly maintain and repair the farming machinery and (2) res ipsa loquitur. The Lamprechts subsequently abandoned their negligence theory and amended their complaint to proceed solely on the theory of res ipsa loquitur. The doctrine of res ipsa loquitur is an exception to the general rule that negligence cannot be presumed. *McLaughlin Freight Lines v. Gentrup*, 281 Neb. 725, 798 N.W.2d 386 (2011). Res ipsa loquitur is a procedural tool that, if applicable, allows an inference of a defendant's negligence to be submitted to the fact finder, where it may be accepted or rejected. *Id*. The essence of res ipsa loquitur is that the facts speak for themselves and lead to a proper inference of negligence by the fact finder without further proof. *Swierczek v. Lynch*, 237 Neb. 469, 466 N.W.2d 512 (1991).

[7] There are three elements that must be met for res ipsa loquitur to apply: (1) The occurrence must be one which would not, in the ordinary course of things, happen in the absence of negligence; (2) the instrumentality which produces the occurrence must be under the exclusive control and management of the alleged wrongdoer; and (3) there must be an absence of explanation by the alleged wrongdoer. *McLaughlin Freight Lines, supra*.

[8,9] When deciding whether res ipsa loquitur applies, a court must determine whether evidence exists from which reasonable persons can say that it is more likely than not that the three elements of res ipsa loquitur have been met. *Id*. If such evidence is presented, then there exists an inference of negligence which presents a question of material fact, and summary judgment is improper. *Id*. The court should not weigh the evidence to determine whether res ipsa loquitur applies. *Id*. Instead, the court must determine whether there is sufficient evidence from which reasonable persons could find that it is more likely than not that the three elements of res ipsa loquitur have been proved and that it is therefore more likely than not that there was negligence associated with the event. *Id*.

Our analysis turns on the first element of res ipsa loquitur, that the occurrence must be one which would not, in the ordinary course of things, happen in the absence of negligence. See *McLaughlin Freight Lines, supra*. Our Supreme Court has stated that this element "'is of course only another way of stating an obvious principle of circumstantial evidence: that the event must be such that in the light of ordinary experience it gives rise to an inference that someone must have been negligent.'" *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 880, 485 N.W.2d 170, 175 (1992).

[10] As a general rule, the mere occurrence of a fire, with resultant damage, does not raise a presumption of negligence, although the circumstances under which a fire occurs may sometimes be such as to justify the application of the doctrine res ipsa loquitur and impose upon the defendant the burden of proving his freedom from fault. See *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.*, 157 Neb. 923, 62 N.W.2d 127 (1954). In *Security Ins. Co.*, the Nebraska Supreme Court affirmed a directed verdict in favor of the defendant bottling company, concluding that res ipsa loquitur did not apply to the plaintiff-insurer's claim that the bottling company had negligently permitted its vending machine to catch fire. At some point during a day when no one was in the building, a

fire broke out in the lunchroom where the vending machine was located. The evening janitor found the building filled with smoke and damage, but did not see a fire, and noticed the vending machine and adjacent wooden pop cases had been completely burned, leaving only the metal shell of the machine. Nothing else in the lunchroom had caught fire. The court in *Security Ins. Co.* concluded that the doctrine of res ipsa loquitur was of limited and restricted scope and should ordinarily be applied sparingly, and the court considered the doctrine inapplicable to the case before it, finding no precedent wherein a party had even attempted to apply the doctrine to a like situation.

Our research has revealed no Nebraska cases wherein the doctrine of res ipsa loquitur was utilized against a defendant in an action for damages resulting from a field fire allegedly caused by the defendant's tractor or other farm equipment where the exact cause of the fire was unknown. Outside of Nebraska, however, res ipsa loquitur has been rejected under circumstances similar to those in the case before us.

In *Hamilton v. Smith*, 163 Colo. 88, 428 P.2d 706 (1967), owners of a wheat crop which had been destroyed in a fire that was allegedly started by a truck which had been used by the defendants in harvesting the wheat were held not to be entitled to rely on the doctrine of res ipsa loquitur. Viewing the evidence in the light most favorable to the crop owners, the court in *Hamilton* found that the fire had broken out in the field either near or under the defendants' truck and that there was a high stubble on the field which could have ignited on contact with a hot exhaust pipe. The plaintiffs, it concluded, had failed to produce any proof, beyond pure speculation, that the truck had started the fire or that there had been some negligence on the part of the defendants. Res ipsa loquitur, it ruled, did not apply where proof of the occurrence alone, without more, still rested on conjecture or where the accident was just as reasonably attributable to other causes as to the negligence of the defendant.

Similarly, in *Emigh v. Andrews*, 164 Kan. 732, 191 P.2d 901 (1948), the plaintiff owner and lessee of a wheatfield could not rely on res ipsa loquitur to state a cause of action against a truck owner, whose truck allegedly started a fire that burned the plaintiff's wheat crop. In that case, a fire started in wheat stubble at a point where the truck had just passed over, and no other persons or vehicles had been near that point. The *Emigh* court held that, at best, the facts raised a presumption that the truck caused the fire, but a mere presumption could not support a further inference that the truck had been defective or improperly operated. The court in *Emigh* further noted that courts were reluctant to draw an inference of negligence from the starting of fires because fires are frequent occurrences and, in many cases, result without negligence on the part of anyone. The court noted that the established rule was that liability cannot result from an inference upon an inference or from a presumption upon a presumption, and concluded that, in the case before it, the presumption that the truck caused the fire "cannot well be said to speak 'for itself.'" *Id.* at 736, 191 P.2d at 904.

In *Anderton v. Downs*, 459 S.W.2d 101 (Mo. App. 1970), res ipsa loquitur was held not to apply to the plaintiff-farmer's claim for damages to 35 acres of his wheat, damaged by a fire that had broken out along the path that the defendant's truck had taken in the plaintiff's wheatfield. Although there was evidence that the truck had caught fire on a previous occasion, and the farmer alleged that the truck owner had been negligent in failing to repair known defects in the truck's electrical and exhaust systems, the court found that res ipsa loquitur was not applicable, in part, because the court found that the plaintiff-farmer had failed to establish the cause of the fire. The mere occurrence of a fire, the court stated, does not prove negligence or raise any presumption as to the cause of the fire.

In *National Union Fire Insurance Company v. Elliott*, 298 P.2d 448 (Okla. 1956), the court held that res ipsa loquitur did not apply to an action filed by the insurer of a wheat crop

destroyed by fire that was allegedly caused by the defendant's truck while harvesting wheat. The defendant had left one of his trucks in the field, and when he returned, he noticed that the wheat stubble around the truck was on fire and the truck was engulfed in flames. The insurer argued that there was sufficient evidence to bring res ipsa loquitur into play because the truck was 6 years old, and was likely to have wiring defects and other malfunctions, and because the truck was shortly ablaze after it had been parked on the field away from the roadway where the fire could not have been started by intervening agencies. The court disagreed and refused to apply res ipsa loquitur, concluding that an inference of negligence could arise only from an established foundation fact and not from a further inference; the mere occurrence of an accident under unexplained circumstances would not support the application of res ipsa loquitur.

In *Thurman v. Johnson*, 330 S.W.2d 179 (Mo. App. 1959), a barn was destroyed by fire that originated in the defendant's truck, which the defendant had driven onto the property to pick up a delivery of the plaintiff-owner's oats. The truck caught fire after getting stuck in a rut as the driver brought the truck into the barn. The owner sought to recover damages for the fire under the theory of res ipsa loquitur, which the court in *Thurman* rejected. The court stated that although the occurrence was "certainly one that does not ordinarily happen," such an occurrence was not usually caused by lack of due care by the owner-operator. *Id*. at 182.

[11] In reviewing the above cases, it is clear that unexplained fires can occur during harvesting and farming operations, on or around trucks or other equipment used in farming operations. However, as observed by those courts, the mere fact that the fire occurred in such a manner does not warrant an inference of negligence. Res ipsa loquitur does not apply where the occurrence alone, without more, rests on conjecture, or where the accident was just as reasonably attributable to other causes as to the negligence of the defendant. See *Hamilton v. Smith*, 163 Colo. 88, 428 P.2d 706 (1967). See, also, *Thurman,*

*supra*. Courts are reluctant to draw an inference of negligence from the starting of fires because fires are frequent occurrences and, in many cases, resulted without negligence on the part of anyone. See *Emigh v. Andrews*, 164 Kan. 732, 191 P.2d 901 (1948). See, also, *Thurman, supra*.

We note that there are cases where res ipsa loquitur has been applied to vehicles alleged to have started a fire. In one case, for example, a truck backed into a barn filled with hay and allegedly caused a fire from its hot exhaust gas and sparks; the court found that fires do not ordinarily occur during the loading or unloading of bales of hay in a barn absent someone's negligence. See *Seeley v. Combs*, 65 Cal. 2d 127, 416 P.2d 810, 52 Cal. Rptr. 578 (1966). In another case where a vehicle was alleged to have started a forest fire, *Roddiscraft, Inc. v. Skelton Logging Co.*, 212 Cal. App. 2d 784, 28 Cal. Rptr. 277 (1963), a logging tractor that had been used in proximity to the fire had not been equipped with a spark arrester and had been smoking excessively. The court concluded that this supported an inference of negligence because as a matter of common knowledge, forest fires do not occur, other than perhaps from lightning, unless someone has been negligent, and therefore the cause of this forest fire was more likely than not from the negligence of the logging tractor owner.

[12,13] In Nebraska, as a general rule, the mere occurrence of a fire, with resultant damage, does not raise a presumption of negligence, unless the circumstances under which a fire occurs justify the application of res ipsa loquitur. See *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.*, 157 Neb. 923, 62 N.W.2d 127 (1954). In the instant case, the only evidence presented with respect to the fire's cause was that Brent saw a "flash" underneath the tractor and that he found a "burnt wire" under the tractor. Kresser testified that a field fire can start when a bearing goes out or gets hot or that an exhaust pipe can start a fire, and Brent thought the fire could have been caused by an electrical short on the tractor. However, none of those explanations are ones which are more likely than not

explained by negligence; and the mere fact that a fire started under Brent's tractor does not lead to an inference that there was negligence. Even though a fire in a wheatfield may not ordinarily happen, such an occurrence is not so unusual as to justify an inference of negligence based upon an alleged lack of due care by the owner and/or operator of a tractor or other equipment being used to harvest the wheat. As with the cases cited above, we too are reluctant to draw an inference of negligence from the mere happening of the fire, because fires are frequent occurrences and, in many cases, result without negligence on the part of anyone. See *Emigh v. Andrews*, 164 Kan. 732, 191 P.2d 901 (1948). Further, as in *Emigh*, even when the facts may raise a presumption that the vehicle caused the fire, that mere presumption cannot support a further inference that the vehicle was defective or improperly maintained or operated. See *id*. (liability cannot result from inference upon inference or from presumption upon presumption). See, also, *National Union Fire Insurance Company v. Elliott*, 298 P.2d 448 (Okla. 1956) (inference of negligence could arise only from established foundation fact and not from further inference). Moreover, we bear in mind that the doctrine of res ipsa loquitur is of limited and restricted scope and should ordinarily be applied sparingly. *Security Ins. Co., supra*. We conclude that fires like the one at issue can occur in the ordinary course of things in the absence of negligence and that thus, the Lamprechts cannot and did not establish the first element of res ipsa loquitur.

[14] Our conclusion above is not based upon any of the findings of fact that the Lamprechts argue were error by the district court. We therefore find it unnecessary to address the Lamprechts' assignment of error related to the district court's factual findings. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Papillion Rural Fire Prot. Dist. v. City of Bellevue*, 274 Neb. 214, 739 N.W.2d 162 (2007).

Because the Lamprechts cannot establish the first element of res ipsa loquitur, we agree with the district court that the

doctrine of res ipsa loquitur is inapplicable as a matter of law, and affirm summary judgment in favor of the Schluntzes.

The Lamprechts also assign as error the district court's exclusion of Arthur's affidavit offered into evidence at the summary judgment hearing. In his affidavit, Arthur stated that he had been farming in Nebraska for over 50 years, that he has operated and maintained tractors and other farm equipment used to harvest wheat, and that in his experience, farm equipment will not start a fire unless it is negligently maintained and/or operated. Arthur further averred that tractors and combines are universally used to harvest wheat and that fires and explosions caused by such equipment do not in the ordinary course of things happen unless there was negligence by the equipment's owners and/or operators.

[15,16] Under the terms of Neb. Rev. Stat. § 25-1334 (Reissue 2008), affidavits offered for the truth of a particular fact (1) shall be made on personal knowledge, (2) shall set forth such facts as would be admissible into evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein. *Whalen v. U S West Communications*, 253 Neb. 334, 570 N.W.2d 531 (1997). Statements in affidavits as to opinion, belief, or conclusions of law are of no effect. *Id.* Arthur's testimony was that of a lay witness. The opinion of a lay witness, formed without personal knowledge, would be inadmissible at trial and, therefore, would not satisfy the requirements of § 25-1334. See *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999). Arthur's statements in his affidavit were merely legal conclusions that fires do not start by farm equipment without negligence. Such statements were properly excluded by the district court.

## CONCLUSION

For the foregoing reasons, we affirm the decision of the district court.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# In re Adoption of Madysen S. et al., minor children. Nicole K. and William K., appellees, v. Jeremy S., appellant.

871 N.W.2d 265

Filed October 20, 2015. No. A-15-032.

1. **Adoption: Appeal and Error.** Appeals in adoption proceedings are reviewed by an appellate court for error appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Constitutional Law: Parental Rights.** The interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court.
4. **Parental Rights: Adoption.** The foundation of Nebraska's adoption statutes is the consent of a biological parent to the termination of his or her parental rights.
5. **Adoption: Abandonment: Proof: Parental Rights.** To prove abandonment in adoption proceedings, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities.

Appeal from the County Court for Lincoln County: Michael E. Piccolo, Judge. Reversed.

Todd M. Jeffers, of Brouillette, Dugan & Troshynski, P.C., L.L.O., for appellant.

Angela M. Franz, of Waite, McWha & Heng, for appellees.

Irwin, Inbody, and Riedmann, Judges.

Inbody, Judge.

## INTRODUCTION

Jeremy S., the biological father of Madysen S., Orion S., and Leo S., appeals the order of the Lincoln County Court finding that pursuant to Neb. Rev. Stat. § 43-104 (Reissue 2008), Jeremy had abandoned the children and his consent was not required for adoption of the children by their stepfather.

## STATEMENT OF FACTS

Jeremy and Nicole K. were married in September 2000. From that marriage, three children were born: Madysen in 2001, Orion in 2004, and Leo in 2005. In 2007, Madysen was interviewed by law enforcement regarding a report of sexual abuse perpetrated on her by Jeremy. Madysen reported that Jeremy sexually assaulted her on numerous occasions between December 2006 and March 2007. Jeremy was arrested, and Nicole and the children relocated from Missouri to Gage County, Nebraska. In July 2007, the Gage County District Court dissolved Jeremy and Nicole's marriage. Nicole was given custody of the children, and Jeremy was ordered to have no parenting time and to pay $50 per month in child support. In 2009, Jeremy was convicted in Missouri with three counts of first degree child molestation. In August 2009, Jeremy was sentenced to a total of 16 years' imprisonment and is currently incarcerated with the Missouri Department of Corrections.

In or around 2009 or 2010, Nicole met William K. and a relationship ensued. In January 2013, Nicole and William married. In May and June 2014, Nicole and William contacted Jeremy and requested that he voluntarily relinquish his parental rights to the three minor children and consent to their adoption by William. Jeremy refused their requests.

On August 5, 2014, Nicole and William filed verified petitions for adoption by a stepparent for Madysen, Orion, and

Leo. On the same day, Nicole and William filed petitions to terminate Jeremy's parental rights to all three children. The petitions to terminate alleged that Jeremy had abandoned the children and that termination of his parental rights was in their best interests. Jeremy filed answers to both the adoption and the termination filings, asking that the petitions be denied.

The petitions came before the county court in October 2014. Nicole testified that she was currently married to William and lived with him in Brady, Nebraska. Nicole testified that she was previously married to Jeremy and that they had three children: Madysen, who at the time of trial was 13 years old; Orion, who was 10 years old; and Leo, who was 8 years old. During the marriage, Nicole discovered that Jeremy was sexually abusing Madysen, who was 6 years old at the time. Nicole testified that at the time of trial, Jeremy was serving a total of 16 years' incarceration in Missouri for those crimes.

Nicole testified that Jeremy recently had a parole board hearing which she attended, during which she observed that Jeremy was not remorseful, as he laughed at the charges and could not answer many of the questions asked of him. Since the abuse, Madysen had spent 1½ years in counseling and experienced depression and confusion, in addition to anger. Nicole explained that now as a teenager, Madysen was returning to counseling because she had come to understand what Jeremy actually did and what that meant and was confused and hurt.

Orion was 3 years old when Jeremy left the family. Orion experienced anxiety issues and saw a counselor for 2 years for those issues. Nicole testified that Leo was a baby when Jeremy left and does not know Jeremy or exhibit any memories of him. Nicole testified that when she and Jeremy were married, Jeremy was not a good father and was often busy with video games or friends and was frequently unable to financially support the family because he spent money to buy "paintball" guns.

Nicole testified that in 2007 or 2008, she wrote a letter to the prison warden asking him to allow Jeremy visitation with the children at the request of Jeremy's family. Nicole also allowed Jeremy's extended family to have liberal visitation with the children whenever they wanted to see the children. Nicole testified that Jeremy pays $50 per month in child support and is current, although Nicole took issue with the payments because, she testified, Jeremy's child support was paid by his grandmother.

Nicole's current husband, William, had been a part of the family's life for 3 years, and Nicole testified that the children referred to him as "'Dad.'" Nicole explained she and the children had discussed the benefits of the adoption and determined that the children's having the same last name as everyone in their family would be less confusing and that they would not "have to lie" about their father any longer. Nicole testified that the children would also qualify for more military benefits available to William as adopted children versus stepchildren. Nicole opined that it was in the best interests of the children to terminate Jeremy's parental rights and allow William to adopt the children.

William is employed full time for the Department of Defense as a surface maintenance mechanic inspector. William testified that he had been involved in the children's lives since 2009 or 2010 and had been involved in several activities with them, such as teaching Leo to ride a bike, teaching Madysen to deer hunt, taking Leo and Orion fishing, and other parenting duties. William testified that the children referred to him as "'Dad.'" William explained that he wanted to adopt the children because he had acted as their father and wanted to legally take that responsibility.

Jeremy testified, explaining that his actions against Madysen were as a result of a "rough spot" he and Nicole were going through. Jeremy testified that a counselor told him he had somehow convinced himself that Madysen was a surrogate for Nicole, but that he is not a pedophile and has never molested

any other children. Jeremy testified that he regrets his actions every day and did not want to give up his parental rights to the children.

Jeremy testified that he might be released from incarceration in 2017 or 2019. Jeremy testified that he has completed several classes while incarcerated, including criminology, criminal thinking, victim impact, restorative justice, dealing with trauma, dealing with emotions, and anxiety and stress management. Jeremy also attends therapy once a week, and if he were conditionally released, he would be required to take a Missouri sex offender program lasting 9 to 18 months. Jeremy testified that he would like to see the children under supervised conditions when he is released.

Jeremy testified that since being incarcerated, he has sent the children birthday cards and letters and listened to the children in the background when he would be speaking with his family on the telephone, although he did not speak directly to the children. The last letters he sent were in June 2014, and he testified he received Father's Day cards from the children. Jeremy testified that he pays his child support. Jeremy testified that Nicole was preventing him from visiting the children, but admitted that he did not have any parenting time according to the dissolution decree. Jeremy testified that he signed the marital dissolution papers under duress and threat of solitary confinement.

Jeremy testified that it was not in the best interests of the children to terminate his parental rights, even though it might be 12 years until his possible release date, when he could see the children in person.

Jeremy's grandmother testified that she was at Jeremy's parole board hearing and that during the hearing, Jeremy was upset, but not disrespectful. She testified that the board was trying to provoke him. She testified that it is in the children's best interests that Jeremy retain his parental rights. She testified that occasionally when Jeremy called, she would allow him to be put on the telephone's loudspeaker to tell

the children that he loved and missed them. She testified that when she told the children that Nicole would not allow them to speak with Jeremy, the children would become upset. Jeremy's grandmother testified that, most recently in June, Jeremy had sent letters to the children. She testified that the children refer to Jeremy as "Daddy" and have sent him many holiday cards.

The children's guardian ad litem testified that she was the court-appointed guardian ad litem and had interviewed all of the interested parties in the case. She explained that she interviewed the children and found that there was little disclosure about a relationship with Jeremy. The children live in a family unit, and Leo appeared confused as to why he needed to be adopted by "his dad, because his dad is married to his mom." The guardian ad litem testified that Madysen was not confused and understood why Nicole was in favor of adoption.

The guardian ad litem testified that Jeremy was very passionate about wanting to have a relationship with the children, whenever that may be. She explained that Jeremy felt like he wanted to atone for his actions. However, as a result of the circumstances and the long-term effects on the children, it was in the best interests of the children that William be allowed to adopt them. She testified that in her experience, it is very difficult for children to reintegrate parents who have been incarcerated for long periods of time. Further, she explained that the children needed permanency, which would be difficult under these circumstances.

In a December 2014 order, the county court proceeded with the proceedings under Neb. Rev. Stat. § 43-101 et seq. (Reissue 2008). The court found that Jeremy did not relinquish his parental rights, was not deprived of his parental rights, and was not incapable of consenting to the adoption, which left only one issue: whether Jeremy had abandoned the children. The court found that the evidence was undisputed that Jeremy was unable to parent the children due to his incarceration, which was a result of his choice to sexually molest

Madysen over the course of several months. The court found that Jeremy had expressed remorse, expressed that he missed and loved the children, and expressed that he intended to attend a sex offender program while incarcerated, but it found that he was devoid of any moral sense or rectitude as to the children, as revealed by his committing the acts he did. The court found that Jeremy intentionally removed himself as a parent, withholding his presence, care, love, protection, guidance, and opportunity to display parental affection. The court found that these actions amounted to abandonment pursuant to § 43-104. The court found that as such, Jeremy's consent was not required and the previously appointed guardian ad litem for the children may provide any and all consents to the adoptions.

## ASSIGNMENT OF ERROR

Jeremy assigns the county court erred by finding that Jeremy had abandoned the children and that as such, his consent to the adoption of the children was not required.

## STANDARD OF REVIEW

[1,2] Appeals in adoption proceedings are reviewed by an appellate court for error appearing on the record. *Jeremiah J. v. Dakota D.*, 287 Neb. 617, 843 N.W.2d 820 (2014). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

## ANALYSIS

Jeremy argues that the county court erred by finding that the record showed he had abandoned the children, thereby relinquishing the requirement that he consent to the adoption of the children.

[3,4] The interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court. *Id.*

The foundation of Nebraska's adoption statutes is the consent of a biological parent to the termination of his or her parental rights. *Id.*

[5] Section 43-104 states that no adoption can be decreed unless the petition is accompanied by parental consent or relinquishments, unless the party seeking adoption has established that the biological parent falls within one of the exceptions to consent. The section applicable to this appeal is § 43-104(2), which provides that "[c]onsent shall not be required of any parent who . . . has abandoned the child for at least six months next preceding the filing of the adoption petition." Although § 43-104 specifies the 6 months preceding the filing of the petition as the critical period of time during which abandonment must be shown, the Nebraska Supreme Court has stated that this statutory period need not be considered in a vacuum. See *In re Adoption of Simonton*, 211 Neb. 777, 320 N.W.2d 449 (1982). "One may consider the evidence of a parent's conduct, either before or after the statutory period, for this evidence is relevant to a determination of whether the purpose and intent of that parent was to abandon his child or children." *Id.* at 783, 320 N.W.2d at 453. The parental obligation "requires continuing interest in the child and a genuine effort to maintain communication and association with that child. Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child." *Id.* at 784, 320 N.W.2d at 454. To prove abandonment in adoption proceedings, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities. *In re Guardianship of T.C.W.*, 235 Neb. 716, 457 N.W.2d 282 (1990).

This court is mindful of the inappropriate and criminal way in which Jeremy subjected his own daughter to sexual abuse.

However, the county court did not act as a juvenile court in proceedings terminating Jeremy's parental rights, but as a county court in adoption proceedings, through which the evidence must clearly and convincingly show that a parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with complete repudiation of parenthood and abandonment of parental rights and responsibilities; mere inadequacy is not the test. See *id.*

The record in this case provides evidence that although Jeremy is incarcerated, he has continually paid and is current with the child support obligation as ordered by the court in the dissolution decree, has sent letters and cards to the children, has adamantly refused to relinquish his parental rights, and has indicated that he does not wish to forgo parental obligations or parental rights. Jeremy's contact with the children through letters and cards fell within the 6 months immediately preceding the filing of the petition for adoption, and as noted, Jeremy was current on his child support obligation. The county court erred in finding that Jeremy had abandoned the children, because the record does not present clear and convincing evidence to prove abandonment pursuant to § 43-104(2). Therefore, the order of the county court must be reversed.

## CONCLUSION

Upon our review of the record, we conclude that the county court erred by terminating Jeremy's parental rights on the basis of abandonment pursuant to § 43-104(2) and by finding that Jeremy's consent was not required in order for William to adopt the children. Therefore, we reverse the county court's order.

Reversed.

**Nebraska Court of Appeals**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# Intervision Systems Technologies, Inc., appellee and cross-appellant, v. InterCall, Inc., appellant and cross-appellee.

872 N.W.2d 794

Filed October 27, 2015. No. A-14-916.

1. **Summary Judgment.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Jurisdiction: Appeal and Error.** When reviewing cross-motions for summary judgment, an appellate court acquires jurisdiction over both motions and may determine the controversy that is the subject of those motions.
3. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
4. **Contracts: Public Policy: Appeal and Error.** Nebraska appellate courts have traditionally been reluctant to void contractual clauses on public policy alone.
5. **Contracts: Public Policy.** Persons should not be unnecessarily restricted in their freedom to make their own contracts, and therefore, the court should act cautiously and not hold contracts void as being contrary to public policy unless they are clearly and unmistakably so.
6. **Contracts: Public Policy: Words and Phrases.** A contract void for public policy reasons is one quite clearly repugnant to the public conscience.
7. **Contracts: Public Policy: Limitations of Actions.** Contractual provisions shortening a statute of limitations are against public policy.

8. **Contracts: Public Policy: Limitations of Actions: Time.** A contract which provides that no action shall be brought thereon or for a breach thereof, unless within a time therein specified which is different from the time which the statute fixes for bringing an action on such contract or for a breach thereof, is against public policy and will not be enforced by the courts of this state.
9. **Contracts: Limitations of Actions.** Parties to a contract may not bind the courts to a period of limitations other than that prescribed by statute.
10. **Courts: Contracts: Public Policy.** Courts will not emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy unless the preservation of the public welfare imperatively so demands.
11. **Limitations of Actions: Words and Phrases.** A statute of limitations is a law declaring that no suit shall be maintained on certain described causes of action unless brought within a specified period of time after the right accrued.
12. **Courts: Contracts.** Courts will not rewrite bargained-for provisions between sophisticated parties.
13. **Courts: Contracts: Claims: Notice: Limitations of Actions.** Nebraska courts have recognized the conceptual differences between notice of claim provisions and statutes of limitations.
14. **Contracts.** A contract is not substantively unconscionable unless the terms are grossly unfair under the circumstances that existed when the parties entered into the contract.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Reversed and vacated, and cause remanded for further proceedings.

Patrick R. Guinan, of Erickson & Sederstrom, P.C., L.L.O., for appellant.

Luke T. Deaver, of Person, DeWald & Deaver, P.C., L.L.O., for appellee.

Irwin, Inbody, and Riedmann, Judges.

Riedmann, Judge.

## INTRODUCTION

InterCall, Inc., appeals from an order of the district court for Douglas County granting partial summary judgment in favor

of Intervision Systems Technologies, Inc. (Intervision), on its breach of contract claim and denying InterCall's cross-motion for summary judgment. Because we find that the district court erred in finding a notice provision of the contract to be an unenforceable statute of limitations clause, we reverse and vacate the district court's grant of summary judgment, and remand the cause for entry of summary judgment in favor of InterCall on the breach of contract claim and for further proceedings on Intervision's remaining causes of action.

## BACKGROUND

Intervision entered into a service agreement contract with InterCall in April 2010. The agreement obligated Intervision to commit to spending at least $8,000 annually on InterCall's audioconferencing services and in turn secured locked-in lower rates per minute than would be available without a contract. In particular, the agreement provided that InterCall would charge Intervision only $0.05 per minute for its telephone conferencing service known as Reservationless - Plus.

When InterCall added Intervision's account to its computer system, it incorrectly listed Intervision as a "non-contracted" customer, which subjected Intervision to automatic rate increases. The first erroneous automatic rate increase occurred on January 1, 2011, when InterCall increased the rate for Reservationless - Plus from $0.05 per minute to $0.25 per minute. On January 1, 2012, InterCall automatically began charging "Enhanced Product and Feature" fees on Intervision's calls. On May 1, InterCall increased Intervision's rate for Reservationless - Plus to $0.29 per minute. The parties stipulate that the erroneous extra charges led to InterCall's charging Intervision $94,733.66 in 2011 and 2012 when it should have charged only $17,863.36 over those 2 years.

InterCall sent monthly invoices to Intervision that detailed the length of each call, the charges for the call, and the amount of taxes and fees on the call. The invoices did not separately show the rate per minute being billed, although Intervision

could have derived that number by dividing the amount charged by the number of minutes for each call. Intervision paid all of the charges as billed in 2011 and 2012.

Intervision first disputed the billing charges in March 2013. Intervision initially disputed only the charges from January and February 2013, but eventually disputed all of the erroneously increased charges dating back to January 2011. InterCall repaid Intervision the erroneous charges for January and February 2013, but refused to repay charges for 2011 or 2012 based on a clause of the service agreement that reads, "Customer must notify InterCall of any billing disputes within thirty (30) days from the date of the invoice, otherwise Customer hereby agrees to such charges and InterCall will not be subject to making adjustments."

Intervision filed suit against InterCall, asserting four causes of action: breach of contract, assumpsit, negligent misrepresentation, and fraudulent misrepresentation. The parties submitted cross-motions for summary judgment on Intervision's breach of contract claim. The district court entered an order granting Intervision's motion for partial summary judgment, holding that the notice clause quoted above was a statute of limitations clause and was unenforceable under Nebraska law as a matter of public policy. The district court entered final judgment for Intervision, awarding $73,852.76 in damages plus prejudgment interest at the rate of 2.142 percent. This appeal follows.

## ASSIGNMENTS OF ERROR

InterCall assigns, restated, that the district court erred in (1) finding that the notice clause is a statute of limitations clause, (2) holding that statute of limitations clauses in private commercial contracts are unenforceable, and (3) receiving into evidence the court file of a prior case in which InterCall was a plaintiff and one of the issues involved the identical notice provision. Intervision on its cross-appeal assigns, restated, that the district court erred in finding that its claim was

unliquidated and in applying the unliquidated prejudgment interest rate in its award of damages.

## STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Johnson v. Nelson*, 290 Neb. 703, 861 N.W.2d 705 (2015).

[2] When reviewing cross-motions for summary judgment, an appellate court acquires jurisdiction over both motions and may determine the controversy that is the subject of those motions. *Id.*

[3] The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *Kercher v. Board of Regents*, 290 Neb. 428, 860 N.W.2d 398 (2015).

## ANALYSIS

### *Characterization of Notice Clause as Statute of Limitations.*

The service agreement between InterCall and Intervision contains a notice of claim clause that reads, "Customer must notify InterCall of any billing disputes within thirty (30) days from the date of the invoice, otherwise Customer hereby agrees to such charges and InterCall will not be subject to making adjustments."

[4-6] Intervision does not argue that this clause contains any ambiguity, but instead asserts that we should find it to be void against public policy as a clause that shortens the applicable statute of limitations. Nebraska appellate courts have traditionally been reluctant to void contractual clauses on public policy alone. *Bedrosky v. Hiner*, 230 Neb. 200, 430 N.W.2d

535 (1988). Persons should not be unnecessarily restricted in their freedom to make their own contracts, and therefore, the court should act cautiously and not hold contracts void as being contrary to public policy unless they are clearly and unmistakably so. *Id.* A contract void for public policy reasons is one "quite clearly repugnant to the public conscience." *Id.* at 207, 430 N.W.2d at 541.

[7-9] However, in a line of cases dating from the late 1800's, the Nebraska Supreme Court has held that contractual provisions shortening a statute of limitations are against public policy. In *Miller v. State Ins. Co.*, 54 Neb. 121, 122-23, 74 N.W. 416, 417 (1898), the Nebraska Supreme Court held:

> The statutes of the state provide in what time all actions may be brought, and a contract which provides that no action shall be brought thereon, or for a breach thereof, unless within a time therein specified, which is different from the time which the statute fixes for bringing an action on such contract, or for a breach thereof, is against public policy, and will not be enforced by the courts of this state.

The court expressed a concern with "'parties to a contract [binding] the courts to a period of limitations other than that prescribed by statute.'" *Id.* at 123, 74 N.W. at 417. See, also, *Wulf v. Farm Bureau Ins. Co.*, 190 Neb. 34, 205 N.W.2d 640 (1973).

[10] The key issue before us is whether the service agreement's notice clause operates to shorten the applicable statute of limitations. Intervision urges us to find the notification clause to be a statute of limitations provision because of the similarity of effect. However, we must interpret this state's proscription on contractual modifications to statutes of limitations literally and narrowly in light of Nebraska's strong general rule that courts will not "'"'"'"emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy unless the

preservation of the public welfare imperatively so demands. . . .”’”’” *Jeffrey Lake Dev. v. Central Neb. Pub. Power*, 262 Neb. 515, 523, 633 N.W.2d 102, 109 (2001). Accordingly, we do not find the Nebraska Supreme Court’s policy pronouncement against contractual modifications to statutes of limitations to be broad enough to encompass the notice provision at issue here.

[11,12] A statute of limitations is a law “declaring that *no suit shall be maintained* on [certain described] causes of action . . . unless brought within a specified period of time after the right accrued.” Black’s Law Dictionary 835 (5th ed. 1979) (emphasis supplied). Definitionally, then, a statute of limitations impacts the ability to file suit in court. The plain language of the notification clause does not change the time in which parties may file suit. Had Intervision notified InterCall of its dispute within 30 days, it would still have had the full 5-year statute of limitations period to file a claim. See Neb. Rev. Stat. § 25-205 (Reissue 2008). At most, then, this clause adds an additional duty to the customer to discover and contest billing errors in a timely manner. The clause shifts the burden of discovering InterCall’s billing errors to Intervision. This is not a small burden; however, courts will not rewrite bargained-for provisions between sophisticated parties. See *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002).

While both the notice of claim clause and a statute of limitations clause can have the effect of foreclosing remedies for InterCall’s billing errors, they do so via different mechanisms. A statute of limitations is a complete bar to causes of action, based only on the passage of time. In contrast, the notice provision places an affirmative obligation on Intervision in order to maintain its rights to adjustment, but does not shorten the absolute period for filing an action. This is significant because statute of limitations clauses are disfavored due to the public harm of allowing private parties to modify a court’s ability to hear claims. See *Miller v. State Ins. Co.*, 54 Neb. 121, 74

N.W. 416 (1898). Although the notice clause can operate to waive Intervision's right to billing adjustments, it does not alter the timeframe in which it may file a suit. Accordingly, this clause does not implicate Nebraska's policy against contractual modifications of statutes of limitations.

[13] Case law supports our refusal to recognize the notification provision as a statute of limitations clause. Nebraska courts have recognized the conceptual differences between notice of claim provisions and statutes of limitations. See *Campbell v. City of Lincoln*, 195 Neb. 703, 240 N.W.2d 339 (1976) (separately analyzing provisions of Political Subdivisions Tort Claims Act (1) requiring notice of claims within 1 year and (2) modifying statute of limitations to 2 years). Similarly, an appellate court in Massachusetts found a contractual provision requiring notice of a wage dispute within 30 days not to be a statute of limitations clause. *Puleio v. North Coast Sea-Foods Corp.*, No. 09-P-1806, 2010 WL 3860664 at *2 (Mass. App. Oct. 5, 2010) (unpublished disposition listed in table of "Summary Dispositions" at 78 Mass. App. 1102, 934 N.E.2d 302 (2010)) ("the notice provision here does not implicate the relevant statutes of limitations . . . because it does not 'limit, between the parties, the time for *bringing an action* . . . to a period less than that prescribed in the general statute'") (emphasis in original). We therefore conclude that the notice provision contained in the service agreement is not a statute of limitations.

*Enforceability of Notice Provision.*

[14] Although the clause as written is burdensome to Intervision, we do not have facts to show that it is unconscionable. A contract is not substantively unconscionable unless the terms are grossly unfair under the circumstances that existed when the parties entered into the contract. *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006). The Nebraska Supreme Court has refused to find unconscionability in business contracts where the record

showed no disparity in the parties' bargaining positions. *Id.* Here, both parties are commercial entities and we have no record of a disparity in bargaining power. The terms of the contract are unambiguous, the entire contract is only four pages long, and the print above the parties' signatures reads, "CUSTOMER HAS READ AND AGREES TO BE BOUND BY THIS AGREEMENT, INCLUDING THE TERMS AND CONDITIONS ATTACHED HERETO." Accordingly, we cannot find the clause unconscionable and cannot rewrite the contract to exclude it. See *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002).

Further, the majority of courts in other jurisdictions addressing contract provisions that require notice of a dispute within an amount of time shorter than the statute of limitations have found them to be enforceable. See, e.g., *Richelieu Foods v. New Horizon Warehouse Distrib.*, 67 F. Supp. 3d 903, 909 (N.D. Ill. 2014) (holding that provision that failure to notify regarding "'"any dispute relating to any invoice or portion thereof within thirty (30) days of receipt of the invoice . . ."'" operates as waiver of dispute is enforceable); *Strom Engineering Corp. v. International Fiber Corp.*, No. 3:12-CV-035, 2013 WL 5274704 (S.D. Ohio Sept. 18, 2013) (enforcing provision requiring notice of any disputed invoices in 30 days); *Barber Auto Sales, Inc. v. United Parcel Services*, 494 F. Supp. 2d 1290 (N.D. Ala. 2007); *Powers Law Offices, PC v. Cable & Wireless USA*, 326 F. Supp. 2d 190 (D. Mass. 2004) (citing group of cases enforcing notice of billing dispute provisions in telecommunications tariffs); *Williams v. Federal Express Corp.*, No. CV 99-06252 MMM BQRX, 1999 WL 1276558 (C.D. Cal. Oct. 6, 1999) (unpublished opinion); *Globaleyes Telecommunications v. Verizon North*, 425 B.R. 481 (S.D. Ill. 2010); *Puleio v. North Coast Sea-Foods Corp., supra*.

Because we find that the notice clause is not a statute of limitations clause and is valid, it must be enforced. Intervision did not dispute the charges until March 2013, more

than 30 days from the invoice date for all of the 2011 and 2012 invoices at issue. Therefore, under the contract's terms, Intervision waived its right to receive adjustment on these invoices. Given this holding, we do not reach the remaining assignments of error.

## CONCLUSION

We find that the notice of claim clause in the contract is not a statute of limitations clause and is valid and enforceable. Because Intervision did not notify InterCall of billing disputes within the 30 days agreed in the contract, it has waived its right under the terms of the contract to adjustment of those bills. Accordingly, we reverse and vacate the district court's entry of summary judgment for Intervision, and remand the cause with instructions to enter summary judgment on the breach of contract claim for InterCall and for further proceedings on the remaining causes of action.

Reversed and vacated, and cause remanded for further proceedings.

**Nebraska Court of Appeals**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# Chrissie Elaine Wiech, appellee, v. Craig Allen Wiech, appellant.

871 N.W.2d 570

Filed November 3, 2015. No. A-14-747.

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: Appeal and Error.** 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.
3. **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.
4. ____: ____: ____. A specific, consistent, and enforceable date of valuation permits the trial court to allocate all the assets of the marital estate in an equitable and fair manner.
5. **Divorce: Property Division.** The marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties.
6. **Property Division: Employer and Employee: Wages.** Where an employee is entitled by agreement to a cash payout of unused vacation, sick, and compensatory time, those benefits constitute property.
7. ____: ____: ____. Where a collective bargaining agreement provides for a cash payment of unused vacation, sick, and compensatory time, such payment is deferred compensation to be included in the marital estate.

8. **Wages: Words and Phrases.** Deferred compensation is defined as compensation which is earned in exchange for services rendered.
9. **Divorce: Property Division.** Deferred compensation is property for purposes of determining the marital estate.
10. **Divorce: Property Division: Pensions.** The marital estate includes any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested.
11. **Divorce: 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, setting aside the nonmarital property to the party who brought that property to the marriage. 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.
12. ____: ____. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
13. **Divorce: Property Division: Real Estate: Sales.** In an action for dissolution of marriage, in order to be credited for the deductibility of a real estate commission, the proponent must adduce evidence that a sale of the real estate is imminent or would occur in the foreseeable future, as well as evidence of the amount of the commission for the property in question.
14. **Property Division: Taxes.** Income tax liability incurred during the marriage is one of the accepted costs of producing marital income, and thus, income tax liability should generally be treated as a marital debt.
15. **Property Division.** Any income accumulated during a marriage is considered a marital asset.

Appeal from the District Court for Sarpy County: William B. Zastera, Judge. Affirmed in part, and in part reversed and remanded with directions.

Aimee S. Melton and A. Bree Robbins, of Reagan, Melton & Delaney, L.L.P., for appellant.

Michael N. Schirber, of Schirber & Wagner, L.L.P., for appellee.

Irwin, Inbody, and Riedmann, Judges.

Riedmann, Judge.

## INTRODUCTION

Craig Allen Wiech appeals the order of the Sarpy County District Court which dissolved his marriage to Chrissie Elaine Wiech and divided the marital estate. On appeal, he challenges the district court's classification, valuation, and division of the marital property. For the reasons explained below, we affirm in part, and in part reverse and remand with directions.

## BACKGROUND

Craig and Chrissie were married on May 26, 2008. They separated on September 28, 2013, and Chrissie filed a complaint for dissolution of marriage on October 2. There were no children born during the marriage.

Trial was held in May 2014 to determine, inter alia, the extent and value of the marital estate and the division of marital property. The evidence presented will be described in more detail as needed in the analysis below.

The district court entered the decree on August 5, 2014. Each party received a vehicle subject to its associated lien: Chrissie received a 2009 Mazda, and Craig received a 2010 Harley-Davidson motorcycle. Chrissie was awarded the marital residence, subject to its mortgage, as well as most of the parties' personal property. Each party was assigned various credit card debts. Chrissie received "a lump sum of $48,009.81" from Craig's pension, an amount "representing the marital portion of the pension in the amount of $42,398.88, and $5,610.93 of [Craig's] accumulated sick and vacation time as evidenced on Trial Exhibit No. 11." Craig timely appeals to this court.

## ASSIGNMENTS OF ERROR

Craig assigns, summarized, that the district court erred in its classification, valuation, and division of the marital property.

## 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. *Rommers v. Rommers*, 22 Neb. App. 606, 858 N.W.2d 607 (2014).

## ANALYSIS

On appeal, Craig generally argues that the district court erred in its classification, valuation, and division of various assets owned by the parties. We address his specific arguments individually below.

*Valuation Date of Craig's Pension.*

Craig asserts that the district court erred in valuing his pension as of March 6, 2014, a date he claims has no rational relationship to the date of separation or dissolution. We find no abuse of discretion in the utilization of this date.

[2-4] 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. *Pohlmann v. Pohlmann*, 20 Neb. App. 290, 824 N.W.2d 63 (2012). The purpose of assigning a date of valuation in a decree is to ensure that the marital estate is equitably divided. *Id*. Because the valuation and distribution of a particular asset rarely takes place in a vacuum, a specific, consistent, and enforceable date of valuation permits the trial court to allocate all the assets of the marital estate in an equitable and fair manner. See *Blaine v. Blaine*, 275 Neb. 87, 744 N.W.2d 444 (2008).

In the present case, Craig challenges the decision to value his pension as of March 2014 instead of September 2013, the time of the parties' separation. We note that other assets of

the marital estate were valued as of early 2014 as well. For example, evidence was received depicting the balance of the mortgage on the marital residence as of May 1. Likewise, the liens on the parties' two vehicles were valued as of March 31. The values of Craig's accrued sick and vacation leave were established as of May 3. The dissolution trial was held on May 23, and the March 2014 pension statement was the statement closest to trial. Consequently, we find no abuse of discretion in valuing Craig's pension as of March 2014.

*Sick, Vacation, and Compensatory Time.*

The district court awarded Chrissie a portion of the value of the sick, vacation, and compensatory (comp) time Craig had accrued through his employment during the marriage. We note that although the decree states sick and vacation time are being awarded, the calculation of $5,610.93 awarded to Chrissie necessarily includes one-half of Craig's accumulated comp time. Craig asserts that the district court erred in considering his accrued leave to be a marital asset. We find no abuse of discretion in the classification of his unused sick, vacation, and comp time as marital property. We further determine that the district court erroneously awarded Chrissie the value of the entire marital portion of Craig's accrued sick leave, instead of an equitable share, and we therefore reverse, and remand for division. See *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006) (stating general rule to award spouse one-third to one-half of marital estate, polestar being fairness and reasonableness as determined by facts of each case).

Craig is employed as a police officer with the city of Bellevue, Nebraska. The collective bargaining agreement governing Craig's employment relationship provides that upon separation of his employment, Craig shall be promptly paid all accumulated vacation leave computed on the basis of his regular pay as of his last day of employment. Similarly, the agreement provides that employees who retire with at least 5 years of service shall receive a cash payout for accumulated

sick leave, but such payment shall be one-half of the accumulated sick leave not to exceed 960 hours at the regular pay at the time of retirement. The portion of the agreement contained in our record does not indicate whether unused comp time is convertible to cash but Craig testified that if he were to retire and had comp time available, he would be entitled to a payout.

Whether an employee's accrued sick leave, vacation leave, and comp time is considered marital property is an issue of first impression in Nebraska. Courts in other jurisdictions are split on this issue. Compare, *Schober v. Schober*, 692 P.2d 267 (Alaska 1984) (unused leave, portion of which was convertible to cash on yearly basis, is marital asset); *In re Marriage of Cardona and Castro*, 316 P.3d 626 (Colo. 2014) (where employee spouse has enforceable right to be paid for accrued sick or vacation leave, such leave earned during marriage is marital property); *Dye v. Dye*, 17 So. 3d 1278 (Fla. App. 2009) (cash value of unused sick and vacation leave is marital asset subject to equitable distribution); *Lesko v Lesko*, 184 Mich. App. 395, 457 N.W.2d 695 (1990) (banked leave days are divisible marital asset); *Marriage of Williams*, 84 Wash. App. 263, 927 P.2d 679 (1996) (same), with *In re Marriage of Abrell*, 236 Ill. 2d 249, 923 N.E.2d 791, 337 Ill. Dec. 940 (2010) (accrued vacation and sick days are not marital property subject to distribution in dissolution of marriage action); *Akers v. Akers*, 729 N.E.2d 1029 (Ind. App. 2000) (reversing trial court's treatment of unused sick days as marital asset); *Bratcher v. Bratcher*, 26 S.W.3d 797 (Ky. App. 2000) (accrued holiday and vacation entitlement is not marital property); *Thomasian v. Thomasian*, 79 Md. App. 188, 556 A.2d 675 (1989) (same).

[5] In Nebraska, the marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties. *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998). Thus, to determine whether accrued but unused sick, vacation, and comp time is part of the

marital estate, we must first determine whether these benefits are property.

[6-9] "Property" is defined as "1. The right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel); the right of ownership . . . . 2. Any external thing over which the rights of possession, use, and enjoyment are exercised . . . ." Black's Law Dictionary 1335-36 (9th ed. 2009). Where, as here, an employee is entitled by agreement to a cash payout of unused vacation, sick, and comp time that employee has a "right" to those payments, and therefore they constitute property. We further determine that where a collective bargaining agreement provides for a cash payment of these benefits, such payment is deferred compensation to be included in the marital estate. See, *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013) (classifying vacation pay as additional wages for services performed); *Wadkins v. Lecuona*, 274 Neb. 352, 740 N.W.2d 34 (2007) (identifying comp time payments as deferred compensation). Deferred compensation is defined as compensation which is earned in exchange for services rendered. *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005). Pursuant to the collective bargaining agreement, Craig earned sick and vacation time based upon the length of service provided. If he does not use his sick or vacation time, he is allowed to cash it out pursuant to the formula contained in the agreement. According to Craig's testimony, he is also allowed to cash out his comp time upon retirement. Thus, the sick, vacation, and comp time pay are deferred compensation. Deferred compensation is property for purposes of determining the marital estate. Neb. Rev. Stat. § 42-366(8) (Reissue 2008). See, also, *Davidson v. Davidson, supra*.

As the Supreme Court of Colorado observed when addressing this issue, an employee who has an enforceable right to be paid for accrued sick or vacation leave receives compensation when the employee either uses the time for a permissible purpose or is paid the value of the accrued leave. See *In re Marriage of Cardona and Castro*, 316 P.3d 626 (Colo. 2014).

In this situation, sick or vacation days accrued by an employee are his property because they are, in effect, a debt due to him as part of the compensation he has earned for work he has already performed. See *In re Marriage of Abrell*, 236 Ill. 2d 249, 923 N.E.2d 791, 337 Ill. Dec. 940 (2010) (Garman, J., dissenting; Kilbride and Burke, JJ., join).

[10] The fact that the amount of sick, vacation, and comp time is subject to reduction based upon Craig's use of it is of no consequence. Under § 42-366(8), the marital estate, for purposes of the division of property at the time of dissolution, includes any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, *whether vested or not vested*.

Prior to the adoption of § 42-366(8), the Nebraska Supreme Court declined to include pension interests as marital assets because of the problems inherent in determining their value and the contingent nature of the interest. See *Witcig v. Witcig*, 206 Neb. 307, 292 N.W.2d 788 (1980). However, with the enactment of § 42-366(8), pensions, as well as other deferred compensation benefits, are to be included in the marital estate. See, *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998) (including unvested employee stock options and stock retention shares as marital property when accumulated and acquired during marriage); *Simon v. Simon*, 17 Neb. App. 834, 770 N.W.2d 683 (2009) (holding husband's early retirement incentives that resulted from employment during marriage as marital property subject to equitable distribution in divorce).

Therefore, the fact that the amount of unused sick, vacation, and comp time available for payment may change does not prevent it from being included in the marital estate where the unused portion was accumulated and acquired during the marriage. Accordingly, we find that the district court did not abuse its discretion in classifying Craig's accrued and unused sick, vacation, and comp time as property for purposes of valuing and dividing the marital estate.

The district court determined that as of May 2014, Craig had 292.5 hours of unused sick leave. As provided in the collective bargaining agreement, he is entitled to the value of one-half of those hours upon his retirement. Thus, the value of 146.25 hours at his present rate of pay ($31.79 per hour) equals $4,649.28. This amount represents the value of the marital portion of Craig's accrued sick leave. The district court, however, awarded this entire amount to Chrissie when she is entitled only to an equitable share. We therefore reverse, and remand to the district court to equitably divide the marital portion of Craig's sick leave. See *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006).

The district court found that Craig's unused vacation hours accrued during the marriage equaled 35.75 hours. Thus, the total value of the marital portion of Craig's vacation time is $1,136.49. Chrissie was awarded one-half of this amount, and we affirm.

Finally, the district court awarded Chrissie one-half of its calculated value of Craig's accrued comp time for a total of $393.41, and we affirm. In sum, the district court did not abuse its discretion in classifying the sick, vacation, and comp time that Craig accrued during the marriage as marital property. However, the court erred in its division of the property. We affirm the award of $568.24 to Chrissie for her share of Craig's vacation leave, and we affirm the award of $393.41 for her share of Craig's comp time. We direct the district court on remand to equitably divide the marital portion of Craig's unused sick leave.

*Equity in Marital Home.*

Craig and Chrissie built the marital residence during the marriage. The district court awarded the home and its mortgage to Chrissie, but it did not assign any values to the property or the associated debt. Craig asserts that the failure to value this asset was erroneous, and we agree.

[11,12] 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, setting aside the nonmarital property to the party who brought that property to the marriage. 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. *Despain v. Despain*, 290 Neb. 32, 858 N.W.2d 566 (2015). 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*.

[13] Chrissie opined that the value of the home was approximately $186,503, which is equal to the 2014 value established by the county assessor. The balance of the mortgage as of May 1, 2014, was $181,730.73. Chrissie claims the home has negative equity after subtracting from the assessed value the mortgage balance and any anticipated real estate commission in the event of a sale. Any future real estate commission should not be considered when determining the value of the marital residence, however. In *Walker v. Walker*, 9 Neb. App. 694, 618 N.W.2d 465 (2000), this court said that to be credited for the deductibility of a real estate commission, the proponent must adduce evidence that a sale of the real estate is imminent or would occur in the foreseeable future, as well as evidence of the amount of the commission for the property in question. We held that failure to adduce such evidence would dictate a finding that there should be no deduction for the real estate commission. *Id*.

There was no evidence presented in this case that Chrissie was planning to sell the home. She merely testified as to her opinion of the amount of a real estate commission in the event of a sale. We therefore reverse this portion of the award and remand the matter to the district court to assign a value to this asset, calculated as the difference between the value of the residence and the mortgage balance, and award the property to either Craig or Chrissie.

*2013 Tax Liabilities.*

Craig contends that the parties' 2013 tax liabilities should have been treated as a marital debt and divided equitably between him and Chrissie. We agree.

[14] Because income tax liability incurred during the marriage is one of the accepted costs of producing marital income, income tax liability should generally be treated as a marital debt. *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000). In *Meints*, the Supreme Court required that the husband's tax liability amount be treated as marital debt even for returns the parties filed separately, but any statutory penalties assessed for delinquent filing is treated as a nonmarital debt solely attributable to the filing spouse. The court cautioned, however, that equity may not demand the same result if credible evidence establishes that the delinquent taxpaying spouse spent significant funds on nonmarital pursuits. *Id.*

In the present case, Chrissie argues that because Craig claimed at least 10 exemptions during the marriage so as to minimize his tax withholdings, she should not be responsible for any portion of his tax liability. While Craig may have attempted to minimize his tax withholdings during the marriage, the additional income he retained benefited both parties during the marriage, and there is no evidence that he spent significant funds on nonmarital pursuits. Craig requested an extension on his 2013 tax return, and thus, at the time trial was held in May 2014, he had not yet filed his taxes. There was no evidence presented at trial that he incurred any statutory penalties for delinquent filing. Craig testified that as calculated, he would owe at least $6,000 for his tax debt, and likely more. Chrissie owed federal income taxes of $800 for 2013. We find that the district court abused its discretion in failing to equitably divide the $6,800 in tax liabilities between the parties. Accordingly, we reverse, and remand to the trial court to equitably divide and assign the tax liabilities.

*Premarital Debt.*

[15] Craig asserts that Chrissie's portion of the marital estate should be offset by the premarital debt she brought into the marriage which was reduced during the marriage using marital funds. Chrissie acknowledges that she brought premarital debt, specifically a bankruptcy obligation, into the marriage and that the balance was reduced during the marriage. But she claims that she used "[her] income" to pay down the debt, not marital assets, and that thus, her share of the marital estate should not be reduced. Any income accumulated during the marriage, however, is considered a marital asset. See *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001). Therefore, even though Chrissie earned a higher income than Craig during the marriage, the funds used to pay down Chrissie's premarital debt are marital assets.

In *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004), the wife had approximately $12,000 in student loan debt at the time of the marriage, and the loans were paid off with marital funds during the marriage. When dissolving the parties' marriage and dividing marital property, the trial court failed to account for the entirety of the loans that the wife brought into the marriage. On appeal, the Nebraska Supreme Court determined that the wife's portion of the marital estate should have been reduced by the total student loan debt that she brought into the marriage because that debt was paid off with marital assets. *Id*. The court, however, found no abuse of discretion under the totality of the circumstances because the marital estate totaled well over $1 million, and the alleged mistake constituted less than one-half of 1 percent of this total. *Id*.

In the present case, the trial court failed to account for Chrissie's premarital debt. She testified that she was required to pay $1,200 per month toward her bankruptcy obligation for 60 months beginning in April or May 2007. Accordingly, Chrissie made payments for approximately 47 months during the marriage, for a total of $56,400. Considering the total

value of the marital estate here, this amount constitutes a significant portion of the estate; it was therefore an abuse of discretion to fail to offset this amount from Chrissie's share. Likewise, Craig admitted that he brought debt into the marriage of $3,549.95, and thus, it was plain error for the district court not to offset this amount from Craig's share of the marital estate. We therefore remand the matter to the district court to equitably divide the marital estate and offset Chrissie's portion by $56,400 and Craig's portion by $3,549.95.

## CONCLUSION

Upon our de novo review of the record, we affirm the district court's decision to value Craig's pension as of March 2014 and classify his sick, vacation, and comp time as a marital asset. However, we conclude that Chrissie was erroneously awarded the entire marital portion of Craig's sick leave. We also conclude that the court abused its discretion in failing to calculate and assign the equity in the marital residence, divide the 2013 tax liabilities, and offset the parties' premarital debt. As a result of these errors, we remand the matter to the district court to equitably divide Craig's sick leave, calculate the equity in the marital home and assign it to one of the parties, equitably divide the tax liabilities, and offset each party's premarital debt from his or her share of the marital estate.

Affirmed in part, and in part reversed and remanded with directions.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# In re Interest of Mya C. et al., children under 18 years of age. State of Nebraska, appellee, v. David M., Sr., appellant.

872 N.W.2d 56

Filed November 17, 2015. No. A-15-204.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Parental Rights: Evidence: Appeal and Error.** In a termination of parental rights case, 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. **Parental Rights: Evidence: Proof.** Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests.
4. **Parent and Child.** The court may terminate all parental rights when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist: The parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection; following a determination that the juvenile is one as described in Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2014), reasonable efforts to preserve and reunify the family if required under Neb. Rev. Stat. § 43-283.01 (Cum. Supp. 2014), under the direction of the court, have failed to correct the conditions leading to the determination; and the juvenile has been in an out-of-home placement for 15 or more months of the most recent 22 months.
5. **Parental Rights: Evidence: Proof: Words and Phrases.** The grounds for terminating parental rights must be established by clear and convincing evidence, which 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 proved.

6. **Parental Rights.** Parental rights may only be terminated if the court finds that termination is in the child's best interests.
7. **Parental Rights: Words and Phrases.** A termination of parental rights is a final and complete severance of the child from the parent.
8. **Parental Rights.** Because termination of parental rights has such severe and final consequences, parental rights should be terminated only in the absence of any reasonable alternative and as the last resort.
9. **Parental Rights: Presumptions: Proof.** There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that a parent is unfit.
10. **Parental Rights: Proof.** The Due Process Clause of the U.S. Constitution would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness.
11. ____: ____. A court may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right.
12. **Parental Rights.** A determination of unfitness is distinct from the determination of whether statutory grounds for termination of parental rights exist.
13. **Parental Rights: Evidence.** While it may be relevant, the evidence supporting the statutory grounds for termination of parental rights is not always sufficient to demonstrate parental unfitness.
14. **Parental Rights: Proof.** While the burden remains with the parent to rehabilitate himself within a reasonable time, the guideline of 15 or more months of the most recent 22 months is merely a guideline of a reasonable time for parental rehabilitation and the passage of time itself does not demonstrate parental unfitness.
15. **Parental Rights: Evidence: Proof.** Generally, when termination of parental rights is sought under subsections of Neb. Rev. Stat. § 43-292 (Cum. Supp. 2014) other than subsection (7), the evidence adduced to prove the statutory grounds for termination will also be highly relevant to the best interests of the juvenile, as it would show abandonment, neglect, unfitness, or abuse.
16. **Parental Rights.** Statutory grounds for termination of parental rights are based on a parent's past conduct, but the best interests of the child requirement for termination focuses on the future well-being of the child.

17. **Parental Rights: Parent and Child.** The law does not require perfection of a parent.
18. **Parent and Child: Appeal and Error.** In determining whether the continuation of a parent-child relationship is in the best interests of the child, an appellate court should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child.
19. **Parental Rights: Parent and Child.** Although the law does not require a child to await uncertain parental maturity, that rule should not be used to trod upon the rights of the parent or the children.
20. **Parental Rights.** The State needs to provide reasonable efforts to reunify a family only when terminating parental rights under Neb. Rev. Stat. § 43-292(6) (Cum. Supp. 2014).

Appeal from the Separate Juvenile Court of Lancaster County: Reggie L. Ryder, Judge. Reversed and remanded for further proceedings.

Laura A. Lowe, P.C., for appellant.

Joe Kelly, Lancaster County Attorney, and Lory A. Pasold for appellee.

Irwin, Inbody, and Riedmann, Judges.

Riedmann, Judge.

## INTRODUCTION

David M., Sr. (David), appeals from the order of the juvenile court for Lancaster County, Nebraska, terminating his parental rights to his minor children, LaToya M. and David M., Jr. (David Jr.). After our de novo review of the record, we reverse, and remand for further proceedings.

## BACKGROUND

This case began as an educational neglect case against David's partner, Ann B., because her oldest daughter, Mya C., had missed an impermissible number of days of school. When the educational neglect case began in the fall of 2012, Ann and David lived together with Ann's two children from a prior relationship, Mya and Tyrone C., and the couple's young

daughter, LaToya. After "Intensive Family Preservation" workers with the Department of Health and Human Services (the Department) began observing the home, they became concerned that both Ann and David were neglecting all three children. The affidavit for temporary custody noted that during drop-in visits, the children wore the same dirty clothes for multiple days in a row, David yelled and used threatening language toward the children, and the parents left Mya in timeouts for extended periods of time. Personnel from the Department observed the home to be very dirty. They also received reports that Mya did not have enough food and had to sleep on the floor.

*Removal of Children.*

On February 14, 2013, the juvenile court granted temporary custody of Mya, Tyrone, and LaToya to the Department and ordered that the children be removed from the home. LaToya was 18 months old at the time of her removal. The next day, the State filed a supplemental petition adding allegations against David. The supplemental petition alleged in relevant part that on one or more occasions since at least December 2012:

> a) [David] failed to provide a safe, suitable, and stable living environment for the minor children;
>
> b) . . . [T]he minor children ha[d] been observed to be wearing the same dirty clothes multiple days in a row; [and]
>
> c) [David had] been verbally, emotionally and/or physically abusive to the minor children or a sibling of the minor children.

Ann and David pleaded no contest to the charges.

In April 2013, David Jr. was born to Ann and David. The State immediately removed him from his parents' care and placed him in the temporary custody of the Department. Ann ultimately relinquished her parental rights to all four children. Accordingly, this appeal pertains only to David's parental rights to LaToya and David Jr.

*Case Plan.*

At a review hearing in June 2013, the court ordered in relevant part that David participate in mental health counseling to address anger issues, that he participate in family therapy with Ann to address relationship and coparenting issues, that he participate in a budget management course, and that Ann and David have reasonable rights of supervised parenting time as arranged by the Department. The court order also allowed for monitored parenting time to be arranged with 10 days' notice.

The Department chose Dr. James Carmer for David's therapy. Due to coordination issues between the Department's providers, his therapy did not begin until September 2013. At the termination hearing, Dr. Carmer testified that David participated in 27 individual sessions and that his therapy was ongoing. Dr. Carmer stated that David has made good progress on issues, including anger management, coping skills, emotional management, and appreciating other people's perspectives. Dr. Carmer opined that David has become more cooperative, less threatened by authority, and better able to manage his emotions and "problem solve" in a parenting context. Dr. Carmer explained that David has benefited from a parenting approach called Common Sense Parenting that he learned from his "family parenting partner." Although Dr. Carmer has not personally observed David with the children and has only reviewed visitation notes, he testified based on the notes and David's progress in therapy that in his professional opinion, David is capable of being a competent parent. Dr. Carmer also provided seven sessions of couple's counseling to Ann and David, which ceased when the couple's relationship ended around June or July 2014.

The State also provided David with a parenting partner to assist him with parenting skills. David completed a 6-week parenting class and testified that he learned useful skills from it. David also worked on budgeting with his parenting partner.

In June 2014, David's court plan was amended to include an order that he follow recommendations set by LaToya's and David Jr.'s doctors. Both LaToya and David Jr. experienced ongoing medical conditions. LaToya was diagnosed with failure to thrive, and she was given strict dietary guidelines and enrolled in occupational therapy at a local agency. LaToya's doctor required that each of her meals contain a fruit, vegetable, and meat. David Jr. suffers from allergies and must maintain a gluten-free and dairy-free diet.

David maintained employment as a dishwasher at a hotel throughout the case. While David initially worked the night shift, he has moved to a Monday-through-Friday daytime schedule and generally works from 7:30 a.m. to 3:30 p.m. However, David will frequently be asked to work late, come in on weekends, or work a split shift to accommodate hotel traffic, often without prior warning.

Supervised visitation has generally occurred at David's home, except for a brief time while Ann and David dealt with a bedbug issue at the beginning of the case and a 1-month gap when the couple ended their relationship and David searched for new housing. On the final day of the termination hearing in January 2015, David was living in a small home that would have been appropriate for reunification.

*Barriers to Reunification.*

David's caseworkers testified as to several ongoing issues throughout the case. One of David's initial caseworkers characterized him as "rude" and stated that he was disengaged and at times volatile during family team meetings. She also noted times when David was angry or confrontational with visitation workers while she managed the case. In some instances, David refused to bathe the children when he believed it would take too much of the visitation time. On a few occasions, visits were canceled or ended early because Ann or David did not have children's Tylenol or David Jr.'s nonallergenic formula and could not afford to buy some before a visit. Recently, David had to end visits early because his bathroom was too

cold for bathing the children in the winter. Additionally, David Jr. needed surgery to remove an abscess around the time of the termination hearing. David did not visit him in the hospital, stating that he, himself, was ill and that he did not want to expose David Jr. to additional illness. Visitation after the surgery was canceled because David failed to procure the Epsom salts and gauze necessary to bathe David Jr.

David's work schedule often conflicted with his ability to timely arrive at visitation or attend at all, and it has caused him to miss the children's daytime doctor and therapy appointments. This issue is compounded by the fact that David does not own a vehicle and must rely on the bus for much of his transportation. David testified that when he and Ann were a couple, he was the sole wage earner, and that Ann was to attend the appointments when he could not. He further testified that he was frustrated when she failed to do so.

Not all of the barriers to reunification came from David. LaToya and David Jr. were removed from their first foster home because the foster mother was referring to the children as her children and was at times preventing David's access to them. The case managers also changed visitation supervision companies because the visitation workers at the first company were not giving accurate feedback about their observations and concerns. David expressed frustration when workers failed to give him any direction or constructive criticism.

*Visitation.*

Visitation never progressed beyond the "fully supervised" level. Ann and David initially had visitation with LaToya and David Jr. four times each week. Following the end of their relationship, the two divided their visitation days, with David having visitation alone with the children 2 days per week and Ann taking visitation the other 2 days.

Since David began visitation without Ann in June 2014, his visitation worker has been John Peterson. Peterson testified that visitation occurs in David's home and that David keeps his home clean and free of clutter. Throughout the visits

that Peterson has supervised, David has provided for all of LaToya's and David Jr.'s basic needs, including clean clothes, diapers, and "pull-ups." David was complying with David Jr.'s feeding restrictions before the caseworker and doctor decided that the foster mother would provide the food while the children were being tested for allergies. David provides LaToya with a fruit, a vegetable, and some type of main dish on each visit, in accordance with the doctor's instructions. Peterson testified that David generally has LaToya's food prepared before the children arrive, so that he only needs to reheat it along with David Jr.'s food, which is provided by the foster parents.

Peterson said that David's routine is to play with both children after dinner. David engages with them well and plays on the floor with them. He gives them both baths, dresses them in clean diapers or pull-ups and clean pajamas, and buckles them into their car seats with a kiss and hug. Peterson testified that David is a loving father and that the children also appear to love David. He stated that he has never seen David become agitated or upset. Peterson observed David with the children utilizing appropriate parenting skills, including calm redirection of LaToya's toddler tantrums and whining. When David needs to discipline LaToya, he uses age-appropriate methods, including a short timeout, calming and redirection strategies, and instruction on proper apologies. Peterson opined that David is meeting all of the goals that are in the service referral. He believes that David exhibits the parenting skills that he would need to parent the children on his own.

David's visitation attendance has not been perfect. Between August and the first week of November 2014, David missed 13 of the 28 scheduled visits. The majority of these cancellations have been because of work, and David's supervisor testified that October was a particularly busy month at the hotel, but David also missed a few visitations because he did not have adequate supplies on hand for the children. David's current caseworker initially testified that David was having issues correcting the originally adjudicated issues, but when

she testified again at the continuation of the termination hearing in January 2015, she stated that the only factor preventing her from decreasing the level of supervision or increasing the amount of visitation was David's failure to be completely consistent in visitation attendance.

*Termination Order.*

The juvenile court terminated David's parental rights. The court found that statutory grounds to terminate David's rights existed under Neb. Rev. Stat. § 43-292(2), (6), and (7) (Cum. Supp. 2014). It also found that termination was in the best interests of the children and that David was an unfit parent.

## ASSIGNMENTS OF ERROR

David assigns that the juvenile court erred in (1) finding that statutory grounds existed for the termination of his parental rights, (2) finding that termination was in the children's best interests, (3) finding that the Department had exercised reasonable efforts to preserve and reunify the family, and (4) finding that he failed to make sufficient progress in court-ordered services to regain custody of his children.

## STANDARD OF REVIEW

[1,2] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012). 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*.

## ANALYSIS

[3] Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164

(2005). Although we find that statutory grounds for termination existed, we determine that the State did not prove by clear and convincing evidence that termination was in the children's best interests. Therefore, we reverse, and remand for further proceedings.

*Statutory Grounds for Termination.*

[4,5] David's first assignment of error is that the juvenile court erred in finding that statutory grounds for termination exist. The State sought to terminate David's parental rights under § 43-292(2), (6), and (7), which provides in relevant part:

> The court may terminate all parental rights . . . when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .
>
> (2) The parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection;
>
> . . . .
>
> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts to preserve and reunify the family if required under section 43-283.01, under the direction of the court, have failed to correct the conditions leading to the determination; [and]
>
> (7) The juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months.

The grounds for terminating parental rights must be established by clear and convincing evidence, which 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 proved. *Kenneth C. v. Lacie H.*, 286 Neb. 799, 839 N.W.2d 305 (2013).

The juvenile court terminated David's rights under all three of the above subsections of § 43-292. After our de novo review of the record, we determine that statutory grounds existed for termination under subsections (7) and (2), but not under (6).

*Subsection (7)—Amount of Time in Out-of-Home Placement.*

Under § 43-292(7), statutory grounds for termination exist if the juvenile has been in an out-of-home placement for 15 or more months of the most recent 22 months. LaToya was removed from the home on February 14, 2013, and David Jr. was removed to the Department's custody immediately following his birth in April of that same year. The children were never returned to the home during the pendency of the case. The State's amended petition asserted that LaToya had been in an out-of-home placement for more than 15 consecutive months at the time of the petition filing in June 2014 and that David Jr. would have been in an out-of-home placement for 15 or more months of the prior 22 months as of August 5. Therefore, there is sufficient evidence in the record to show that the children were in out-of-home placement for 15 or more months of the most recent 22 months under § 43-292(7).

*Subsection (2)—Neglect of Child or Sibling of Child.*

We also find that clear and convincing evidence supports a finding that § 43-292(2) was satisfied in this case. Subsection (2) provides for termination where "[t]he parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection." Court reports in evidence document that when Intensive Family Preservation services began conducting home visits following the commencement of the educational neglect case, on more than one occasion workers found that the children were wearing the same dirty pajamas multiple days in a row. The workers noted

that David used angry, aggressive, and threatening language toward the children during their visits on at least six occasions in a 2-month span. In addition, the oldest daughter, Mya, was in a corner in her bedroom in timeout "more often than not" when they dropped in to visit. David admitted in testimony at the termination hearing that at the inception of the case, he kept Mya in timeout for longer periods than were age appropriate. Mya's school reported that she was constantly hungry. A visitation worker witnessed David yell at Mya for eating off the floor.

This evidence from a series of visits establishes clearly and convincingly that during the time period at the inception of the case, David substantially and repeatedly neglected the juveniles at issue or a sibling of those juveniles and refused to give them necessary parental care and protection. Therefore, the statutory grounds for termination under § 43-292(2) are also satisfied.

*Subsection (6)—Failure to Correct Adjudicated Conditions.*

The record does not, however, provide clear and convincing evidence that § 43-292(6) is satisfied. Subsection (6) involves a failure to correct the adjudicated conditions. The conditions underlying the adjudication in this case are outlined above and include David's neglecting to give the children a clean home, clean clothes, and proper food; being unable to control his anger; yelling at the children; and disciplining them inappropriately. David has attended therapy to work on his anger and difficulty with authority. He has completed a parenting class. David's current visitation worker testified at trial that David has a tidy home; keeps proper clean clothes, food, and supplies for the children's visits; has always been a calm parent during visits; has never raised his voice; and uses age-appropriate and effective redirection techniques to discipline his toddler. Accordingly, the record does not contain clear and convincing evidence that the adjudicated issues have not been corrected

and therefore does not support finding that statutory grounds for termination exist under subsection (6).

*Best Interests of Children.*

[6-8] Although we find that statutory grounds for termination exist, parental rights may only be terminated if the court finds that termination is in the child's best interests. § 43-292. A termination of parental rights is a final and complete severance of the child from the parent. *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004). Therefore, with such severe and final consequences, parental rights should be terminated only in the absence of any reasonable alternative and as the last resort. *Id.*

[9] There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. *In re Interest of Nicole M.*, 287 Neb. 685, 844 N.W.2d 65 (2014). Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that a parent is unfit. *Id.*

[10-14] "[T]he U.S. Supreme Court has been clear that the Due Process Clause of the U.S. Constitution would be offended '"[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness . . . ."'" *In re Interest of Xavier H.*, 274 Neb. 331, 348, 740 N.W.2d 13, 24 (2007), quoting *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978). A court may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right. *In re Interest of Xavier H., supra*. A determination of unfitness is distinct from the determination of whether statutory grounds for termination exist. While it may be relevant, the evidence supporting the statutory grounds for termination is not always sufficient to demonstrate parental unfitness. For instance, adjudication under subsection (7), which looks only at the amount of time in which a child has been in an out-of-home placement, does

not provide evidence of unfitness. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). While the burden remains with the parent to rehabilitate himself within a reasonable time, the guideline of 15 or more months of the most recent 22 months is merely a guideline of a reasonable time for parental rehabilitation and the passage of time itself does not demonstrate parental unfitness. *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012).

[15,16] Generally, when termination is sought under other subsections of § 43-292, the evidence adduced to prove the statutory grounds for termination will also be highly relevant to the best interests of the juvenile, as it would show abandonment, neglect, unfitness, or abuse. *In re Interest of Aaron D., supra*. However, this is not always the case, as statutory grounds are based on a parent's past conduct, but the best interests element focuses on the future well-being of the child. *Kenneth C. v. Lacie H.*, 286 Neb. 799, 839 N.W.2d 305 (2013).

Above, we find statutory grounds for termination met under § 43-292(2) and (7). While evidence of neglect under subsection (2) will often be relevant to a determination of unfitness, in this case it is not, because the conditions of neglect that support grounds for termination under subsection (2) existed only at the initiation of this case and David has since corrected those conditions. Our finding of repeated neglect is based upon reports that the children were dirty, hungry, and subject to inappropriate discipline during several Intensive Family Preservation worker visits before the children were removed from the home. As David's current visitation worker testified, David now has a clean home and clean clothing for the children, provides them with nutritious food during visits, has learned to manage his anger and is always calm during visits, and demonstrates effective and age-appropriate redirection methods for his toddler. Therefore, the evidence of neglect from the inception of the case is not sufficient to show that David is presently an unfit parent.

[17,18] The State's evidence presented at the termination hearing also fails to establish clearly and convincingly that David is an unfit parent and that termination is in the children's best interests. We are mindful that the State's evidence does present concern about David's financial and organizational abilities to be a consistent parent. The State's only witnesses were the three caseworkers who have managed David's case. They noted several problems that David encountered throughout the case. David encountered difficulty trusting and cooperating with authority figures from the Department. David missed some of the children's medical appointments. At times, David lacked supplies or the funds to procure supplies, such as allergen-free cans of formula for David Jr., children's Tylenol, or sufficient healthy food for LaToya. David has consistently had problems with missing or arriving late to visitation when he was required to remain at work beyond the end of his scheduled shift. However, the law does not require perfection of a parent. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). Instead, we should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child. *Id.*

The State did not elicit a straightforward opinion from any of its witnesses as to whether termination at this time is in the best interests of the children. David's current caseworker stated that reunification would not be in the best interests of the children "at this time"; that she believed that permanency was in the best interests of any child, especially LaToya and David Jr.; and that she does not believe that languishing in the system is in any child's best interests. However, this testimony falls short of clear evidence that termination is in these children's best interests. Further, the caseworker testified on the final day of the termination hearing that the only basis for not moving toward increased visitation or decreased levels of supervision during visitation was David's inconsistency with visitation attendance.

The Nebraska Supreme Court has noted the limits of caseworker testimony, given that caseworkers spend relatively little time in the home with the families, and often serve as proxies for the visitation workers and therapists who have closer family contact. See, e.g., *In re Interest of Aaron D., supra*. In contrast, David presented the testimony of his current visitation worker and his therapist, both of whom testified positively about David's parenting, problem-solving, and anger management skills. The visitation worker testified that David has good parenting skills, that he communicates appropriately when his work schedule conflicts with visitation, and that David is meeting all of the parenting goals set out for him in the visitation referral. The visitation worker believes that David exhibits the kind of parenting skills necessary to parent on his own. He has had no safety concerns for the children during any of the visits. He also testified that he believes that David loves his children and that the children love David based on the interactions he has witnessed. Although the visitation worker has not been with David throughout the entire case, he has been the worker during the most relevant time period, from June 2014 to the present, which is the period after David ended his relationship with Ann and began visitation independently. This time period is most relevant to understanding how David would parent on his own if the children were eventually returned to his custody. This recent evidence shows that David's parenting skills are improving and that his relationship with his children is beneficial. See *In re Interest of Aaron D., supra*.

Nebraska appellate courts have reversed orders terminating parental rights where the parents are substantially complying with court orders and are improving as parents. See, *id*; *In re Interest of Hill*, 207 Neb. 233, 298 N.W.2d 143 (1980); *In re Interest of Justin H. et al.*, 18 Neb. App. 718, 791 N.W.2d 765 (2010). Termination may be improper in light of continuing parental progress even where lingering visitation issues exist. See *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d

13 (2007) (reversing termination of parental rights where mother had improved parenting skills, obtained employment, and maintained sobriety despite her visitation having been decreased to one time per week because of missed visits). See, also, *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005) (reversing termination where mother had progressed on case plan despite continuing deficiencies in her employment, living situation, and visitation consistency).

[19] The evidence here reflects that David is struggling with balancing his employment and visitation commitments. This difficulty is compounded because David does not have access to a vehicle and must rely on bus transportation available only at set times. However, he has substantially complied with court plans, including signing releases of information, participating in mental health counseling, participating in family therapy, working on a budget with his parenting partner, completing parenting classes, utilizing parenting skills taught through State services, and following doctor's orders to provide appropriate food for the children. His parenting skills are improving and have been described as "good" by his most recent visitation worker. Although the law does not require a child to await uncertain parental maturity, that rule should not be used to trod upon the rights of the parent or the children. *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 368 N.W.2d 474 (1985). In light of David's improving parenting skills, stable job and residence, and beneficial relationship with his children, we cannot say that the record before us shows that David is unfit or that termination is in the best interests of the children at this time. See *In re Interest of Aaron D., supra*. Accordingly, we reverse, and remand for further proceedings.

*Reasonable Efforts.*

[20] David's third assignment of error alleges that the State failed to provide the requisite reasonable efforts to achieve reunification. However, the State needs to provide reasonable

efforts to reunify a family only when terminating parental rights under § 43-292(6). *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009). Because we determined above that subsection (6) was not satisfied in this case, we need not address this assignment of error.

*Progress on Regaining Custody.*

David's final assignment of error is that the juvenile court erred in determining that he had not made sufficient progress in court-ordered services to regain custody of his children. We note that in ordering termination, the juvenile court necessarily determined David was not in a position to regain custody of his children. While we agree with the juvenile court that David is not currently in a position to regain custody, we disagree to the extent that the trial court determined that David could not, within a reasonable time, be in a position to have custody of his children returned to him.

## CONCLUSION

Because the evidence does not show clearly and convincingly that David is an unfit parent or that termination of David's parental rights is in the best interests of the children at this time, we reverse, and remand for further proceedings.

Reversed and remanded for
further proceedings.

**Nebraska Court of Appeals**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# In re Interest of Gavin S. and Jordan S., children under 18 years of age. State of Nebraska, appellee and cross-appellee, v. Lacy S., appellant, and Daniel S., appellee and cross-appellant.

873 N.W.2d 1

Filed November 24, 2015. No. A-14-1124.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Parental Rights: Evidence: Appeal and Error.** Because factual questions concerning a judgment or order terminating parental rights are tried by an appellate court de novo on the record, impermissible or improper evidence is not considered by an appellate court.
3. **Parental Rights.** When parental rights are terminated pursuant to Neb. Rev. Stat. § 43-292(9) (Cum. Supp. 2014), a prior adjudication order is not required.
4. **Parental Rights: Evidence: Proof.** For a juvenile court to terminate parental rights under Neb. Rev. Stat. § 43-292 (Cum. Supp. 2014), it must find by clear and convincing evidence that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests.
5. **Evidence: Words and Phrases.** 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.

Appeal from the Separate Juvenile Court of Lancaster County: Toni G. Thorson, Judge. Affirmed.

Lisa F. Lozano for appellant.

Joe Kelly, Lancaster County Attorney, Alicia B. Henderson, and Joshua L. Christolear, Senior Certified Law Student, for appellee State of Nebraska.

Sanford J. Pollack, of Pollack & Ball, L.L.C., for appellee Daniel S.

Irwin, Inbody, and Riedmann, Judges.

Irwin, Judge.

## I. INTRODUCTION

Lacy S. appeals and Daniel S. cross-appeals from an order of the separate juvenile court of Lancaster County, which order adjudicated Lacy and Daniel's two minor children to be within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2013) and terminated Lacy's and Daniel's parental rights to the children. In their appeals, both Lacy and Daniel assert that the juvenile court erred in admitting into evidence a report authored by a doctor who was unavailable to testify during the juvenile court proceedings. In addition, both Lacy and Daniel allege that the juvenile court erred in finding sufficient evidence to warrant the adjudication of their children pursuant to § 43-247(3)(a) and to warrant the termination of their parental rights. For the reasons set forth below, we affirm the decision of the juvenile court.

## II. BACKGROUND

Lacy and Daniel are the parents of Gavin S., born in August 2009, and Jordan S., born in June 2011. The events which gave rise to the juvenile court proceedings involving this family occurred on January 3, 2012.

In January 2012, Lacy was a stay-at-home mother who operated a daycare out of the family's home in order to earn additional income. One of the children who attended Lacy's daycare was 1-year-old Zachary T. On the morning

of January 3, Zachary's father dropped him off at Lacy and Daniel's home. When Zachary arrived at the daycare, he was awake, alert, happy, and playful.

Approximately 1 hour after Zachary arrived at the daycare, Lacy left to take Gavin and Jordan to a doctor's appointment. Daniel stayed behind to watch Zachary, who was in a baby swing in the family's living room. When Lacy returned to the home a couple of hours later, Zachary was still in the baby swing. Zachary remained in the swing, not moving and not making any noise, until about 3:30 p.m., when Lacy checked on him. At that time, she discovered that Zachary was not breathing and felt cold to the touch. Lacy called the 911 emergency dispatch service and attempted to perform CPR on Zachary. Zachary was later pronounced dead at the hospital.

After Zachary's death, doctors discovered that he had a skull fracture which was a few weeks old and that he had significant additional trauma to his brain which the doctors believed had occurred much more recently.

Due to the events of January 3, 2012, the State filed a motion for emergency temporary custody of Gavin and Jordan on January 5. The juvenile court granted this motion, ordered Gavin and Jordan removed from Lacy and Daniel's home, and placed them in the custody of the Department of Health and Human Services. The children have remained in the custody of the department, in an out-of-home placement, since the entry of the court's order on January 5. The next day, on January 6, the State filed a petition alleging that Gavin and Jordan were within the meaning of § 43-247(3)(a).

The petition alleged that the children were within the meaning of § 43-247(3)(a) due to the faults or habits of Lacy and Daniel or due to being in a situation dangerous to life or limb or injurious to their health. Specifically, the petition alleged that Zachary had "died as a result of extensive, inflicted head trauma" while in Lacy's and Daniel's care; that neither Lacy nor Daniel had provided any explanation for Zachary's head

trauma; and that consequently, Gavin and Jordan were at risk for harm.

A few months after the filing of the original petition, on March 29, 2012, the State filed an amended petition and a motion for the termination of Lacy's and Daniel's parental rights. In the amended petition, the State again alleged that Gavin and Jordan were within the meaning of § 43-247(3)(a) due to the faults or habits of Lacy and Daniel or due to being in a situation dangerous to life or limb or injurious to their health. Specifically, the amended petition alleged:

> On or about January 3, 2012, Zachary . . . , a one-year old child who had been in the care of [Daniel] and [Lacy], died as a result of cerebral edema which occurred while Zachary . . . was in the care of [Daniel] and/or [Lacy]. Zachary . . . also suffered from cerebral contusion(s), subarachnoid hemorrhages and bruises to his shoulders, which occurred while he was in the care of [Daniel] and [Lacy]. These injuries are most consistent with abusive head trauma.

The petition also alleged that Lacy and Daniel had not provided any explanation as to how Zachary's injuries occurred and that Lacy and Daniel had caused Zachary's death or failed to provide appropriate care to Zachary, which failure had contributed to or caused his death. The petition alleged that as a result of these facts, Gavin and Jordan were at risk for harm.

The motion for the termination of Lacy's and Daniel's parental rights alleged that termination was warranted pursuant to Neb. Rev. Stat. § 43-292(9) (Cum. Supp. 2014) because Lacy and Daniel subjected Zachary to aggravated circumstances, including, but not limited to, torture and chronic abuse. In addition, the State alleged that termination of Lacy's and Daniel's parental rights was in the children's best interests and that reasonable efforts to reunify the family were not required.

On January 13, 2014, the State filed a second amended petition and amended motion for termination of Lacy's and Daniel's parental rights. This petition and motion constitute the operative pleading for the proceedings at issue in this appeal. Accordingly, we lay out the allegations contained in this second amended petition and motion to terminate parental rights in some detail.

In the second amended petition, the State again alleged that Gavin and Jordan were within the meaning of § 43-247(3)(a) due to the faults or habits of Lacy and Daniel or due to being in a situation dangerous to life or limb or injurious to their health. Specifically, the second amended petition alleged:

> A) On or between November of 2011 and January 3, 2012, [Daniel] and [Lacy] provided day-care for Zachary . . . .
>
> B) On or after December 1, 2011, Zachary['s] skull was fractured while in the care of [Daniel] and/or [Lacy].
>
> C) On or about January 3, 2012, Zachary . . . died as a result of cerebral edema and/or trauma to his brain which occurred while Zachary . . . was in the care of [Daniel] and/or [Lacy], and which was the result of child abuse and/or non-accidental or abusive head trauma.
>
> D) On or about January 3, 2012, while in the care of [Daniel] and/or [Lacy], Zachary . . . suffered from acute injuries to his brain, acute injuries to his head, and acute symmetrical bruising to his shoulders which injuries and bruising are most consistent with child abuse and/or non-accidental or abusive head trauma.
>
> E) Neither [Daniel] nor [Lacy] has provided an explanation as to how the above-described injuries, bruising, skull fracture, and/or death occurred to Zachary . . . .
>
> F) [Daniel] and/or [Lacy] caused Zachary['s] death; and/or [Daniel] and/or [Lacy] failed to provide appropriate care to Zachary . . . which resulted in his death; and/or [Daniel] and/or [Lacy] failed to provide appropriate care to Zachary . . . which contributed to his death.

G) One or more of the above and/or this situation place(s) said juveniles at risk of harm.

H) All in Lancaster County, Nebraska.

In the amended motion to terminate Lacy's and Daniel's parental rights, the State again alleged that termination was warranted pursuant to § 43-292(9); however, in addition, the State alleged that termination was also warranted pursuant to § 43-292(7) because Gavin and Jordan had been in an out-of-home placement for 15 or more months of the most recent 22 months. The State alleged that termination of Lacy's and Daniel's parental rights was in the children's best interests and that reasonable efforts to reunify the family were not required.

On the same day that the State filed its second amended petition and amended motion to terminate parental rights, January 13, 2014, the hearing on that pleading began. This lengthy hearing continued on numerous dates in January through June 2014. We have reviewed the evidence presented at this hearing in its entirety, including the 2,500-page bill of exceptions and each of the more than 80 exhibits presented by the parties. However, we do not set forth the specifics of all of the voluminous testimony and exhibits here.

Nevertheless, because the exact cause of Zachary's death and the precise time his injuries were sustained played a central role in the hearing, and are similarly significant in this appeal, we do briefly summarize the expert witness testimony presented by all of the parties on this topic.

The State and the children's guardian ad litem offered the testimony of three separate medical professionals in order to prove that Zachary died as a result of injuries he sustained while at Lacy and Daniel's home on January 3, 2012. These medical professionals included Dr. Robert Bowen, a pathologist who performed the autopsy on Zachary; Dr. Daniel Davis, a pathologist and medical examiner in the State of Oregon; and Dr. Suzanne Haney, a pediatrician specializing in child abuse treatment.

Dr. Bowen testified that during the autopsy of Zachary, he observed evidence of both recent and older head trauma. Dr. Bowen testified that Zachary had a healing skull fracture which was more than 2 weeks old. Zachary also had bruising on his brain and bleeding on the surface of the brain which were much more recent. Dr. Bowen opined that these injuries were less than 24 hours old. In addition, Dr. Bowen observed bruising on both of Zachary's shoulders which he believed to be less than 24 hours old. Dr. Bowen testified that it was the most recent traumatic brain injuries, and not the skull fracture, that were the cause of Zachary's death.

After reviewing Zachary's medical records, police reports, and the autopsy report authored by Dr. Bowen, Dr. Davis testified that Zachary died from inflicted, blunt force head trauma which caused bruising to the brain and bleeding on the surface of the brain. He testified that such injuries would cause immediate and dramatic changes in Zachary, including irregular breathing, stiffening of his limbs, and unresponsiveness. Dr. Davis testified that given that Zachary was awake, alert, and mobile when he arrived at Lacy and Daniel's home on January 3, 2012, he had to have been injured by either Lacy or Daniel when they were caring for him that morning. Dr. Davis specifically testified that Zachary's preexisting skull fracture did not directly contribute to his death on January 3.

Similarly, Dr. Haney testified that Zachary's death was caused by abusive head trauma which occurred after Zachary was dropped off at Lacy and Daniel's home on January 3, 2012. She testified that the preexisting skull fracture did not cause Zachary's death. Dr. Haney indicated that in her experience in treating skull fractures in children, a child can die from a skull fracture and a resulting brain injury, but such death would occur immediately or in a few days after the injury. A child's condition would not dramatically worsen in the weeks following the injury; nor would a child die suddenly and unexpectedly weeks after incurring such an injury. Dr. Haney testified that Zachary's death was caused by a

second injury to Zachary's brain. This injury was caused by a force similar to a fall of approximately 12 feet, such as out of a window, or to a car accident. It was not an injury which could have occurred with normal caretaking or a fall from a piece of household furniture.

Lacy offered the testimony of one medical professional, Dr. Janice Ophoven, a pediatric pathologist. Dr. Ophoven disagreed with the other three medical professionals who testified. She testified that Zachary died as a result of complications from the skull fracture he sustained a few weeks prior to his death. She testified that Zachary did not sustain any new, significant trauma on January 3, 2012.

We will set forth other pertinent facts as presented at the hearing as necessary in our analysis below.

After the hearing, the juvenile court entered a detailed, 21-page order summarizing and analyzing the evidence presented by all the parties. In the order, the court indicated that it found the medical opinions of Drs. Bowen, Davis, and Haney to be credible and, accordingly, that Zachary "died as a result of blunt force trauma to his head and that the trauma was caused by physical force consistent with a finding of intentional injury." The court specifically stated that it found that the medical opinion of Dr. Ophoven was not supported by the evidence. The court found that Zachary did not die as a result of the skull fracture he sustained weeks before his death. Instead, the court found that on January 3, 2012, "[a]fter [Zachary] was left in the care of Daniel . . . and Lacy . . . , one or both of them inflicted the injury that resulted in his death and one or both of them failed to provide prompt medical care to Zachary."

Ultimately, the court adjudicated Gavin and Jordan as children described in § 43-247(3)(a). The court also terminated Lacy's and Daniel's parental rights to the children after finding the children were within the meaning of § 43-292(7) and (9) and that such termination was in their best interests.

Lacy appeals and Daniel cross-appeals from this order.

## III. ASSIGNMENTS OF ERROR

Given that Lacy and Daniel present the same assignments of error in their appeals, we combine their assignments of error as follows: Lacy and Daniel assert that the juvenile court erred in (1) admitting into evidence exhibit 53, a report authored by Dr. Roger Brumback, a neuropathologist, when Dr. Brumback was unavailable to testify at the termination hearing; (2) finding sufficient evidence to warrant the adjudication of Gavin and Jordan pursuant to § 43-247(3)(a); and (3) finding sufficient evidence to warrant the termination of their parental rights to Gavin and Jordan.

## IV. ANALYSIS

### 1. 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 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. Admissibility of Exhibit 53

Lacy and Daniel first challenge the juvenile court's decision to admit into evidence exhibit 53, a pathology report authored by Dr. Brumback, who was not available to testify at the termination hearing. On appeal, they both assert that the report was inadmissible because it contained hearsay and because they were unable to cross-examine Dr. Brumback about his opinions and conclusions. Lacy and Daniel also both assert that the juvenile court erred in permitting Dr. Bowen to discuss the report during his testimony. For the reasons set forth below, we find Lacy's and Daniel's assertions concerning exhibit 53 to be without merit.

As we discussed above, Dr. Bowen performed the autopsy of Zachary after his death. Part of the autopsy involved

studying specific areas of Zachary's brain. For this portion of the autopsy, Dr. Bowen worked in collaboration with Dr. Brumback. Together, Drs. Bowen and Brumback determined what specific testing needed to be completed on the brain and then conducted that testing and analyzed the results. Once the testing and analysis were completed, Dr. Brumback authored a report containing his observations and conclusions. After he authored this report, but before the time of the termination hearing in this case, Dr. Brumback died unexpectedly. As a result, he was unavailable to testify at the hearing.

During Dr. Bowen's testimony, the State questioned him about Dr. Brumback's report. Dr. Bowen indicated that he relied on some of the conclusions in the report in rendering his opinion about the cause of Zachary's death. After this testimony, the State offered into evidence those portions of Dr. Brumback's report that Dr. Bowen relied upon. This exhibit was identified as exhibit 53. Lacy and Daniel objected to the admission of this exhibit, arguing that the report was not relevant, that it was not admissible because Dr. Brumback was not available to be cross-examined, and that it constituted hearsay. The court overruled the objections and admitted into evidence exhibit 53. Lacy and Daniel appeal from this evidentiary ruling.

In analyzing whether the juvenile court erred in admitting into evidence Dr. Brumback's report, we first note that in its lengthy order and recitation of the evidence presented, the court did not ever mention Dr. Brumback, his report, or the conclusions contained in the report. In fact, the court specifically stated that it based its conclusion that Zachary died from significant injuries which were inflicted on January 3, 2012, "on the medical testimony provided by Dr. Davis and Dr. . . . Bowen and Dr. . . . Haney." Accordingly, it does not appear that the juvenile court relied on Dr. Brumback's report in any way.

[2] However, even if the juvenile court did rely on Dr. Brumback's report and even if that report was erroneously

admitted into evidence, a juvenile court's consideration of improper evidence does not, by itself, require reversal of a judgment terminating parental rights under the Nebraska Juvenile Code. Because factual questions concerning a judgment or order terminating parental rights are tried by an appellate court de novo on the record, impermissible or improper evidence is not considered by an appellate court. See *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

In our review of the juvenile court's decision to terminate Lacy's and Daniel's parental rights, we assume, without specifically deciding, that exhibit 53, Dr. Brumback's report, was improperly admitted into evidence, and as such, we do not consider that exhibit in determining whether there was sufficient evidence to warrant the termination of Lacy's and Daniel's parental rights. Instead, we rely on the testimonies of the four other experts, Drs. Bowen, Davis, Haney, and Ophoven, in determining the cause of Zachary's death.

### 3. Adjudication

Lacy and Daniel next challenge the juvenile court's decision to adjudicate their children pursuant to § 43-247(3)(a). However, before we address the merits of this assertion, we address their arguments concerning the juvenile court's decision to terminate their parental rights, because we find that a prior adjudication is not necessary when parental rights are terminated pursuant to § 43-292(9). So, if we affirm the court's decision to terminate Lacy's and Daniel's parental rights on that ground, an analysis of the propriety of the juvenile court's adjudication order would be unnecessary.

The Nebraska Supreme Court has previously found that the grounds contained in § 43-292(1) through (5) do not "require, imply, or contemplate juvenile court involvement, including adjudication, prior to the filing of the petition for termination of parental rights." *In re Interest of Joshua M. et al.*, 256 Neb. 596, 609, 591 N.W.2d 557, 566 (1999). Subsection (9)

of § 43-292 was not in effect at the time of the decision in *In re Interest of Joshua M. et al.*, and as a result, the Supreme Court did not specifically determine whether termination under that subsection required a prior adjudication order. See *id*. However, based upon our review of the court's rationale with regard to § 43-292(1) through (5) and our reading of subsection (9), we conclude that subsection (9) also does not require, imply, or contemplate an adjudication prior to the termination of parental rights.

In *In re Interest of Joshua M. et al.*, 256 Neb. at 609-10, 591 N.W.2d at 566, the Supreme Court explained its rationale for finding that § 43-292(1) through (5), unlike subsections (6) and (7), do not require a prior adjudication order:

> [S]ubsections (1) through (5) each concern historical actions or conditions of the parents such as abandonment, neglect, unfitness, and mental deficiency. There is no requirement of longitudinal involvement of the juvenile court under § 43-292(1) through (5), much less a prior adjudication. . . .
>
> Through the plain language of § 43-292, the Legislature has demonstrated its intention that under certain circumstances, prior court action or an adjudication is required before parental rights can be terminated. See § 43-292(6) and (7). Conversely, in this same statutory section, the Legislature has listed other conditions justifying parental termination, dependent not upon prior juvenile court action but upon the actions or conditions of the parents. The Legislature's obvious inclusion of prior court action under certain conditions demonstrates a clear intention that such action is necessary only under the enumerated circumstances.

When we apply the court's rationale concerning § 43-292(1) through (5) to the language of subsection (9), we conclude that there is no indication that the Legislature contemplated any prior court action prior to termination under this subsection. Section 43-292(9) provides that a court may terminate

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." This language is focused primarily on "the actions or conditions of the parents" and not on any prior juvenile court involvement. See *In re Interest of Joshua M. et al.*, 256 Neb. at 610, 591 N.W.2d at 566. The Legislature did not include any mention of prior court action under this subsection.

[3] We conclude that terminating parental rights pursuant to § 43-292(9) does not require a prior adjudication order. And, because no prior adjudication order is required, we do not review at this point in our analysis the juvenile court's decision to adjudicate Gavin and Jordan. Instead, we will first analyze whether the court abused its discretion in terminating Lacy's and Daniel's parental rights pursuant to § 43-292(9). If we do not find an abuse of discretion in this regard, we need not discuss the court's adjudication order any further.

### 4. Termination of Parental Rights

On appeal, both Lacy and Daniel assert that the juvenile court erred in finding that clear and convincing evidence supports the termination of their parental rights to Gavin and Jordan. Specifically, Lacy and Daniel assert that there was insufficient evidence presented to prove they were responsible for Zachary's death and that without such definitive evidence, there is no basis for the termination of their parental rights. Upon our de novo review of the record, we affirm the decision of the juvenile court to terminate Lacy's and Daniel's parental rights.

[4,5] For a juvenile court to terminate parental rights under § 43-292, it must find that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests. See *In re Interest of Jagger L.*, 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 Factors

In this case, the juvenile court found that termination of Lacy's and Daniel's parental rights was warranted pursuant to § 43-292(7) and (9). Because only one statutory ground contained within § 43-292 must be proven to support the termination of parental rights, we focus our discussion on the evidence presented with regard to § 43-292(9).

As we have stated above, § 43-292(9) provides that parental rights may be terminated 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." Upon our de novo review of the record, we conclude that there was clear and convincing evidence presented at the termination hearing to demonstrate that Lacy and Daniel subjected Zachary to "aggravated circumstances" pursuant to subsection (9).

The evidence presented by the State at the termination hearing revealed that 1-year-old Zachary arrived at Lacy and Daniel's home for daycare on January 3, 2012. When he arrived, he was alert, playful, and happy. And, although he was suffering from an undiagnosed skull fracture, that injury had begun to heal and, on that morning, was not affecting Zachary in a significant way.

Approximately 8 hours after Zachary arrived at Lacy and Daniel's home, he was pronounced dead due to recent and severe head trauma similar to that incurred in a fall from a height of at least 12 feet or in a car accident. Such trauma was so significant that anyone would have been able to observe an immediate and dramatic change in Zachary. He would have had trouble breathing and moving his limbs, and soon after sustaining the injury, he would have become completely unresponsive. Clearly, Zachary did not have such an injury when

he arrived at Lacy and Daniel's home. Lacy and Daniel were the only people who provided care for Zachary during and after the time he sustained this serious injury. Neither Lacy nor Daniel offered any explanation for Zachary's injury or death. Instead, they contend that Zachary fell asleep in a baby swing at 10:15 in the morning and that they assumed that he continued to sleep for the next 6 hours until Lacy finally checked on him and found him unresponsive. While Zachary was in the swing for that extended period of time, no one checked on his well-being, even though Zachary had never before slept that long and even though he had skipped mealtime, snacktime, and all diaper changes. Lacy and Daniel's story provides more questions than answers, and it is simply not supported by the weight of a majority of the expert medical testimony.

Moreover, there was some evidence which suggested that Zachary had previously been seriously injured in Lacy and Daniel's home in the weeks leading up to January 3, 2012. Specifically, there was evidence that Zachary sustained his skull fracture while at daycare when he fell down some stairs. Lacy did not report Zachary's fall to his parents and, in fact, seemingly lied to his parents when they asked how he obtained a large bump on the back of his head. As a result of Lacy's failure to report the fall, Zachary's skull fracture went undiagnosed, despite his parents' repeated trips to multiple medical professionals. After Zachary's death, Lacy attempted to cover up this earlier incident.

When viewed as a whole, the evidence presented by the State is sufficient to clearly and convincingly prove that Lacy and Daniel subjected Zachary to "aggravated circumstances" pursuant to § 43-292(9). This evidence demonstrates that Zachary died as a result of serious injuries he sustained while in Lacy's and Daniel's care. These injuries could not have been sustained by normal toddler activities or by normal caretaking. Instead, these injuries were a result of intentional child abuse. In addition, the evidence demonstrates that Lacy and

Daniel failed to obtain medical care for Zachary both after he sustained the fatal injuries and on a previous occasion, after he fell and fractured his skull. Instead, they tried to cover up Zachary's injuries and delayed obtaining necessary medical intervention.

On appeal, Lacy and Daniel assert that the State's evidence concerning the cause of Zachary's fatal injuries and the cause of his skull fracture was not sufficient to demonstrate their responsibility for Zachary's death, because there was conflicting evidence presented about both the events of January 3, 2012, and the cause of Zachary's death. Specifically, they point to the testimony of Lacy's expert, Dr. Ophoven, who opined that Zachary's death was a result of complications from the skull fracture and not from any new injury he suffered on January 3, and to evidence that doctors were not able to place a specific date on when Zachary sustained that skull fracture. Lacy's and Daniel's assertions lack merit.

While we recognize that there was conflicting evidence presented at the trial about the cause and timing of Zachary's fatal injuries, we also must recognize that the juvenile court heard and observed all of the witnesses and that it specifically determined that the State's and the guardian ad litem's experts, Drs. Bowen, Davis, and Haney, were credible, while Lacy's expert, Dr. Ophoven, was not credible. In addition, the court found that the statements of Lacy and Daniel and the testimony of Lacy were also not credible. As we stated above, in appeals from juvenile court proceedings, 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. See *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006). Given our de novo review of all of the evidence presented, and giving weight to the juvenile court's findings about witness credibility, we affirm the juvenile court's conclusion that termination of Lacy's and Daniel's parental rights was warranted pursuant to § 43-292(9). There was clear and convincing

evidence presented to demonstrate that Lacy and Daniel subjected Zachary to "aggravated circumstances." See *id.*

(b) 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. 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), quoting *In re Interest of J.H.*, 242 Neb. 906, 497 N.W.2d 346 (1993).

In its order, the juvenile court found that because Lacy and Daniel "bear the responsibility for the abuse and death of Zachary," it is in the best interests of Gavin and Jordan that their parental rights be terminated. Specifically, the court found that Lacy and Daniel are "unfit to be entrusted with the care of their children because of their abuse and neglect of Zachary . . . and their failure to accept responsibility for their actions." The court explained its decision further:

> [Lacy and Daniel] have not accepted responsibility for their actions or failures to act to provide medical care for Zachary. They have not explained the injuries Zachary received. It is unlikely that they will do so now because to do so would potentially result in criminal charges being brought they have thus far avoided. [Lacy and Daniel] have remained silent as to the true events involving Zachary despite having their children removed. They have remained silent despite having their parental rights placed at jeopardy. Given their silence to date, with so much at stake, it is unlikely they would now come forward with an explanation. Without that

> explanation and acceptance of responsibility there can be no elimination of risk of harm to their children. There is no rehabilitative plan that could be developed by [the Nebraska Department of Health and Human Services] that could correct the adjudicated conditions in the Second Amended Petition or that would adequately correct the actions of these parents or that would protect [Gavin and Jordan].
>
> [Gavin and Jordan] need permanency and the ability to move on with parents that can provide a safe and stable home. Lacy . . . and Daniel . . . are unable to provide that home. It is in the best interest of the above children that the parental rights of Lacy . . . and Daniel . . . be terminated. . . .

Lacy and Daniel appeal from the juvenile court's finding that termination of their parental rights is in Gavin's and Jordan's best interests. In support of their argument, they again assert that there was not sufficient evidence to demonstrate their responsibility for Zachary's injuries and death. In addition, they assert that there was no evidence whatsoever which demonstrated that they were anything but loving and involved parents to their own children, Gavin and Jordan. Upon our de novo review of the record, we affirm the decision of the juvenile court that termination of Lacy's and Daniel's parental rights is in the children's best interests.

As we discussed more thoroughly above, there was clear and convincing evidence presented at the termination hearing which revealed that Lacy and Daniel were responsible for the injuries Zachary sustained on January 3, 2012, and his resulting death. There was also clear and convincing evidence presented which demonstrated that Lacy and Daniel failed to obtain any medical intervention for Zachary after he suffered his injuries. Neither Lacy nor Daniel has ever provided any reasonable explanation for what happened to Zachary on January 3. Given the gravity of Zachary's fatal injuries and given the lack of explanation for those injuries, we must

agree with the findings of the juvenile court. There are no rehabilitative measures which can be offered to Lacy and Daniel which would make reunification of the family possible at some point in the future, and returning Gavin and Jordan to the care and custody of their parents without any such measures would present an unacceptable risk to their safety and well-being.

We recognize that there was no evidence presented about Lacy and Daniel acting inappropriately or violently with their own children. In fact, the visitation notes from their daily visitations with the children while this case was pending reflect that Lacy and Daniel have a strong bond with the children and love them very much. However, because we do not know exactly what happened to Zachary on January 3, 2012, the risk of harm to Gavin and Jordan in their parents' home is simply too much to overcome. There is no reasonable alternative other than to terminate Lacy's and Daniel's parental rights to Gavin and Jordan.

## V. CONCLUSION

After reviewing the record de novo, we conclude that the juvenile court did not err in finding that clear and convincing evidence supports the termination of Lacy's and Daniel's parental rights to Gavin and Jordan under § 43-292(9) or in finding that clear and convincing evidence shows that termination of Lacy's and Daniel's parental rights is in the children's best interests. For those reasons, we affirm the court's order terminating Lacy's and Daniel's parental rights to both Gavin and Jordan.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Michael P. Burns, appellee, v. Kerry E. Burns, appellant.

872 N.W.2d 900

Filed December 1, 2015. No. A-14-789.

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. **Records: Pleadings: Presumptions: Appeal and Error.** Where there is no bill of exceptions, an appellate court is limited on review to an examination of the pleadings. If they are sufficient to support the judgment, it will be presumed on appeal that the evidence supports the trial court's orders and judgment.
4. **Limitations of Actions: Dismissal and Nonsuit.** 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 6 months from the date the complaint was filed.
5. **Modification of Decree.** Modification proceedings are initiated by the filing of a complaint to modify.
6. **Complaints: Jurisdiction: Service of Process.** A proceeding under Neb. Rev. Stat. §§ 42-347 to 42-381 (Reissue 2008 & Cum. Supp. 2014) shall be commenced by filing a complaint in the district court. The proceeding may be heard by the county court or the district court as provided in Neb. Rev. Stat. § 25-2740 (Reissue 2008). Summons shall be served upon the other party to the marriage by personal service or in the manner provided in Neb. Rev. Stat. § 25-517.02 (Reissue 2008).
7. **Service of Process: Jurisdiction: Appeal and Error.** Nebraska appellate courts have strictly construed the requirements of service of summons for a court to gain jurisdiction.

8. **Service of Process: Notice: Pleadings: Time.** A summons notifies the defendant that in order to defend the lawsuit, an appropriate written response must be filed with the court within 30 days after service and that upon failure to do so, the court may enter judgment for the relief demanded in the petition.
9. **Service of Process: Notice: Words and Phrases.** Generally, a summons is an instrument used to provide notice to a party of civil proceedings and of the opportunity to appear and be heard.
10. **Limitations of Actions: Dismissal and Nonsuit.** The language providing that an action shall stand dismissed without prejudice as to any defendant not served within 6 months from the date the complaint was filed is self-executing and mandatory.
11. **Limitations of Actions: Dismissal and Nonsuit: Service of Process.** Any orders or pleadings filed after a lawsuit has been dismissed by operation of law for failure to serve the defendant within 6 months are a nullity.

Appeal from the District Court for Adams County: James E. Doyle IV, Judge. Judgment vacated, and cause remanded with directions.

Matt Catlett for appellant.

Robert M. Sullivan, of Sullivan Shoemaker, P.C., L.L.O., for appellee.

Irwin, Inbody, and Riedmann, Judges.

Riedmann, Judge.

## INTRODUCTION

This matter comes before us upon the motion for rehearing filed by Kerry E. Burns in response to our memorandum opinion and judgment on appeal issued on June 3, 2015, in this case. On July 31, we granted the motion in part, relating only to whether service of a summons was required and the effect of Neb. Rev. Stat. § 25-217 (Reissue 2008) on the court's jurisdiction. On that same date, we also withdrew the memorandum opinion. We conclude that Neb. Rev. Stat. § 42-364(6) (Cum. Supp. 2014) requires service of summons

on a defendant when an application for modification of a divorce decree is filed and that failure to serve the summons on Kerry within 6 months of the date of filing the application for modification deprived the district court of jurisdiction.

## BACKGROUND

For purposes of addressing the issues on rehearing, the following facts are pertinent:

Kerry and Michael P. Burns were divorced in May 2004. The decree was modified in August 2010. Kerry filed a "Complaint for Modification of Decree" in October 2011, and the parties purportedly came to an agreement in October 2012. Kerry appealed the district court's order enforcing the agreement. While the appeal was pending, Michael filed an application to modify in June 2013. After unsuccessfully trying to serve Kerry with the application to modify, Michael filed a motion to appoint a special process server. When Michael first filed the praecipe, he requested that the summons and application be forwarded to the sheriff for service. The sheriff's return specifically stated she was unable to serve the summons and the application to modify. Michael then filed the motion to appoint a special process server; however, this motion requested only service of the application to modify and made no mention of the summons. On August 21, a special process server signed an affidavit of service of process certifying that she effectuated personal service on Kerry of the "Application to Modify, Motion to Appoint Process Server, Order." Her affidavit for service of process makes no mention of a summons.

On September 20, 2013, Kerry filed a "Special Appearance" asserting a lack of personal jurisdiction. In her special appearance, Kerry asserted that her daughter, and not she, received the envelope containing the application to modify. Kerry also asserted that she had never been served with a summons.

In its February 5, 2014, order addressing the issue of jurisdiction, the district court misstated the record and stated that

Kerry "averred she was not personally served with *summons*, contrary to the sworn statements of the process server." (Emphasis supplied.) While the process server's affidavit does contradict Kerry's assertion that her daughter was served rather than Kerry, the process server does not state that she served *summons* on either Kerry or her daughter.

## ASSIGNMENTS OF ERROR

In her initial appellate brief, Kerry assigned two errors: (1) that the district court erred in exercising jurisdiction over the modification action and (2) that it erred in modifying child support, visitation, and custody while a prior order was pending appeal. Because of our resolution on the jurisdictional issue, we need not reach Kerry's second assigned error.

## 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. *In re Guardianship & Conservatorship of Forster*, 22 Neb. App. 478, 856 N.W.2d 134 (2014). The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court. *Anthony K. v. State*, 289 Neb. 523, 855 N.W.2d 802 (2014).

## ANALYSIS

We first note that the appellate record in this case contains no bill of exceptions, only the transcript which contains the pleadings and the orders of the district court.

[3] Where there is no bill of exceptions, an appellate court is limited on review to an examination of the pleadings. *Murphy v. Murphy*, 237 Neb. 406, 466 N.W.2d 87 (1991). If they are sufficient to support the judgment, it will be presumed on appeal that the evidence supports the trial court's orders and judgment. *Id*.

Kerry argues that the district court erred in overruling her special appearance because the actual summons was not

served upon her within 6 months and thus that court did not have jurisdiction over the modification action.

First, we note that Neb. Rev. Stat. § 25-801.01 (Reissue 2008) abolished the special appearance for all civil actions filed on or after January 1, 2003. Thus, we shall treat Kerry's special appearance as a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b), because the failure of Kerry to specifically reference the appropriate mode of dismissal is not fatal. See, *Weeder v. Central Comm. College*, 269 Neb. 114, 123, 691 N.W.2d 508, 515 (2005) (motion to dismiss alleging three affirmative defenses without specifically referring to "subsection (6) of rule 12(b) is not fatal"); 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1347 at 51 (3d ed. 2004) ("technical accuracy in the designation . . . of the specific rule under which the defense, motion, or objection is asserted, is [not] critical to [its] presentation and determination").

[4] Kerry argues that at no point in the 6 months after Michael filed his application to modify was she served with a summons and that therefore the complaint was dismissed by operation of law. Section 25-217 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." This language is self-executing and mandatory. *Dillion v. Mabbutt*, 265 Neb. 814, 660 N.W.2d 477 (2003); *Mohr v. Mohr*, 22 Neb. App. 772, 859 N.W.2d 377 (2015).

[5] Modification proceedings are initiated by the filing of a complaint to modify.

> Modification proceedings relating to support, custody, parenting time, visitation, other access, or removal of children from the jurisdiction of the court shall be commenced by filing a complaint to modify. Modification of a parenting plan is governed by the Parenting Act. Proceedings to modify a parenting plan shall be

> commenced by filing a complaint to modify. . . . *Service of process and other procedure shall comply with the requirements for a dissolution action.*

§ 42-364(6) (emphasis supplied).

[6] The service of process requirements for a dissolution action state:

> A proceeding under sections 42-347 to 42-381 shall be commenced by filing a complaint in the district court. The proceeding may be heard by the county court or the district court as provided in section 25-2740. *Summons shall be served upon the other party to the marriage by personal service or in the manner provided in section 25-517.02.*

Neb. Rev. Stat. § 42-352 (Reissue 2008) (emphasis supplied). The statutory requirement that modification proceedings be commenced by filing a fresh complaint and that they comply with service requirements was first added in 2004. See 2004 Neb. Laws, L.B. 1207. This amendment clearly requires service of a summons, which did not occur in this case.

[7] Although the Nebraska appellate courts have not addressed the effect of failing to serve a summons in modification proceedings, the Nebraska appellate courts have strictly construed the requirements of service of summons for a court to gain jurisdiction in other contexts. The Nebraska Supreme Court has concluded that the absence of a summons in a juvenile support case precluded the lower court from exercising jurisdiction. See *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996).

In *In re Interest of Rondell B.*, the juvenile's mother had received a summons regarding an adjudication action brought pursuant to Neb. Rev. Stat. § 43-247(3) (Reissue 1993). Thereafter, a support proceeding was commenced under Neb. Rev. Stat. § 43-290 (Reissue 1993), and her attorney received a hearing date for the support proceeding. Section 43-290, governing support proceedings, stated in relevant part that "after summons to the parent of the time and place of hearing

served as provided in sections 43-262 to 43-267, the court may order and decree that the parent shall pay . . . a reasonable sum that will cover in whole or part the support . . . of the juvenile." The court held that in order to comply with this statute, a summons must be served. In rejecting the State's argument to the contrary, the court stated:

> [W]e simply are not free to disregard the requirement of § 43-290 that in the event of a separate support hearing, a summons with regard thereto is to be served. In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute.

*In re Interest of Rondell B.*, 249 Neb. at 932-33, 546 N.W.2d at 805.

[8,9] Likewise, in *Osborn v. Osborn*, 4 Neb. App. 802, 806, 550 N.W.2d 58, 61 (1996), we iterated the requirement for service of a summons under § 42-352 (Reissue 1993) where one party failed to serve either a motion to modify a decree or a summons on the other party; rather, the moving party served a "'Notice of Hearing'" on the other party's attorney. We held such service was insufficient. *Osborn* was decided prior to the 2004 revisions to § 42-364(6); however, we cited § 42-352 and Neb. Rev. Stat. §§ 42-365 (Reissue 1993) and 25-504.01 (Reissue 1995) to conclude that the moving party "was required to file a petition for modification and to serve [respondent] with both a copy of the petition and a summons." 4 Neb. App. at 805, 550 N.W.2d at 60. We noted the purpose of a summons:

> A summons notifies the defendant that in order to defend the lawsuit[,] an appropriate written response must be filed with the court within 30 days after service and that upon failure to do so, the court may enter judgment for the relief demanded in the petition. Neb. Rev.

> Stat. § 25-503.01 (Reissue 1995). Where the Legislature has intended for service to be executed as a summons in civil cases, it has specifically stated so within the statutes. *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994) (finding that service upon attorney of record was permissible under Neb. Rev. Stat. § 25-534 (Reissue 1995) where notice statute, Neb. Rev. Stat. § 20-333 (Reissue 1991), did not require any particular form of service). Generally, a summons is an instrument used to provide notice to a party of civil proceedings and of the opportunity to appear and be heard. *Ventura v. State, supra.*

*Osborn*, 4 Neb. App. at 805-06, 550 N.W.2d at 61.

Accordingly, the summons that had been initially directed to Kerry specifically advised her that she had been sued by Michael, that she was required to respond within 30 days, and that her failure to do so may result in Michael's being granted his requested relief. This summons was never served, however, as the sheriff was unable to obtain service. Michael did not request that the special process server serve the summons when alternate service by a special process server was approved.

Similarly, in *American Nat. Bank v. Cutler*, No. A-01-1398, 2003 WL 22038257 (Neb. App. Sept. 2, 2003) (not designated for permanent publication), we held that where a statute delineates the procedure to bring a motion to vacate, a petitioner's failure to follow the statutory prerequisites (in that case, filing a petition and serving a summons) may deprive a district court of subject matter jurisdiction to hear the motion.

In the present action, the statutes specifically direct that summons be served upon the other party to the marriage. See §§ 42-352 (Reissue 2008) and 42-364. The evidence contained in the record reveals that a summons was never served. While there is no doubt that Kerry received the application to modify, no summons was served as required by the statutes.

Accordingly, the district court lacked personal jurisdiction over Kerry at the time her special appearance was filed.

For purposes of completeness, we address whether Kerry's subsequent answer waived her defense of lack of jurisdiction. We conclude that it did not. In reaching our decision, the following chronology is important:

- June 28, 2013—Michael filed application for modification.
- August 21, 2013—Modification papers left with Kerry's daughter.
- September 20, 2013—Kerry filed special appearance.
- January 27, 2014—Hearing on special appearance held.
- February 5, 2014—Order overruling special appearance entered.
- February 18, 2014—Kerry filed answer.

[10] As evidenced by the above chronology, Kerry filed her answer almost 8 months after Michael filed the modification action. Section 25-217 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." This language is self-executing and mandatory. *Dillion v. Mabbutt*, 265 Neb. 814, 660 N.W.2d 477 (2003); *Mohr v. Mohr*, 22 Neb. App. 772, 859 N.W.2d 377 (2015).

[11] Because Michael did not properly serve Kerry within 6 months from the date he filed the application to modify, the action stood dismissed as of December 28, 2013. Any subsequent orders or pleadings were a nullity. Any orders or pleadings filed after a lawsuit has been dismissed by operation of law for failure to serve the defendant within 6 months are a nullity. See *Reid v. Evans*, 273 Neb. 714, 733 N.W.2d 186 (2007). Accordingly, Kerry's subsequent answer, filed more than 6 months after the modification action was filed, was a nullity and could not have conferred jurisdiction over her. Likewise, all court orders issued after December 28, 2013, were also null.

## CONCLUSION

Because Kerry was never served with a summons, the modification action was dismissed by operation of law on December 28, 2013. The district court and this court lack the power to determine the merits of Michael's application for modification. We previously withdrew our memorandum opinion affirming the district court's decision modifying the parties' decree, and we now vacate the district court's decision. We further remand the cause to the district court with directions to dismiss the application to modify.

Judgment vacated, and cause
remanded with directions.

**Nebraska Court of Appeals**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# In re Guardianship and Conservatorship of Lorine Mueller, an alleged incapacitated person. Margo Loop, Guardian and Conservator, appellee, v. Cheryl Mueller, appellant.

872 N.W.2d 906

Filed December 8, 2015. Nos. A-14-780, A-14-971.

1. **Guardians and Conservators: Appeal and Error.** An appellate court reviews guardianship and conservatorship proceedings 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, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Guardians and Conservators: Evidence.** A court may appoint a guardian under Neb. Rev. Stat. § 30-2620(a) (Cum. Supp. 2014) if it is satisfied by clear and convincing evidence that (1) the person for whom a guardian is sought is incapacitated and (2) the appointment is necessary or desirable as the least restrictive alternative available for providing continuing care or supervision of the person alleged to be incapacitated.
4. **Guardians and Conservators.** The persons eligible for appointment as guardian, as well as their respective priorities, are described in Neb. Rev. Stat. § 30-2627 (Reissue 2008). If it is in the best interest of the ward, a court may pass over a person having priority and appoint a person having lower or no priority.
5. **Guardians and Conservators: Agents.** If a guardian has been appointed and an attorney in fact has been designated and authorized under a valid power of attorney for health care, the attorney in fact's authority to make health care decisions supersedes the guardian's authority to make such decisions.
6. ____: ____. Neb. Rev. Stat. §§ 30-2628(c) (Cum. Supp. 2014) and 30-3420(5)(b) and (c) (Reissue 2008) do not preclude a court from

considering a ward's best interest and revoking or setting aside a health care power of attorney in favor of a guardianship when the facts support such action.

7. ____: ____. Under Neb. Rev. Stat. § 30-3421 (Reissue 2008), a court can revoke a power of attorney for health care upon finding (1) that the attorney in fact has violated, failed to perform, or is unable to perform the duty to act in a manner consistent with the principal's wishes or, when the principal's wishes are unknown, in the principal's best interest and (2) that the principal lacks the capacity to revoke the power of attorney.
8. **Guardians and Conservators: Evidence.** Under Neb. Rev. Stat. § 30-2630(2) (Reissue 2008), a court may appoint a conservator to manage a person's estate and property affairs if satisfied by clear and convincing evidence that (1) the person is unable to manage his or her property and property affairs effectively for reasons including mental illness, mental deficiency, or physical illness or disability and (2) the person has property that will be wasted or dissipated unless proper management is provided, or funds are needed for the support, care, and welfare of the person and protection is necessary or desirable to obtain or provide the funds.
9. **Guardians and Conservators: Agents.** Pursuant to Neb. Rev. Stat. § 30-2639(b)(1) (Reissue 2008), a person nominated in a power of attorney or acting under a power of attorney has first priority for appointment as conservator; however, if it is in the best interest of the protected person, a court may pass over a person having priority and appoint a person having lower or no priority.
10. ____: ____. A conservatorship may be necessary despite the existence of a power of attorney where an attorney in fact has violated his or her fiduciary duty, to act solely for the benefit of the principal, by engaging in self-dealing with the protected person's estate.
11. **Decedents' Estates: Wills: Words and Phrases.** A specific devise is a provision in a will that passes a particular piece of property. When specifically devised property ceases to be part of the estate at the time of the testator's death, ademption occurs.
12. **Estates: Wills: Sales: Presumptions: Words and Phrases.** Ademption by implied revocation occurs when specifically devised property is sold during the testator's lifetime. This type of ademption is based upon a presumed alteration of intention arising from the changed condition and circumstances of the testator, or on the presumption that the will would have been different had it been executed under the altered circumstances.
13. **Estates: Sales.** The common-law doctrine of ademption has been modified by statute under certain circumstances. Pursuant to Neb. Rev.

Stat. § 30-2346(a) (Reissue 2008), when a conservator or guardian, not the testator, sells specifically devised property during the testator's lifetime, no ademption occurs. The proceeds of the sale are not included in the testator's residuary estate, but, rather, are given to the specific devisee to honor the specific devise.

14. **Guardians and Conservators: Estates.** Pursuant to Neb. Rev. Stat. § 30-2656 (Reissue 2008), in selecting the assets of a protected person's estate for distribution and utilizing the powers of revocation or withdrawal available for the support of the protected person, a conservator and the court should take into account any known estate plan of the protected person, including his or her will.
15. **Guardians and Conservators: Estates: Sales.** Given the heightened protection that specific devises receive by statute, a conservator taking into account a protected person's known estate plan should invade specifically devised property as a last resort, and only when doing so is clearly necessary for the protected person's care and support. Where there is ample property in a protected person's estate that can be sold to adequately fund the protected person's care without invading specifically devised property, the conservator and the court should not sell the specifically devised property unless circumstances clearly establish that it is in the protected person's best interests to do so.

Appeal from the County Court for Platte County: Frank J. Skorupa, Judge. Judgment in No. A-14-780 affirmed. Judgment in No. A-14-971 affirmed in part, and in part reversed.

Clark J. Grant, of Grant & Grant, for appellant.

Brenda K. Smith and Heather S. Voegele, of Dvorak & Donovan Law Group, L.L.C., for appellee.

Moore, Chief Judge, and Pirtle and Bishop, Judges.

Bishop, Judge.

Margo Loop was appointed guardian and conservator for her 94-year-old mother, Lorine Mueller, in the county court for Platte County, Nebraska. At the time of the appointment, Lorine suffered from moderate to severe Alzheimer's disease and dementia and resided in a skilled nursing facility. After appointing Margo, the county court authorized her to sell

various real property to fund Lorine's care, including a 17.56-acre property owned by Mue-Cow Farms, Inc. (Mue-Cow), a corporation of which Lorine is the majority shareholder.

Cheryl Mueller, Lorine's daughter-in-law who lives in a farmhouse on the Mue-Cow property and alleges that she is a minority shareholder of Mue-Cow, appeals the orders appointing Margo guardian and conservator and authorizing her to sell the Mue-Cow property. Cheryl does not dispute that Lorine is incapacitated and unable to manage her property; instead, she argues that as Lorine's attorney in fact under powers of attorney for health care and asset management, she is capable of caring for Lorine and managing her property. She also argues that if a guardian and conservator were necessary, she had statutory priority for appointment. Cheryl challenges the order authorizing the sale of the Mue-Cow property because it fails to preserve Lorine's estate plan, in which Lorine devised the property to Cheryl.

As explained below, we affirm the county court's order appointing Margo guardian and conservator for Lorine. However, we reverse the county court's order authorizing Margo to sell the Mue-Cow property. We conclude that because Lorine specifically devised the Mue-Cow property to Cheryl in her will, and because there was sufficient property in Lorine's estate to adequately support her without selling the Mue-Cow property, it was error to authorize Margo to sell the Mue-Cow property absent circumstances establishing that it was in Lorine's best interests to do so.

## BACKGROUND

Lorine was born in January 1920 and had three children, Margo, Gary Mueller, and Randy Mueller. Margo has lived in Wichita, Kansas, since 1982; Gary has lived in St. Charles, Missouri, since 1991; and Randy died in 2001 while living in Columbus, Nebraska.

Until 1990, Lorine lived with her husband in the farmhouse on the Mue-Cow property, which is located in Platte County.

Lorine's husband conducted a dairy cow operation on the property and farmed adjoining parcels of land that totaled approximately 156 acres. Shortly before her husband passed away in 1991, Lorine and he moved into a house in the city of Columbus.

Cheryl was married to Lorine's son Randy. When Lorine and her husband moved to Columbus, Cheryl and Randy moved into the farmhouse on the Mue-Cow property and Randy managed the dairy cow operation and farm. In 2003, approximately 2 years after Randy passed away, Lorine sold her house in Columbus and moved back to the farmhouse to live with Cheryl. In March 2006, Lorine executed powers of attorney for health care and asset management, appointing Cheryl as her attorney in fact for health care and property-related decisions.

In March 2014, Lorine fell and broke her hip while still residing at the farmhouse. She underwent surgery and was admitted to Mory's Haven, a skilled nursing facility in Columbus, for rehabilitation.

In May 2014, while Lorine was at Mory's Haven, Margo and Gary filed a petition for appointment of a guardian and conservator for Lorine. They alleged that Lorine suffered from Alzheimer's disease and dementia and was in need of continuing medical care for her broken hip. They requested that Margo be appointed guardian and conservator but noted that Cheryl might have a prior right to appointment by virtue of the powers of attorney. Margo and Gary alleged that it would not be in Lorine's best interests to appoint Cheryl, because Cheryl planned to remove Lorine from Mory's Haven.

Cheryl objected to the petition, arguing that Lorine was not incapacitated and that appointing a guardian and conservator was not the least restrictive means of caring for Lorine or managing her property. Cheryl contended that the powers of attorney were less restrictive and accomplished the same goals.

The court appointed Margo temporary guardian and conservator, pending a hearing on the petition.

*Guardian Ad Litem's Report and Recommendation.*

Prior to the hearing on the petition, the guardian ad litem (GAL) appointed by the court for Lorine filed a report and recommendation. She confirmed that Lorine suffered from moderate to severe Alzheimer's disease and dementia. She further indicated that Lorine was in a wheelchair and that her doctor had advised that she should not "'be doing stairs from here on out.'" The GAL noted that the only bathroom in the farmhouse was located on the second floor, up a series of 24 steps.

The GAL stated that until Lorine's hospitalization in March 2014, Cheryl did not believe that she was acting in the capacity of Lorine's attorney in fact under the powers of attorney. The GAL reported that Cheryl was first listed on Lorine's bank account in September 2011. The GAL was concerned with the number of checks written to "'Cash'" and was unable to verify Cheryl's explanations for the checks. Cheryl told the GAL that she had not understood her fiduciary duties as attorney in fact and had signed checks at Lorine's direction and for convenience. Cheryl indicated that she and Lorine had shared home expenses and taken care of each other.

The GAL located seven lawsuits that were either collection or tax matters involving Lorine filed during the time that Cheryl held the powers of attorney. The GAL also discovered that Cheryl's father had loaned money for the payment of delinquent taxes on Lorine's properties and that promissory notes and deeds of trust issued as security for the notes were recorded against the properties. The GAL reported that Cheryl's father was recently deceased and that Cheryl was a beneficiary of his estate.

The GAL noted that in addition to Lorine's Mue-Cow shares and the parcels of land adjoining the Mue-Cow property,

Lorine owned a rental home in Columbus and leased a lot at Wagner Lakes. The rental home had not had a tenant for 3 years due to water damage that occurred after the last tenant moved out. Cheryl told the GAL that the damage had been repaired and that the repairs had been funded in part using a loan from Cheryl's father. The Wagner Lakes lot did not produce any income.

The GAL indicated that an individual had farmed approximately 70 to 80 acres of Lorine's land for the prior 3 years under an oral agreement for a 50-50 crop share. Cheryl informed the GAL that the agreement with that individual had not been as profitable as preferred during its first 2 years because of drought, lack of crop insurance, and other factors. Cheryl reported that crop insurance had since been obtained.

The GAL stated that Cheryl had consistently taken Lorine to doctors' appointments over the years. However, the GAL was concerned that Lorine had not received proper dental care and had experienced tooth decay and broken teeth. Cheryl told the GAL that Lorine had not wanted to receive followup care after she was fitted for dentures between 2003 and 2005 because they caused her pain.

The GAL further reported that during Lorine's time at Mory's Haven, the administrative staff had limited the times that Cheryl could visit. The staff had been concerned with how Cheryl treated Lorine, including that Cheryl was withholding snacks from her and attempting to have her walk without the proper assistance. Under the restrictions, Cheryl was permitted to visit Lorine only when a member of the administrative staff was present.

The GAL stated that Margo was concerned that Cheryl planned to move Lorine back to the farmhouse as soon as possible. Margo was also concerned with the lack of dental care and with Cheryl's handling of Lorine's finances. The GAL noted that Margo had not had much contact with Lorine for a number of years, but observed that Margo and Cheryl gave differing explanations for this.

The GAL recommended that Margo be appointed guardian and conservator. The GAL did not believe that it would be in Lorine's best interests to appoint Cheryl, due to her financial interests in Lorine's property, including her status as a beneficiary of her father's estate. Further, Cheryl lived on the property owned by Mue-Cow, in which Lorine held a majority interest and, according to the GAL, Cheryl owned a minority interest.

*Hearing on Petition to Appoint Guardian and Conservator.*

On July 22, 2014, the court held a hearing on the petition. Because Cheryl does not dispute on appeal that Lorine is incapacitated and unable to manage her property, we only briefly summarize the testimony relating to Lorine's incapacity. According to Cheryl, Lorine stopped driving at her doctor's recommendation approximately 5 years prior to the date of the hearing because she would get lost. Gary testified that Lorine had suffered from memory problems for a "very, very long time" and that when he visited her in July 2011, Lorine initially did not know who he was and did not know where he lived or the names of his children. While a resident at Mory's Haven in 2014, Lorine tested in the "severe impairment" category on mental status examinations. The record reflects that at the time of the hearing, Lorine suffered from moderate to severe Alzheimer's disease and dementia, did not understand where she resided, did not know her children's names, and had difficulty following conversation.

The first two witnesses were Sue Bougger, the social service director at Mory's Haven, and Terri Groteluschen, the administrator of Mory's Haven. Bougger testified that when Cheryl visited Lorine at Mory's Haven, Lorine's mood became "more subdued, apprehensive, [and] intimidated." Bougger described Cheryl as abrupt and said that she yells and causes "quite a commotion." Bougger indicated that Cheryl had taken foods away from Lorine, even though they were not medically restricted. Groteluschen confirmed this

and testified that she had restricted Cheryl to visiting Lorine only when a member of the administrative staff was present. During Groteluschen's 11 years at Mory's Haven, she had placed restrictions on a person's visitation only one other time. She placed the restrictions on Cheryl because staff members felt that they were unable to care for Lorine with Cheryl's disruptions.

Bougger testified that when Margo was present, Lorine was content and peaceful. Bougger described Margo as open, conscientious, and appropriately concerned about Lorine's care. Groteluschen testified that she had seen Margo at Mory's Haven frequently and that Margo was very caring.

Lorine's son Gary testified that after Margo was appointed temporary guardian and conservator, she gave him access to Lorine's bank records for the past 3 to 4 years. He observed that Lorine received no income from the rental home in Columbus, for the Wagner Lakes lot, or for the Mue-Cow property. Lorine received between $5,000 and $7,000 per year in income from her farmland.

Gary explained that as part of his job at the Federal Deposit Insurance Corporation, he examined agricultural banks, which required reviewing farm loans made by those banks. Based on his work experience and on his time helping on the farm as a minor, he prepared cashflow projections for the years 2010 to 2014 for Lorine's properties, including a 48-acre parcel used for pasture, a 99-acre parcel that was tillable, and the rental home in Columbus. His projections of total cashflow for the properties based on treating the 99 acres as dryland were between $24,000 and $34,000 per year; treating the 99 acres as irrigated raised the projections to between $31,000 and $44,000.

Gary testified that after Lorine broke her hip in March 2014, he learned that Cheryl had removed him from the list of persons approved to access Lorine's hospital records. Margo had since placed his name back on the list. Gary's concern with Cheryl was that due to her daycare business and Lorine's

specialized needs, Cheryl did not have adequate time to care for Lorine.

Margo testified that during the past 5 years it had been very difficult to visit Lorine because Cheryl had restricted Margo's access to her. Margo attended a class reunion the prior summer and was told it was not a good time to visit Lorine. Lorine did not have a landline or a cell phone, which also made access difficult. Margo purchased a cell phone for Lorine in 2004, but she never learned to use it.

Margo testified that since being appointed temporary guardian and conservator, she had reviewed Lorine's financial records and inspected her property, although she had not been allowed inside the farmhouse on the Mue-Cow property. At the time of her temporary appointment, there was no insurance on the properties; Margo had since obtained insurance policies for them.

Margo had discovered that "large sums of cash" had been withdrawn from Lorine's bank accounts following the execution of the powers of attorney in March 2006. Although Margo's testimony fails to provide a specific timeframe, she testified that in 1 month, there was $2,000 in checks written to a grocery store. There were checks written for car insurance after Lorine was unable to drive and checks written for groceries and for discount store purchases after Lorine was admitted to Mory's Haven. All of the checks were signed by Cheryl.

Margo confirmed that promissory notes and deeds of trust had been recorded against all of Lorine's properties in Platte County. The promissory notes and deeds of trust, which were admitted into evidence, reflected a total of $31,389.60 in loans from Cheryl's father to Lorine between February and April 2007.

Margo further testified that five foreclosure cases brought by the purchasers of tax liens had been filed in Platte County against Lorine's properties in recent years. Copies of the complaints for foreclosure were admitted into evidence.

According to Margo, after Lorine's rental property in Columbus sustained water damage in 2009, an insurance company issued a check for $48,429. Margo confirmed that $22,000 went to a contractor for demolition and mold abatement. Margo was still attempting to find out what happened to the remaining $26,000 in insurance proceeds. Lorine's bank records did not show a deposit of funds in that amount.

Margo testified that in 1977, Lorine and her husband entered into a 50-year lease for the Wagner Lakes lot, which had a small cabin on it. In May 2007, the lease was assigned to Lorine and Cheryl jointly. To Margo's knowledge, Cheryl had not compensated Lorine for the assignment.

Margo identified copies of notices of state and federal tax liens for unpaid taxes recorded in Platte County against any property in which Cheryl had an ownership interest. The tax liens were issued between 2005 and 2012 and totaled over $76,000.

Margo testified that she and her husband have owned and operated an interior landscaping business in Wichita for 30 years. The corporation is in good standing and has not had any tax liens or judgments rendered against it.

When asked why she was seeking to be appointed guardian and conservator for Lorine, Margo testified that Lorine needed her help and that she was trying to do the right thing. Her first goal would be to ensure that Lorine had enough assets to pay for her care. Margo believed that Lorine needed 24-hour supervision.

Margo characterized Cheryl's treatment of Lorine as controlling, demeaning, and disrespectful. According to Margo, after Lorine was admitted to the hospital for her broken hip, her hair was matted, she smelled as if she had not taken a bath in a very long time, and her toenails were an inch long.

At this point in the hearing on the petition, Margo and Gary rested and Lorine's attorney called the GAL as her only witness. The GAL testified that since completing her report, she had revised her recommendation to be that a neutral third

party should be appointed guardian and conservator, although she did not have a specific person in mind. The considerations supporting the change were that Margo lived out of state and that there was "a lot of family tension." She believed that it might be "a fairly excessive strain" on Lorine to be moved out of state and that if a family member were appointed, there would be ongoing disputes. The GAL reiterated that Cheryl should not remain serving under the powers of attorney; she noted that Cheryl had not acted in Lorine's best interests when handling finances and that Lorine had not received proper dental care under her supervision.

Cheryl testified in her own behalf. She testified that she had operated a daycare since 1988. After Lorine's husband died, Lorine would come to the daycare to read stories to the children. For at least 5 years prior to the date of the hearing, during which time Lorine suffered from dementia and could not drive, Cheryl would bring Lorine to the daycare daily, where Lorine would play with the children, read them stories, and fold laundry.

According to Cheryl, Lorine decided to move back to the farmhouse (in 2003) so that she and Cheryl could pool their resources and take care of each other. Cheryl testified that she wrote checks out of Lorine's account for living expenses, because she and Cheryl "just paid the bills as they needed."

When asked why the taxes were not paid for Lorine's properties, Cheryl explained that it was due to "[l]iving expenses and trying to make it day-to-day." She testified, "I'll admit, I'm not making good choices. I'm trying to learn from those experiences and make good choices." She testified that the "state tax liens" and "tax lien foreclosures" had been resolved using a combination of Cheryl's money, Lorine's money, and loans from Cheryl's father.

Cheryl testified that the insurance proceeds from the water damage to Lorine's rental home went to paying for new "electrical," for a new furnace and water heater, and to "adjust the plumbing." Prior to the filing of Margo and Gary's petition,

Cheryl and Lorine's plan had been to sell the rental property to pay the delinquent taxes.

Cheryl testified that she would not remove Lorine from Mory's Haven without a doctor's approval. In anticipation of Lorine's possible release, Cheryl had planned on conducting a home study to determine what was needed for Lorine to live in the farmhouse. The home study had not been completed, in part because the physical therapist had recommended waiting to see how Lorine progressed.

The county court took the matter under advisement and, on August 1, 2014, issued a written ruling. It first addressed the appointment of a conservator, finding that there was clear and convincing evidence that a conservator was necessary. The court found that Lorine suffered from mental and physical disabilities that left her unable to manage her property and that her property would be wasted or dissipated without proper management. The court rejected Cheryl's argument that a conservator was unnecessary in light of her status as Lorine's attorney in fact under the power of attorney for asset management. The court found that Cheryl had "done a poor job of asset management and quite possibly breached the fiduciary duty that an agent has toward a principal." The court further found that it was in Lorine's best interests to pass over Cheryl, even though she had statutory priority for appointment as Lorine's conservator. It found that although there was animosity between Margo and Cheryl, it was in Lorine's best interests to appoint Margo, the person with next priority, as conservator.

Addressing the appointment of a guardian, the court found that there was clear and convincing evidence that Lorine was incapacitated. The court then addressed Cheryl's argument that a guardian was unnecessary because Cheryl had been named Lorine's attorney in fact under the power of attorney for health care. The court acknowledged that Cheryl was concerned about Lorine's care, but found that Cheryl had been "difficult to work with regarding Lorine's physical placement"

and that her conduct had resulted in restriction of her visitation privileges at Mory's Haven. The court also noted that Cheryl had "blocked Lorine's children from obtaining information" about her health and possibly restricted their contact with Lorine. The court acknowledged Cheryl's statutory priority for appointment as guardian, but found that it was in Lorine's best interests to pass over Cheryl and appoint Margo as her guardian. The court found that a full guardianship was "necessary" and the "least restrictive alternative." The court listed the powers conferred upon Margo as guardian, including the power to arrange for Lorine's medical care.

On August 15, 2014, letters of guardianship and conservatorship were issued. The letters required Margo to obtain court approval before selling real property belonging to Lorine.

Cheryl timely filed a notice of appeal from the court's August 1, 2014, order, which appeal was docketed as case No. A-14-780. The county court then appointed Margo special guardian and conservator pending appeal pursuant to Neb. Rev. Stat. § 30-1601(4) (Cum. Supp. 2014).

*Motion for Authority to Act.*

On September 24, 2014, Margo filed a "Motion for Authority to Act" in which she sought court approval for, among other things, preparing the Mue-Cow property and adjoining farm parcels for auction "so that the proceeds therefrom may be used to support" Lorine. The motion indicated that Lorine had been transferred to an assisted living facility in Wichita. A separately filed "Application for Withdrawal of Funds" stated that Lorine's recurring monthly expenses at the facility totaled $6,275. An inventory of Lorine's assets valued the Mue-Cow property at $110,795, the adjoining 99-acre parcel at $489,535, the adjoining 48-acre parcel at $67,910, the rental home in Columbus at $60,000, and the Wagner Lakes cabin at $46,000.

At the October 23, 2014, hearing on Margo's motion, Rick Grubaugh, a real estate broker and auctioneer, testified that

Margo had contacted him about selling Lorine's properties. He testified that the Mue-Cow property could be used for residential or agricultural purposes but explained that because the property was in a floodway, an owner could not add to existing buildings or construct new buildings. He opined that selling the Mue-Cow property and adjoining parcels of land at the same time would bring the highest price, because it would attract the greatest variety of buyers and because advertising costs would be minimized. In Grubaugh's opinion, the Mue-Cow property would not appreciate in value in its current state, because it needed maintenance. Upon further examination by the court, Grubaugh admitted that he was "guessing" it would be advantageous to sell the tracts together and that excluding the Mue-Cow property from the sale may not have any effect on the sales prices of the other properties.

Margo testified that in her role as guardian and conservator, she had obtained a $75,000 loan to pay for Lorine's nursing home, medical expenses, taxes, and debts. She had spent approximately $46,000 of the borrowed funds, and the court had authorized her to utilize more funds on various expenses. The remaining funds would cover Lorine's expenses through November 2014. Lorine's only income at that time was Social Security of $594 per month.

Margo testified that in September 2014, she reviewed Mue-Cow's corporate records, including a stock ledger, of which she created a summary. The stock ledger and summary showed that as of August 1, Lorine owned 6,799 shares of stock; the only other shareholder of record was Cheryl's deceased husband, Randy, who was listed as the owner of 1,201 shares.

Margo believed that the Mue-Cow property should be sold because it was "the biggest strain on [Lorine's] income." The property had not produced income in a number of years, and because Lorine received no rent for the property, she lost money by retaining it. Margo believed that selling the Mue-Cow property was in Lorine's best interests, because Lorine "desperately need[ed] money . . . to stay in her nursing

home." When asked if she understood that as conservator, she was obligated to take into account any known estate plan, Margo testified that she was "aware of it" but also was aware that she needed to "look at [Lorine's] immediate needs first and to take care of the best interest of [Lorine]."

On cross-examination, Cheryl's attorney began asking Margo about the status of the shareholders in Mue-Cow. The county court interjected and questioned whether it had authority to address the issue of stock ownership in this proceeding. During discussion among the attorneys and the court, Cheryl's attorney indicated that a belated probate estate may have to be opened to address ownership of the shares recorded in Randy's name.

Gary testified that based on his review of Mue-Cow's records and income for the prior 5 years, he did not believe that it would produce any income that could be used for Lorine's support.

Margo and Gary rested, and Cheryl called a real estate broker who testified that he had viewed the properties. The broker did not believe that selling the Mue-Cow property with Lorine's other properties would increase the sale prices.

Cheryl testified that she was willing to pay the Mue-Cow property's expenses, including utilities and maintenance, so that the property would not be a financial drain. Cheryl then offered into evidence a copy of Lorine's will, which the parties had previously filed with the court pursuant to a joint stipulation. The will specifically devised to Cheryl Lorine's personal property, farm machinery, equipment, and livestock; Lorine's shares in Mue-Cow, including any real estate owned by Mue-Cow; and Lorine's interest in the lease of the Wagner Lakes lot and the cabin on the lot. Lorine's residuary estate was divided equally between Margo, Gary, and Cheryl.

At the conclusion of the hearing, the court granted Margo's motion, authorizing her to sell the Mue-Cow property and adjoining parcels of land. The court indicated that it found persuasive Grubaugh's testimony regarding the advisability

of selling the properties at the same time. The court's ruling granting the motion was memorialized in a journal entry and order filed October 23, 2014.

Cheryl timely filed a notice of appeal from the court's order, which appeal was docketed as case No. A-14-971.

On Cheryl's motion, this court consolidated Cheryl's appeals for briefing and decision and allowed the supersedeas bond that she filed on appeal in case No. A-14-780 to serve as the supersedeas bond in the consolidated appeals. Cheryl requested that her supersedeas bond suspend the court's October 23, 2014, order only insofar as it authorized Margo to sell the Mue-Cow property.

## ASSIGNMENTS OF ERROR

Cheryl assigns that the county court erred in (1) determining that the appointment of a guardian for Lorine was the least restrictive means of providing for her care; (2) determining that it was in Lorine's best interests not to appoint Cheryl as her guardian despite Cheryl's statutory priority for appointment; (3) determining that the appointment of a conservator was necessary to manage Lorine's property; (4) determining that it was in Lorine's best interests not to appoint Cheryl as her conservator despite Cheryl's statutory priority for appointment; (5) appointing Margo, rather than a neutral third party, as guardian and conservator; and (6) authorizing Margo to sell the Mue-Cow property.

## STANDARD OF REVIEW

[1,2] An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court. *In re Guardianship of Benjamin E.*, 289 Neb. 693, 856 N.W.2d 447 (2014). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*.

## ANALYSIS

*Appointment of Margo as Guardian.*

In support of her first and second assignments of error, Cheryl argues that because she was Lorine's attorney in fact under the power of attorney for health care, either no guardian was necessary or she had statutory priority for appointment. Cheryl contends that she "should be allowed to continue to act as attorney in fact for healthcare unless good cause is shown to the contrary." Brief for appellant at 14. Further, Cheryl states that appointing a guardian for Lorine is not "the least restrictive alternative available for providing her continuing care and supervision." *Id.* at 15.

We first address whether the county court erred in not permitting Cheryl to continue to act as Lorine's attorney in fact for health care. A power of attorney for health care is a document executed in accordance with Neb. Rev. Stat. §§ 30-3401 to 30-3432 (Reissue 2008) that authorizes a designated attorney in fact to make health care decisions for the principal when the principal is incapable. § 30-3402(10). Health care decisions include "consent, refusal of consent, or withdrawal of consent to health care." § 30-3402(5). "Health care" means "any treatment, procedure, or intervention to diagnose, cure, care for, or treat the effects of disease, injury, and degenerative conditions." § 30-3402(4). A health care power of attorney becomes effective upon a determination pursuant to § 30-3412 that the principal is incapable of making health care decisions. § 30-3411. The attorney in fact has a duty to consult with medical personnel and make health care decisions in accordance with the principal's wishes or, if his or her wishes are unknown and cannot with reasonable diligence be ascertained, with the principal's best interests. § 30-3418(1).

[3,4] By comparison, a court may appoint a guardian under Neb. Rev. Stat. § 30-2620(a) (Cum. Supp. 2014) if it is satisfied by clear and convincing evidence that (1) the person for whom a guardian is sought is incapacitated and (2) the appointment is necessary or desirable as the least restrictive

alternative available for providing continuing care or supervision of the person alleged to be incapacitated. The persons eligible for appointment as guardian, as well as their respective priorities, are described in Neb. Rev. Stat. § 30-2627 (Reissue 2008). Pertinent here, a person nominated by the incapacitated person in a power of attorney, or a person acting under a power of attorney, has first priority for appointment, while an adult child of the incapacitated person has third priority. § 30-2627(b)(1) and (3). If it is in the best interest of the ward, a court may pass over a person having priority and appoint a person having lower or no priority. § 30-2627(c).

Unless limited by the court, a guardian appointed pursuant to § 30-2620(a) has the same powers, rights, and duties respecting the ward that a parent has respecting an unemancipated minor child. Neb. Rev. Stat. § 30-2628(a) (Cum. Supp. 2014). Those powers and duties include having custody of the ward and establishing the ward's place of abode; making provision for the care, comfort, and maintenance of the ward; and giving any consents or approvals necessary to enable the ward to receive medical or other professional care, counsel, or treatment. § 30-2628(a)(1) through (3).

[5] If a guardian has been appointed and an attorney in fact has been designated and authorized under a valid power of attorney for health care, the attorney in fact's authority to make health care decisions supersedes the guardian's authority to make such decisions. The guardianship statute provides that nothing in a guardian's power "shall be construed to alter the decisionmaking authority of an attorney in fact designated and authorized under sections 30-3401 to 30-3432 to make health care decisions pursuant to a power of attorney for health care." § 30-2628(c). Similarly, the statute governing health care powers of attorney provides that unless the power of attorney provides otherwise, a valid power of attorney for health care supersedes any guardianship or conservatorship proceedings to the extent the proceedings involve the

right to make health care decisions for the protected person. § 30-3420(5)(b) and (c).

As applied to the case before us, these statutes would permit the county court to appoint a guardian under § 30-2620(a) if it is satisfied by clear and convincing evidence that (1) the person for whom a guardian is sought is incapacitated and (2) the appointment is necessary or desirable as the least restrictive alternative available for providing continuing care or supervision of the person alleged to be incapacitated. Further, the county court could pass over Cheryl, a person having priority, and appoint Margo, a person having lower priority, if it was in Lorine's best interests.

[6] These statutes, therefore, permit the coexistence of a guardian and an attorney in fact for health care, but the statutes also make it clear that the authority of the attorney in fact for health care supersedes a guardian's authority when it comes to making health care decisions for the protected person. In the present case, this would mean that despite the county court appointing Margo as guardian, for matters related to Lorine's health care, Cheryl still retained the ultimate authority over health care decisions if her health care power of attorney remained intact. Importantly, however, the statutes discussed above do not preclude a court from considering a ward's best interest and revoking or setting aside a health care power of attorney in favor of a guardianship when the facts support such action.

[7] *In re Trust Created by Nabity*, 289 Neb. 164, 854 N.W.2d 551 (2014), provides such an example. In 1998, a woman executed a power of attorney for health care designating her two daughters as attorneys in fact. After the woman was diagnosed with Alzheimer's disease in 2011, her son petitioned for appointment of a guardian and conservator. One daughter objected on the basis that she was the woman's attorney in fact, and the son moved for a determination of the validity of the power of attorney. Following a hearing, the court set aside the 1998 health care power of attorney pursuant to § 30-3421(1)(d),

which provides that a court can revoke a power of attorney for health care upon finding (1) that the attorney in fact has violated, failed to perform, or is unable to perform the duty to act in a manner consistent with the principal's wishes or, when the principal's wishes are unknown, in the principal's best interest and (2) that the principal lacks the capacity to revoke the power of attorney. The court reasoned that the daughters had failed to act in the woman's best interests by not acknowledging the severity of her condition, not obtaining proper medical care or abiding by physicians' recommendations, and allowing her to make her own health care decisions. After revoking the power of attorney, the court appointed a guardian and conservator for the woman.

The Nebraska Supreme Court affirmed the decision to revoke the power of attorney, determining that the court's finding that the daughters had not acted in the woman's best interests was "amply supported by the evidence." *In re Trust Created by Nabity*, 289 Neb. at 181, 854 N.W.2d at 564. The Supreme Court also rejected the objecting daughter's argument that the 1998 health care power of attorney should have superseded the guardianship, reasoning that there was no valid power of attorney for health care because it was properly set aside. *In re Trust Created by Nabity, supra*.

Although in the case before us, the county court did not expressly revoke the power of attorney for health care prior to appointing a guardian, as the court did in *In re Trust Created by Nabity*, its decision to pass over Cheryl for appointment as guardian involved consideration of the same factors necessary to revoking or setting aside a power of attorney. In finding that it was in Lorine's best interests to pass over Cheryl for appointment, the court in essence determined that Cheryl had failed to act or was unable to act in Lorine's best interests in her role as attorney in fact for health care, which is consistent with the provision in § 30-3421(1) authorizing a court to revoke a power of attorney for health care upon such a finding. The court's finding was supported by

competent evidence, including that (1) Cheryl's disruptive conduct while Lorine was at Mory's Haven resulted in her visitation privileges' being limited, which Groteluschen testified had occurred only one other time in her 11 years at Mory's Haven; (2) when Lorine was admitted to the hospital in March 2014 for her broken hip, her hair was matted, she smelled as if she had not taken a bath in a very long time, and her toenails were an inch long; and (3) although Lorine's dental problems began before the health care power of attorney was signed or became effective, Cheryl had not ensured that Lorine received proper dental care even after Lorine began suffering from Alzheimer's disease and dementia, which the record reflects had reached a moderate to severe level by the time Lorine was admitted to Mory's Haven.

A reading of the court's order in light of this evidence makes it clear that in deciding to pass over Cheryl for the appointment, the court was focused on Cheryl's ability to fulfil her duties as Lorine's attorney in fact for health care. Notably, after finding that it was in Lorine's best interests to appoint Margo as guardian despite Cheryl's statutory priority for appointment, the court explicitly granted Margo the power to arrange for Lorine's medical care. Such a determination necessarily indicates that the court was setting aside or invalidating Cheryl's health care power of attorney in favor of Margo having a guardianship with full authority for health care decisions. While not articulated as precisely as may be preferred, the court's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

Cheryl also argues that the county court erred in determining that the appointment of a guardian for Lorine was the least restrictive means of providing for her care. Under the circumstances of this case, for the county court to determine that a guardianship was not the least restrictive alternative available, the court would have had to find that Cheryl was able to care for Lorine in her capacity as Lorine's attorney in fact

for health care. However, as stated, the evidence supported the contrary finding, and the court therefore did not err in determining that a full guardianship was "necessary" and "the least restrictive alternative" and did not err in passing over Cheryl for the appointment. See *In re Trust Created by Nabity*, 289 Neb. 164, 183, 854 N.W.2d 551, 565 (2014) ("[g]iven that [the proposed ward] cannot make decisions for herself, there is clear and convincing evidence that a permanent guardianship is necessary and is the 'least restrictive alternative available for providing continuing care' for her").

We disagree with Cheryl that *In re Guardianship & Conservatorship of Hartwig*, 11 Neb. App. 526, 656 N.W.2d 268 (2003), compels a different result. In 1992, prior to the effective date of the health care power of attorney statute, a woman executed a power of attorney designating her adult son as her attorney in fact for property and health care decisions. In 1998, after the woman showed signs of dementia, she was placed at a health care center where the son visited her on a daily basis and had a good relationship with her. The evidence established that the son and the nursing home staff adequately cared for the woman. When her grandson successfully petitioned for a guardianship and conservatorship in 2001, resulting in the termination of the son's authority under the power of attorney, this court reversed, and restored the son's authority because there was no evidence that the woman was not receiving proper care.

*In re Guardianship & Conservatorship of Hartwig* is distinguishable from our case. Lorine was admitted to Mory's Haven for rehabilitation following her surgery for her broken hip. Although her immediate medical needs may have been addressed, it was imminent that a permanent placement would need to be chosen for her, and there were legitimate concerns about Cheryl's ability to make that decision in Lorine's best interests. As discussed, the concerns arose out of Cheryl's treatment of Lorine at Mory's Haven, Cheryl's behavior that resulted in her visitation privileges' being restricted, and other

evidence that Lorine had not been properly cared for while under Cheryl's supervision. Although Cheryl testified that she would not move Lorine back to the farmhouse without a physician's approval, there was evidence that Cheryl had begun investigating ways for Lorine to return there. In contrast to *In re Guardianship & Conservatorship of Hartwig*, at the time Margo and Gary filed the petition to appoint a guardian and conservator, Lorine was not well settled in a nursing facility with her care and support adequately provided for into the foreseeable future.

*Appointment of Margo as Conservator.*

In support of her third and fourth assignments of error, Cheryl argues that Margo and Gary failed to prove by clear and convincing evidence that Lorine's property would be wasted or dissipated if a conservator were not appointed. She further argues that as Lorine's attorney in fact under the power of attorney for asset management, she had priority for appointment as conservator.

[8] Under Neb. Rev. Stat. § 30-2630(2) (Reissue 2008), a court may appoint a conservator to manage a person's estate and property affairs if satisfied by clear and convincing evidence that (1) the person is unable to manage his or her property and property affairs effectively for reasons including mental illness, mental deficiency, or physical illness or disability and (2) the person has property that will be wasted or dissipated unless proper management is provided, or funds are needed for the support, care, and welfare of the person and protection is necessary or desirable to obtain or provide the funds.

[9] Pertinent here, a person nominated in a power of attorney or acting under a power of attorney has first priority for appointment as conservator, while an adult child has fifth priority. Neb. Rev. Stat. § 30-2639(b)(1) and (5) (Reissue 2008). If it is in the best interest of the protected person, a court may pass over a person having priority and appoint a person

having lower or no priority. § 30-2639(c). A conservator's powers are listed in Neb. Rev. Stat. §§ 30-2653 and 30-2654 (Reissue 2008) but may be limited by the court. Neb. Rev. Stat. § 30-2655 (Cum. Supp. 2014).

The Nebraska Uniform Power of Attorney Act applies to powers of attorney, other than health care powers of attorney (Neb. Rev. Stat. § 30-4003(2) (Cum. Supp. 2014)), "created before, on, or after January 1, 2013" (Neb. Rev. Stat. § 30-4045(1) (Cum. Supp. 2014)). The act authorizes a principal to nominate a conservator or guardian in his or her power of attorney for consideration by the court in the event that protective proceedings for the principal's estate or person are commenced. Neb. Rev. Stat. § 30-4008(1) (Cum. Supp. 2014). A person appointed guardian or conservator has the same power to revoke or amend the power of attorney that the principal would have had if he or she were not disabled or incapacitated. § 30-4008(2). (We note that the health care power of attorney statute discussed previously contains no similar provision permitting a guardian or conservator to revoke the power of attorney for health care. See §§ 30-3401 to 30-3432.)

*In re Conservatorship of Anderson*, 262 Neb. 51, 628 N.W.2d 233 (2001), provides an example of when a conservatorship may be necessary despite the existence of a power of attorney. In that case, a man appointed his daughter and son-in-law as his attorneys in fact in a durable power of attorney. After November 1998, when the man was admitted to a nursing facility, the daughter and son-in-law took over management of his property and affairs. In the following 2 years, the daughter and son-in-law made gifts from the estate to themselves and their children. After two of the man's grandchildren petitioned for appointment of a conservator for him, the court appointed a bank, a neutral third party, as conservator.

[10] The Nebraska Supreme Court affirmed, reasoning that by making gifts to themselves from the estate, the daughter and son-in-law had violated their fiduciary duties as attorneys

in fact and had shown that the man's assets would be wasted or dissipated unless a conservator were appointed. *Id*. The court explained that an attorney in fact is obligated to act solely for the benefit of the principal and agreed with the trial court's finding that given the daughter and son-in-law's self-dealing, a conservatorship was necessary despite the existence of the power of attorney. *Id.* The court also upheld the finding that it was in the man's best interests to pass over the daughter and son-in-law when appointing a conservator, despite their statutory priority for appointment. *Id.*

Although Cheryl might not have made gifts to herself from Lorine's estate, the same result that was reached in *In re Conservatorship of Anderson* is warranted here. The durable power of attorney for asset management executed by Lorine in March 2006 became effective immediately. The GAL indicated that Cheryl did not understand her fiduciary duties as Lorine's attorney in fact, and Cheryl's actions confirm this. Cheryl was first listed on Lorine's bank account in September 2011 and began signing checks out of the account shortly thereafter. A number of checks written to "'Cash'" were unexplained. According to Margo, in 1 month, Cheryl wrote $2,000 in checks to a grocery store; Cheryl also wrote checks for car insurance after Lorine was unable to drive and checks for groceries and for discount store purchases after Lorine was admitted to Mory's Haven. All of these expenses, while not necessarily gifts to Cheryl from Lorine's estate, raise questions about Cheryl's ability to act solely for Lorine's benefit when managing Lorine's property.

More significant, however, is what Cheryl failed to do with Lorine's property while acting as her attorney in fact. During the time Cheryl was acting under the power of attorney for asset management, Lorine's property taxes became delinquent, the resulting tax liens were sold, and the purchasers of the tax liens instituted five foreclosure cases in Platte County against Lorine's properties. When asked about the delinquent taxes, Cheryl testified that they had resulted from "[l]iving expenses

and trying to make it day-to-day." She further testified that she had not been "making good choices" and that she was "trying to learn from those experiences and make good choices." In essence, rather than ensure that Lorine's assets were used to fund her care and support, Cheryl risked losing Lorine's property in foreclosure actions by failing to see to it that Lorine's property taxes were paid.

Based on the foregoing, the county court's finding that Lorine's property would be wasted or dissipated unless proper management were provided was supported by competent evidence, as was its finding that it was in Lorine's best interests to pass over Cheryl despite her statutory priority for appointment.

*Appointment of Neutral Third Party.*

Cheryl's fifth assignment of error is that the county court should have passed over Margo and appointed a neutral third party as guardian and conservator. Cheryl's only argument in support of this assignment is that the GAL "was certainly correct in her judgment" when she recommended that a neutral party be appointed guardian and conservator due to the potential for family disputes. Brief for appellant at 24.

As noted above, in appointing a guardian or conservator, a court may bypass a person with priority and appoint a person with lower or no priority, if it is in the protected person's best interest. §§ 30-2627(c) and 30-2639(c). Other than some animosity between Margo and Cheryl, however, there was nothing indicating that it was in Lorine's best interests to pass over Margo and appoint a neutral third party as guardian and conservator. Bougger testified that when Margo was at Mory's Haven, Lorine was content and peaceful, and Bougger described Margo as open, conscientious, and appropriately concerned about Lorine's care. Similarly, Groteluschen testified that Margo was very caring with Lorine. Once Margo was appointed temporary guardian and conservator, she quickly began taking steps to properly manage Lorine's property,

including securing insurance policies for her properties. Margo had experience in managing assets and making financial decisions by virtue of running her own business in Wichita for 30 years, which business was in good standing and had not had any tax liens or judgments rendered against it. The court's decision to appoint Margo, rather than a neutral third party, as guardian and conservator was supported by competent evidence.

*Authority to Sell Mue-Cow Property.*

Cheryl's sixth assignment of error is that the county court erred in authorizing Margo to sell the Mue-Cow property. Cheryl contends that by authorizing the sale, the court failed to take into account Lorine's will, in which she specifically devised the property to Cheryl. Cheryl also argues that she is a minority shareholder in Mue-Cow, such that the court's order essentially authorized Margo to sell property that did not solely belong to Lorine.

Cheryl's argument concerning Lorine's will is based on Neb. Rev. Stat. § 30-2656 (Reissue 2008), which provides that in selecting the assets of the estate for distribution and utilizing the powers of revocation or withdrawal available for the support of the protected person, a conservator and the court "should take into account any known estate plan of the protected person, including his will." The Uniform Probate Code contains a nearly identical provision, the comment to which explains that "by allowing the conservator access to the estate plan, the risk of inadvertent sales of specifically devised property and the difficult ademption problems such sales often create may be avoided." Unif. Probate Code § 5-418, comment, 8 (part III) U.L.A. at 109 (2013).

[11,12] A specific devise is a provision in a will that passes a particular piece of property. See Black's Law Dictionary 547 (10th ed. 2014). When specifically devised property ceases to be part of the estate at the time of the testator's death, "ademption" occurs. See *In re Estate of Bauer*, 270 Neb.

91, 95, 700 N.W.2d 572, 577 (2005). One type of ademption, called "ademption by implied revocation," occurs when specifically devised property is sold during the testator's lifetime. *Id*. This type of ademption is "'"based upon a presumed alteration of intention arising from the changed condition and circumstances of the testator, or on the presumption that the will would have been different had it been executed under the altered circumstances."'" *Id*. at 95-96, 700 N.W.2d at 577, quoting *In re Estate of Poach*, 257 Neb. 663, 600 N.W.2d 172 (1999).

[13] In Nebraska, the common-law doctrine of ademption has been modified by statute under certain circumstances. *In re Estate of Bauer, supra.* Pertinent here, Neb. Rev. Stat. § 30-2346(a) (Reissue 2008) provides that "[i]f specifically devised property is sold by a conservator or guardian . . . the specific devisee has the right to a general pecuniary devise equal to the net sale price." In other words, when a conservator or guardian, not the testator, sells specifically devised property during the testator's lifetime, no ademption occurs. The proceeds of the sale are not included in the testator's residuary estate, but, rather, are given to the specific devisee to honor the specific devise. As applied here, § 30-2346 means that even if Margo were to sell the Mue-Cow property during Lorine's lifetime, Cheryl would still receive the net sale price of the property as her specific devise upon Lorine's death, assuming that sufficient funds remained in Lorine's estate.

The rationale underlying § 30-2346 is apparent. When a conservator or guardian sells specifically devised property, the presumption that a testator's intent has changed, or that the will would have been different under the altered circumstances, does not apply. As one court explained when addressing the effect of a conservator's sale of specifically devised property, "[t]o allow the sale of . . . various articles of personal property to work an ademption would be to give the court powers to alter and amend the Will of the testatrix and thereby defeat her

testamentary intent." *Will of Clark*, 90 Misc. 2d 925, 930, 396 N.Y.S.2d 593, 596 (N.Y. Sur. Ct. 1977).

[14,15] Understanding § 30-2346 and its rationale helps to inform our analysis of what it means for a conservator and the court to fulfil their duty pursuant to § 30-2656 to "take into account any known estate plan of the protected person." By enacting § 30-2346, the Legislature provided protection to specific devises in the estate plans of incapacitated persons subject to guardianships and conservatorships. Given the heightened protection that specific devises receive by statute, it would seem that a conservator taking into account a protected person's "known estate plan" should invade specifically devised property as a last resort, and only when doing so is clearly necessary for the protected person's care and support. See § 30-2656. Where, as here, there is ample property in a protected person's estate that can be sold to adequately fund the protected person's care without invading specifically devised property, the conservator and the court should not sell the specifically devised property unless circumstances clearly establish that it is in the protected person's best interests to do so. See *In re Guardianship & Conservatorship of Garcia*, 262 Neb. 205, 631 N.W.2d 464 (2001) (describing standard for assessing conservator's exercise of power as whether there is clear and convincing evidence that conservator's actions are in best interests of protected person).

Applying these principles here, we conclude that it was error for the county court to authorize Margo to sell the Mue-Cow property. At the time of the hearing on Margo's "Motion for Authority to Act," the court had before it the estimated values of Lorine's property, which included the Mue-Cow property, valued at $110,795; the adjoining 99-acre parcel, valued at $489,535; the adjoining 48-acre parcel, valued at $67,910; the rental home in Columbus, valued at $60,000; and the Wagner Lakes cabin, valued at $46,000. Lorine's recurring monthly expenses at her nursing facility totaled $6,275, which meant that selling the 99-acre parcel, the 48-acre parcel, and

the rental home in Columbus for a total of $617,445 would have funded Lorine's care for 98 months, or over 8 years. Neither the 99-acre parcel, the 48-acre parcel, nor the rental home in Columbus was specifically devised in Lorine's will, which meant that selling them would have had little to no effect on her estate plan. In short, there was ample property in Lorine's estate that could have been sold to adequately fund Lorine's care for a number of years without invading specifically devised property.

Furthermore, Margo and Gary did not establish by clear and convincing evidence that despite the ample assets available for Lorine's care, it was in Lorine's best interests to sell the specifically devised property. The evidence that the county court relied upon in authorizing the sale of the Mue-Cow property was Grubaugh's testimony that selling all of the properties together would generate the highest sales prices. However, upon questioning by the court, Grubaugh admitted that he was "guessing" it would be advantageous to sell the tracts together and that excluding the Mue-Cow property from the sale may not have any effect on the sales prices of the other properties. Even assuming that it would have had some effect, the benefit of selling the properties together had to be balanced against the goal of protecting Lorine's estate plan. Given the significant values of Lorine's properties that were not specifically devised in her will, any marginal benefit that may have been realized by selling all of the properties together did not justify invading the specifically devised property, especially given Grubaugh's equivocal testimony. While Lorine's circumstances may very well change in the future, rendering it necessary to sell the Mue-Cow property, those circumstances did not exist at the time of the hearing. We also note that although Margo testified that the Mue-Cow property was a "strain" on Lorine's estate, Cheryl testified to her willingness to pay all of the Mue-Cow property's expenses while she lived on the property, which would eliminate any financial drain.

Because we have concluded that the county court erred in authorizing Margo to sell the Mue-Cow property, we need not address Cheryl's argument concerning her alleged minority ownership of Mue-Cow. See *Hall v. County of Lancaster*, 287 Neb. 969, 846 N.W.2d 107 (2014) (appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it). For the reasons stated, we reverse the October 23, 2014, order insofar as it authorized Margo to sell the Mue-Cow property.

## CONCLUSION

For the reasons explained above, we affirm the order appointing Margo guardian and conservator for Lorine in case No. A-14-780 and reverse the order in case No. A-14-971 insofar as it authorized Margo to sell the Mue-Cow property; because Cheryl did not challenge any other aspect of the order in case No. A-14-971, we affirm the remainder of the order.

Judgment in No. A-14-780 affirmed.
Judgment in No. A-14-971 affirmed in part, and in part reversed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Bradley A. Simmons, appellant.

872 N.W.2d 293

Filed December 8, 2015. No. A-15-171.

1. **Rules of Evidence: Appeal and Error.** When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
2. **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.
3. **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.
4. **Evidence: Proof.** Because of its obvious importance, where material exculpatory evidence is destroyed, a showing of bad faith is not necessary.
5. **Assault: Words and Phrases.** Pepper spray is a dangerous instrument as defined by Nebraska law.
6. ____: ____. A dangerous instrument is any object which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury.

Appeal from the District Court for Johnson County: Daniel E. Bryan, Jr., Judge. Affirmed.

Timothy W. Nelsen, Johnson County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

Pirtle, Riedmann, and Bishop, Judges.

Pirtle, Judge.

## INTRODUCTION

After a bench trial, Bradley A. Simmons was found guilty of one count of assault on an officer in the second degree, a Class II felony. He appeals his conviction, asserting that certain evidence should not have been introduced and that the pepper spray used during the altercation should not have been considered a dangerous instrument within the meaning of the Nebraska Revised Statutes. For the reasons that follow, we affirm.

## BACKGROUND

Simmons, an inmate at Tecumseh State Correctional Institution (TSCI), was charged by information with one count of assault on an officer in the second degree. The information alleged that on February 6, 2013, he caused bodily injury to an employee of the Department of Correctional Services while the employee was engaged in the performance of his official duties. Specifically, he was charged with causing bodily injury to caseworker David Daire with pepper spray. The incident took place at TSCI.

Simmons filed a motion in limine on October 6, 2014. Prior to Simmons' motion, the State notified Simmons' counsel that the department no longer had possession of the physical evidence of the incident, because the pepper spray and the surveillance video depicting the incident were destroyed prior to the case's being referred to the Johnson County Attorney for prosecution. Simmons' motion requested that the State not be allowed to present testimony from the department's employees, because they had "intentionally destroyed evidence which may be mitigating to [Simmons] through their own actions and deeds."

On the date of the hearing on Simmons' motion in limine, the parties stipulated that the events resulting in the criminal filing in this case took place on February 6, 2013, and that the department did not notify the county attorney of the case until February 2014. They stipulated that the events were recorded, but that the department routinely destroys all video at least 6 months from the date it is recorded. The joint stipulation noted Simmons believed the video contained exculpatory evidence that would help his defense.

The State asserted the video evidence was destroyed as part of the normal video maintenance routine. The State also asserted the evidence was not exculpatory nor was it unavailable due to bad faith. After the hearing, the district court denied the motion in limine. The court reasoned that the State disclosed the lack of the video without any formal discovery order and that the State did not act in bad faith in failing to preserve evidence. Further, the court found that, although the video could contain potentially useful information, there was no showing that the video had any exculpatory value, and the parties could obtain comparable evidence from witness testimony.

The matter was tried before the district court for Johnson County on January 26 and February 3, 2015.

Daire testified that on February 6, 2013, he observed Simmons at the far end of the housing unit walking toward the "inmate telephones." When Daire saw Simmons again, he was carrying a bag of potato chips and Daire suspected they were not obtained in a way that is permitted. Daire told Simmons to give him the bag of chips. When he did not, Daire told Simmons he intended to search his cell and told him to leave the cell. At that time, Simmons was "lying on the top bunk of the cell." Daire testified that Simmons jumped down off of the bunk, grabbed the bag of chips, and attempted to leave the cell. When Daire asked him to leave the chips, Simmons moved rapidly and said to Daire, "Let's go." Daire radioed that there was an inmate behaving

aggressively and started to back out of the cell. Daire testified that Simmons began to swing his arms at him with closed fists. When Daire radioed a second time, Simmons grabbed the radio microphone from his hand and ripped it off of the cord. Daire said Simmons made contact and struck him around the head and ribs.

Daire said he looked for an opportunity to close the distance between them so Simmons could no longer swing at him. He grabbed Simmons around the waist and pulled him to the ground. During the struggle, Simmons reached over Daire's shoulders and grabbed a canister of pepper spray off of Daire's person, sprayed Daire in the face, and said, "See how this feels." Daire testified Simmons sprayed the pepper spray directly into his eyes, causing him to experience an extreme burning sensation. He was unable to open his eyes because they were tearing up rapidly and because of the pain. Daire was assisted by a case manager who responded to his radio call, and Simmons was secured. Daire was escorted to the staff bathroom to flush his eyes out with running water, then he was escorted to the administration area to shower and wash off the remaining pepper spray. He was taken to a hospital for followup.

Pepper spray is the first line of defense carried by caseworkers and corrections officers when in contact with inmates. A department lieutenant testified that the pepper spray used by the department is a 2-percent solution, which is a weaker solution than that carried by most law enforcement officers. The TSCI warden testified that the pepper spray canister allegedly used by Simmons was taken into evidence, but that it was not retained. He testified that the canister would have been weighed to determine whether it was used, but that such evidence is not a part of the record.

Simmons testified that he had a receipt for the purchase of the bag of chips. He asserted that he never put his hands on Daire and that he did not spray Daire with the pepper spray.

A video of security footage on the day of the incident was eventually discovered, and the parties stipulated that the video, marked exhibit 2, was that video. It was received without objection. The video reflects the beginning of the altercation, showing Daire backing out of a cell and Simmons swinging at him with his left fist, before they moved out of camera range.

The court found the State met its burden of proof, and Simmons was found guilty of assault on an officer in the second degree, a Class II felony. Simmons waived his right to a presentence investigation, and he was sentenced the same day to a term of 3 years' imprisonment. His sentence was to run consecutively to the sentences he was serving at the time. Simmons timely appealed.

## ASSIGNMENTS OF ERROR

Simmons asserts that the department intentionally disposed of relevant evidence and that the district court erred by admitting evidence produced by the department. Simmons also asserts the district court erred in finding that the pepper spray allegedly used by Simmons was a dangerous instrument within the meaning of Neb. Rev. Stat. § 28-930 (Cum. Supp. 2012).

## STANDARD OF REVIEW

[1] When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion. *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015).

## ANALYSIS

*Admission of Evidence.*

Simmons asserts the district court erred in admitting evidence from the department's employees after the department had intentionally disposed of relevant evidence in the case. In

his brief, Simmons states his argument is that "first the evidence destroyed by the [d]epartment . . . showed the incident as it happened, and further the OC Spray canister not being available for fingerprinting is clearly materially exculpatory evidence." Brief for appellant at 7.

Simmons asserts that employees of the department should not have been allowed to testify because the department destroyed potentially exculpatory evidence. Where there has been a pretrial ruling regarding the admissibility of evidence, a party must make a timely and specific objection to the evidence when it is offered at trial in order to preserve any error for appellate review; thus, when a motion in limine to exclude evidence is overruled, the movant must object when the particular evidence which was sought to be excluded by the motion is offered during trial to preserve error for appeal. *State v. Herrera*, 289 Neb. 575, 856 N.W.2d 310 (2014). Simmons' motion in limine sought to prevent the State from presenting witnesses who were employees of the department, and his motion was overruled. At trial, Simmons did not make a specific objection to the testimony or evidence presented, and he did not renew his motion in limine until the close of all of the evidence. Therefore, we find he did not timely renew his motion in limine, and this issue was not properly preserved for appeal.

[2-4] It also appears that Simmons may be asserting on appeal that he was prejudiced because the pepper spray canister used by Simmons was not available. In Nebraska, 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. *State v. Hashman*, 20 Neb. App. 1, 815 N.W.2d 658 (2012). 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 is required.

Following Simmons' motion in limine, the trial court found that the video and canister, which were unavailable at the time, were potentially useful evidence, but there was no showing of bad faith in the department's failure to preserve this evidence. Simmons asserts the pepper spray canister would have been material exculpatory evidence if it had been available for fingerprinting; thus, a showing of bad faith was not necessary.

At trial, the State provided video evidence of Simmons swinging at Daire, and witnesses testified that Simmons struck Daire and sprayed him with pepper spray. Although a fingerprint analysis of the canister could have been helpful, there was ample evidence that Simmons dispensed the pepper spray during the altercation with Daire. There is no showing that the department acted in bad faith in destroying the canister. Thus, the district court did not abuse its discretion in allowing the State to present the evidence. This assignment of error is without merit.

*Dangerous Instrument.*

According to the Nebraska Revised Statutes, a person commits the offense of assault on an officer if he or she intentionally, knowingly, or recklessly causes bodily injury with a dangerous instrument to a peace officer, a probation officer, or an employee of the department, and the offense is committed while such employee is engaged in the performance of his or her official duties. § 28-930(1).

[5] While the appellate courts of Nebraska have not addressed the specific issue of whether pepper spray is a dangerous instrument, several other states have concluded that it can be considered a dangerous instrument capable of causing bodily injury. See, *U.S. v. Bartolotta*, 153 F.3d 875 (8th Cir.

1998) (serious bodily injury did result from use of mace); *People v. Blake*, 117 Cal. App. 4th 543, 557, 11 Cal. Rptr. 3d 678, 688 (2004) ("[m]ost courts have found tear gas, mace or pepper spray to be dangerous or deadly weapons capable of inflicting great bodily injury"); *State v. Ovechka*, 292 Conn. 533, 975 A.2d 1 (2009) (injuries suffered by victim supported finding that pepper spray is dangerous instrument or dangerous weapon); *Handy v. State*, 357 Md. 685, 745 A.2d 1107 (2000) (victim's temporary blindness and burning in his eye was sufficient evidence of serious physical harm to render pepper spray used in robbery as dangerous weapon). For the reasons stated below, we find that pepper spray is a dangerous instrument as defined by Nebraska law.

[6] Nebraska case law has defined a dangerous instrument as "any object which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury." *State v. Romo*, 12 Neb. App. 472, 476, 676 N.W.2d 737, 741 (2004). It might, for example, be a piece of lumber, a hammer, or many other physical objects. *State v. Hatwan*, 208 Neb. 450, 303 N.W.2d 779 (1981). For the purposes of the Nebraska Criminal Code, the Nebraska Revised Statutes define bodily injury as "physical pain, illness, or any impairment of physical condition." Neb. Rev. Stat. § 28-109(4) (Reissue 2008).

Simmons asserts the evidence admitted at trial showed the department does not allow dangerous instruments or weapons to be used in the housing units at TSCI. Therefore, he asserts, it follows that the pepper spray commonly carried by the caseworkers and employees at TSCI cannot be considered a dangerous instrument. He also asserts that the pepper spray did not cause "bodily injury" because Daire suffered only temporary pain, which could be treated with "a shower with baby soap." Brief for appellant at 7.

The pain caused to Daire, though temporary, clearly comes within the definition of "bodily injury" as defined by the

statutes. After being sprayed with pepper spray, Daire experienced pain which impaired his ability to see for the period of time that passed before he was able to rinse his eyes and face. Further, the pepper spray used by Simmons was capable of causing bodily injury, and was used in a way that did cause injury, so it must come within the definition of a dangerous instrument under the statutes. We find the district court did not err in determining that the pepper spray was a dangerous instrument within the meaning of § 28-930.

## CONCLUSION

We find the district court did not err in allowing the State to present evidence and in determining that the pepper spray used by Simmons was a dangerous instrument as defined by the Nebraska Revised Statutes.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Sarah K., appellee, v.
Jonathan K., appellant.

Sarah K., on behalf of Tegan K.,
a minor child, appellee, v.
Jonathan K., appellant.

873 N.W.2d 428

Filed December 22, 2015. Nos. A-15-150, A-15-152.

1. **Injunction: Judgments: Appeal and Error.** A protection order pursuant to Neb. Rev. Stat. § 42-924 (Cum. Supp. 2014) is analogous to an injunction. Thus, 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. However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Pleadings: Affidavits: Time.** Neither Neb. Rev. Stat. § 42-903(1)(a) (Cum. Supp. 2014) nor Neb. Rev. Stat. § 42-924(1) (Cum. Supp. 2014) imposes any limitation on the time during which a victim of domestic abuse resulting in bodily injury can file a petition and affidavit seeking a protection order. However, this does not mean that the remoteness of the abuse is irrelevant to the issue of whether a protection order is warranted.
3. **Judgments: Evidence: Time.** Remoteness of past abuse is a matter for a court to consider in weighing the evidence before it while deciding whether to issue a protection order.

Appeal from the District Court for Lancaster County: Thomas W. Fox, County Judge. Affirmed.

Matt Catlett, of Law Office of Matt Catlett, for appellant.

Steffanie J. Garner Kotik, of Kotik & McClure Law, for appellee.

Pirtle, Riedmann, and Bishop, Judges.

Bishop, Judge.

Jonathan K. appeals from orders of the district court for Lancaster County granting petitions for domestic abuse protection orders filed by his wife, Sarah K., on behalf of herself and her minor daughter, Tegan K. Jonathan's sole contention is that because the most recent abuse alleged in the petitions occurred 12 weeks prior to the filing of the petitions, it was too remote in time to support the entry of protection orders. We affirm.

## BACKGROUND

In January 2015, pursuant to Neb. Rev. Stat. § 42-924 (Cum. Supp. 2014), Sarah filed petitions and affidavits for domestic abuse protection orders against Jonathan on behalf of herself and Tegan, who was 1 year old. In Sarah's affidavit filed in her own behalf, the most recent incident of domestic abuse that she described occurred on November 6, 2014. During an argument on that date, Jonathan placed Sarah in a choke hold. Shortly afterward, when Jonathan saw Sarah taking photographs of the redness on her neck, he "tried to wrestle her phone away" and again placed her in a choke hold. In the 12 weeks following the incident, Jonathan had respected a "'no contact bond'" issued in the resulting criminal case. Nevertheless, due to a 5½-year history of incidents, Sarah feared "likely further violence."

Sarah described the next most recent incident of abuse as occurring on November 2, 2014. On that date, she awoke around midnight to find Jonathan sitting on the side of the bed, urinating on the floor. He was too intoxicated to clean up the mess, so Sarah cleaned it while holding Tegan in her arms. Jonathan pulled Tegan from Sarah's arms "with enough force that if [Sarah] hadn't let her go, it really would

have torqued her body/torso." Sarah "backhanded" Jonathan's shoulder, and he then "forcefully backhanded" the left side of Sarah's face.

The third most recent incident was based on photographs dated October 12, 2014, which were stored in Sarah's cell phone and showed a red mark on the back of her right hand or wrist. Although Sarah did not remember the incident that caused the mark, she believed that Jonathan had "dealt some form of blow" to her hand or wrist.

At the conclusion of her affidavit, Sarah wrote:

> [M]y increasing documentation indicates a history and pattern of recurring violence, from Fall of 2009 to the present, including damage to home (walls, doors, and possessions), harm to self ([Jonathan] will throw his body into walls, doors, has hit head on table and with drinking glass), and both violence and sexual assault towards me.

Sarah stated that she feared further violence in the absence of continued separation from Jonathan.

In Sarah's affidavit filed on Tegan's behalf, the first two incidents of alleged abuse were the same as those described in Sarah's own affidavit. Sarah indicated that Tegan witnessed Jonathan placing Sarah in a choke hold twice on November 6, 2014, and that Jonathan pulled Tegan from Sarah's arms during the incident on November 2. The third incident occurred earlier that year on March 10, when during an argument, Jonathan threw a glassful of cold water on Sarah and Tegan as they lay together in bed.

An evidentiary hearing on the petitions was scheduled for February 6, 2015. Sarah testified that the allegations in the petitions and affidavits were true and correct. The court admitted the petitions and affidavits into evidence and asked Jonathan if he had any questions of Sarah. At that point, Jonathan requested a continuance to obtain counsel, and the court continued the hearing to February 20.

At the February 20, 2015, hearing, Jonathan appeared with counsel. On cross-examination, Sarah testified that she did not have any contact with Jonathan between the incident on November 6, 2014, and the filing of the petitions in January 2015. She further testified that she initiated the protection order proceedings after she learned the criminal charges against Jonathan arising out of the November 6, 2014, incident would be dismissed and he would no longer be subject to a no contact order in the criminal case. She acknowledged that neither she nor Tegan was "in imminent bodily danger" from Jonathan on the date she filed the petitions.

Jonathan testified that during the incident on November 6, 2014, Sarah struck him first and Tegan was not in the room. Regarding the November 2 incident, Jonathan testified that Sarah might have been drinking as well. Jonathan did not recall the October 12 incident but testified that because Sarah had struck him "multiple times in the past," the red mark could have resulted from Jonathan protecting himself. Jonathan further testified that he had no contact with Sarah or Tegan between the November 6 incident and the date the petitions were filed. He explained that as a condition of bond in the criminal case arising out of the November 6 incident, he was prohibited from having contact with Sarah. Jonathan testified that the criminal case had been "dismissed fully" upon his entry into a diversion program.

At the close of the evidence, Jonathan's counsel argued that based on *Ditmars v. Ditmars*, 18 Neb. App. 568, 788 N.W.2d 817 (2010), the allegations of abuse in Sarah's petitions were too remote in time to support entry of protection orders.

On February 20, 2015, following the hearing, the court entered domestic abuse protection orders against Jonathan in favor of Sarah and Tegan. The form orders enjoined Jonathan for a period of 1 year from imposing any restraint upon the person or liberty of Sarah or Tegan or threatening, assaulting, molesting, attacking, or otherwise disturbing the peace of

Sarah or Tegan. Jonathan was also ordered to stay away from Sarah's residence and Tegan's daycare.

Jonathan timely appealed the protection orders to this court. After briefing was completed, this court on its own motion consolidated the appeals for disposition.

## ASSIGNMENTS OF ERROR

In each appeal, Jonathan assigns that the district court erred in granting a petition for a domestic abuse protection order, based on insufficient evidence.

## STANDARD OF REVIEW

[1] A protection order pursuant to § 42-924 is analogous to an injunction. *Torres v. Morales*, 287 Neb. 587, 843 N.W.2d 805 (2014). Thus, the grant or denial of a protection order is reviewed de novo on the record. *Id*. In such de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court. *Id*. However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id*.

## ANALYSIS

Section 42-924(1) of the Protection from Domestic Abuse Act permits "[a]ny victim of domestic abuse" to file a petition and affidavit for a protection order. The act defines "abuse" in pertinent part 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 means of credible threat, another person in fear of bodily injury. . . ; or
>
> (c) Engaging in sexual contact or sexual penetration without consent as defined in section 28-318.

Neb. Rev. Stat. § 42-903(1) (Cum. Supp. 2014). Upon the filing of a petition, if grounds do not exist for the issuance of an ex parte temporary protection order, a court must schedule an evidentiary hearing on the petition to be held within 14 days and cause notice of the hearing to be given to the petitioner and respondent. Neb. Rev. Stat. § 42-925(2) (Cum. Supp. 2014). A protection order issued pursuant to § 42-924 remains in effect for a period of 1 year unless dismissed or modified by the court prior to that date. § 42-925(4).

For a protection order to be entered under these statutes, Sarah was required to prove that she and Tegan were the victims of domestic abuse in that Jonathan had attempted to cause or had intentionally and knowingly caused bodily injury with or without a dangerous instrument. §§ 42-903(1)(a) and 42-924(1). Jonathan does not dispute that Sarah made such a showing in that she proved that he (1) twice placed Sarah in a choke hold; (2) "forcefully backhanded" Sarah's face; (3) pulled Tegan from Sarah's arms "with enough force that if [Sarah] hadn't let her go, it really would have torqued her body/torso"; and (4) threw a glassful of cold water on Sarah and Tegan as they lay in bed.

However, Jonathan suggests that "a showing of abuse is not enough — the petitioner must still be reasonably prompt in seeking the protection order." Reply brief for appellant in case No. A-15-150 at 2. Jonathan acknowledges that "the legislature has imposed no specific time limitation with respect to the filing of a petition for a domestic abuse protection order." Brief for appellant in case No. A-15-150 at 8. But Jonathan argues "there is unquestionably *some* limitation." *Id*. (emphasis in original). Jonathan's sole argument on appeal is that the allegations of abuse in Sarah's petitions and affidavits were too remote in time to support the entry of protection orders against him. As he did before the trial court, Jonathan relies on *Ditmars v. Ditmars*, 18 Neb. App. 568, 788 N.W.2d 817 (2010), to support his position.

In *Ditmars*, Elena Ditmars filed petitions for domestic abuse protection orders against her husband, Chalmer Ditmars, in her own behalf and on behalf of her minor son. The allegations of abuse in Elena's petitions and affidavits, which were filed in the district court for Lancaster County in November 2009, were that in September 2009 in rural Kansas, Chalmer had insisted that Elena have sex with him on a daily basis. Elena further alleged that in April 2009 in Kansas, Chalmer became angry, because she would not have sex with him, and stood outside pretending to fire a gun at the house and laughing "'like he was crazy.'" *Id*. at 570, 788 N.W.2d at 819. At a hearing on the petition, the evidence showed that Elena had moved to Nebraska with her son at the end of September 2009 and that Chalmer and Elena had not seen each other since then. Chalmer had also filed for divorce.

After the district court entered protection orders against Chalmer, he appealed to this court, and the orders were reversed. Notably, we began our analysis in *Ditmars* by noting that the definitions of abuse contained in subsections (a) and (c) of § 42-903(1) (Reissue 2008) were not at issue. We stated that we would limit our consideration to whether Elena proved abuse under § 42-903(1)(b), which at the time defined abuse as "[p]lacing, by physical menace, another person in fear of imminent bodily injury . . . ." Thus, the question before this court at that time was whether Elena had shown that Chalmer, by physical menace, had placed her or her son in fear of imminent bodily injury. *Ditmars, supra*.

In *Ditmars*, we explained that in *Cloeter v. Cloeter*, 17 Neb. App. 741, 770 N.W.2d 660 (2009), we had recently concluded that imminent bodily injury in the context of the Protection from Domestic Abuse Act meant an immediate, real threat to one's safety that places one in immediate danger of bodily injury, that is, bodily injury that is likely to occur at any moment. We then stated, "Assuming without deciding that Elena's allegations rise to the level of abuse contemplated by the [a]ct, we determine that the incidents alleged by Elena

are too remote in time to support entry of a protection order." *Ditmars*, 18 Neb. App. at 572, 788 N.W.2d at 821. We noted that the alleged abuse included incidents that occurred months prior to Elena's filing of the petitions and that Elena and her son had moved from Chalmer's home at the end of September 2009, ceasing contact with Chalmer at that point. We held that "the record does not support a conclusion that Elena was placed in fear of imminent bodily injury." *Id.* at 573, 788 N.W.2d at 821. Summarizing our holding, we stated that "the facts upon which the protective orders rest are stale, and as a result, the proof of fear of an imminent bodily injury [was] insufficient." *Id.*

Jonathan contends that *Ditmars v. Ditmars*, 18 Neb. App. 568, 788 N.W.2d 817 (2010), requires reversal of the protection orders against him because in *Ditmars*, this court "assumed" there was abuse and decided the case based on the remoteness in time between the abuse and the filing of the petition seeking a protection order. Reply brief for appellant in case No. A-15-150 at 2 (emphasis omitted). Jonathan argues that Sarah waited "twice" as long as Elena to seek protection orders, brief for appellant in case No. A-15-150 at 8, and that *Ditmars* "stands for the non-controversial proposition that a person seeking a domestic abuse protection order must be reasonably prompt in doing so," reply brief for appellant in case No. A-15-150 at 3. Jonathan argues that, similar to the facts of *Ditmars*, Sarah and Tegan had no contact with Jonathan between the most recent alleged abuse and the filing of Sarah's petitions. Jonathan also urges that the protection orders should be reversed because Sarah admitted that she and Tegan were not "in imminent bodily danger" on the date the petitions were filed, just as Elena was not in imminent danger once she moved to Nebraska.

*Ditmars* does not compel us to reverse the protection orders in this case, for two reasons. First, in *Ditmars*, we limited our discussion to the definition of abuse contained in § 42-903(1)(b), which at the time defined abuse as "[p]lacing,

by physical menace, another person in fear of imminent bodily injury . . . .” In the instant case, the evidence revealed past instances of actual physical abuse, which implicated the definition of abuse contained in § 42-903(1)(a) (Cum. Supp. 2014), which defines abuse as “[a]ttempting to cause or intentionally and knowingly causing bodily injury with or without a dangerous instrument.” While Elena, the petitioner in *Ditmars*, was required to establish a fear of “imminent bodily injury” based on the law at that time, § 42-903(1)(b) (Reissue 2008), in the instant case, Sarah was not required to make any such showing. We reject Jonathan’s contention that *Ditmars*’ discussion of imminent bodily injury and the remoteness of abuse under § 42-903(1)(b) applies to all domestic abuse protection order cases, regardless of which definition of abuse is involved.

The second reason that *Ditmars* does not compel reversal of the protection orders is that 2 years after *Ditmars* was decided, the Nebraska Legislature amended the definition of abuse contained in § 42-903(1)(b). As noted above, at the time of *Ditmars*, § 42-903(1)(b) defined abuse as “[p]lacing, by physical menace, another person in fear of imminent bodily injury . . . .” In 2012, the statute was amended, in relevant part, to say that abuse means “[p]lacing, by means of credible threat, another person in fear of bodily injury.” See § 42-903(1)(b) (Cum. Supp. 2014). The Legislature had removed from the definition the requirement that the alleged abuse victim fear “imminent” bodily injury, which requirement weighed heavily in this court’s analysis in *Ditmars*. The 2012 legislative amendments render the continuing precedential value of *Ditmars* questionable, particularly with regard to any discussion therein about “imminent” bodily injury. See *Linda N. v. William N.*, 289 Neb. 607, 856 N.W.2d 436 (2014) (explaining statutory amendment and legislative intent behind it).

[2,3] Other than *Ditmars v. Ditmars*, 18 Neb. App. 568, 788 N.W.2d 817 (2010), Jonathan cites no Nebraska case reversing

a domestic abuse protection order based solely on the remoteness of the alleged abuse, and our research has uncovered none. We note that neither § 42-903(1)(a) nor § 42-924(1) imposes any limitation on the time during which a victim of domestic abuse resulting in bodily injury can file a petition and affidavit seeking a protection order. However, this does not mean that the remoteness of the abuse is irrelevant to the issue of whether a protection order is warranted. See *Steckler v. Steckler*, 492 N.W.2d 76, 81 (N.D. 1992) ("[t]he remoteness of the [past abuse] incident is a matter for the court to consider in weighing the evidence before it").

We agree that remoteness of past abuse may be considered by the court, and we appreciate Jonathan's concern that a remote incident of abuse may not always support the issuance of a domestic abuse protection order. However, based on the evidence produced in this case, we cannot conclude that the abuse alleged was too remote in time to support entry of the protection orders. See *Coburn v. Coburn*, 342 Md. 244, 258, 674 A.2d 951, 958 (1996) ("[d]ifferent remedies are required when there has been an isolated act of abuse that is unlikely to recur, as compared to an egregious act of abuse preceded by a pattern of abuse"). Significantly, Sarah testified that she filed the petitions because the no contact order in Jonathan's criminal case resulting from the November 6, 2014, incident was expiring. During the 12-week period between the November 6 incident and the filing of the petitions, Sarah had the protection of the no contact order, which successfully kept Jonathan separated from Sarah and Tegan for that period. Although nothing prevented Sarah from seeking protection orders sooner, her delay in seeking the orders was not arbitrary or unreasonable under the circumstances, and it did not render the incidents of abuse too remote to justify entry of the orders.

Furthermore, while Sarah testified that she did not feel that she and Tegan were in "imminent bodily danger" from Jonathan on the date she filed the petitions, as previously

discussed, neither § 42-903(1)(a) nor § 42-903(1)(b) in its current form required Sarah to make such a showing. Additionally, the most recent incidents of abuse also must be viewed in light of Sarah's uncontested allegation that they were part of a history and pattern of abuse dating back 5½ years to the fall of 2009. Sarah stated in her affidavit that given the history of abuse, she feared further violence in the absence of continued separation from Jonathan. Thus, while Sarah testified that she and Tegan were not in "imminent bodily danger" from Jonathan, Sarah nevertheless had a present fear of future abuse by Jonathan if he were allowed to have contact with her and Tegan.

Based on our de novo review of the record, we conclude that the district court did not err in entering protection orders against Jonathan.

## CONCLUSION

For the foregoing reasons, we affirm the protection orders issued by the district court for Lancaster County.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Debra Yost, appellant and cross-appellee, v. Davita, Inc., appellee and cross-appellant.

873 N.W.2d 435

Filed December 29, 2015. Nos. A-15-197, A-15-234, A-15-235.

1. **Workers' Compensation: Appeal and Error.** On appellate review, the findings of fact made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
2. **Workers' Compensation: Evidence: Appeal and Error.** If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court.
3. **Workers' Compensation.** Under Neb. Rev. Stat. § 48-120(1)(a) (Supp. 2015), an employer is liable for all reasonable medical, surgical, and hospital services which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment.
4. ____. Whether medical treatment is reasonable or necessary to treat a workers' compensation claimant's compensable injury is a question of fact.
5. **Workers' Compensation: Appeal and Error.** Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
6. **Workers' Compensation.** A procedure that provides relief from the symptoms of an injury is compensable under Neb. Rev. Stat. § 48-120(1)(a) (Supp. 2015), regardless of whether those symptoms produce a permanent physical impairment or disability.
7. ____. Neb. Rev. Stat. § 48-120(1)(a) (Supp. 2015) requires three factors be established before payment for a medical service is required: that the service (1) is reasonable, (2) is required by the work injury, and (3) will

relieve pain or promote or hasten the employee's restoration to health and employment.

8. **Workers' Compensation: Expert Witnesses: Physicians and Surgeons.** The Workers' Compensation Court is the sole judge of the credibility and weight to be given medical opinions, even when the health care providers do not give live testimony.
9. ____: ____: ____. Resolving conflicts within a health care provider's opinion rests with the Workers' Compensation Court, as the trier of fact.
10. **Workers' Compensation: Expert Witnesses: Physicians and Surgeons: Appeal and Error.** When the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the Workers' Compensation Court.
11. **Workers' Compensation: Proof.** An applicant seeking modification of a workers' compensation award, or an approved agreement and stipulation, under Neb. Rev. Stat. § 48-141 (Reissue 2010) must prove by a preponderance of the evidence that an increase in his or her incapacity is due solely to the injury resulting from the original accident.
12. ____: ____. 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.
13. **Workers' Compensation: Words and Phrases.** In a workers' compensation context, impairment refers to a medical assessment whereas disability relates to employability.
14. **Workers' Compensation: Appeal and Error.** Whether an injured worker's incapacity has increased since the entry of an award of benefits so as to justify modification of the award is a finding of fact, and upon appellate review, the findings of fact made by the trial judge have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
15. **Workers' Compensation: Words and Phrases.** Under Neb. Rev. Stat. § 48-121 (Reissue 2010), a workers' compensation claimant may receive permanent or temporary workers' compensation benefits for either partial or total disability. "Temporary" and "permanent" refer to the duration of disability, while "total" and "partial" refer to the degree or extent of the diminished employability or loss of earning capacity.
16. ____: ____. Temporary disability ordinarily continues until the claimant is restored so far as the permanent character of his or her injuries will permit.
17. **Workers' Compensation.** Compensation for temporary disability ceases as soon as the extent of the claimant's permanent disability is ascertained.

18. ____. Temporary disability should be paid only to the time when it becomes apparent that the employee will get no better or no worse because of the injury.
19. **Workers' Compensation: Words and Phrases.** The term "maximum medical improvement," describes the point of transition from temporary to permanent disability.
20. **Workers' Compensation.** Once a worker has reached maximum medical improvement from a disabling injury and the worker's permanent disability and concomitant decreased earning capacity have been determined, an award of permanent disability is appropriate.
21. ____. Generally, whether a workers' compensation claimant has reached maximum medical improvement is a question of fact.
22. **Workers' Compensation: Judgments: Time: Appeal and Error.** The Nebraska Workers' Compensation Court may, on its own motion or on the motion of any party, modify or change its findings, order, award, or judgment at any time before appeal and within 14 days after the date of such findings, order, award, or judgment.
23. **Workers' Compensation.** The Nebraska Workers' Compensation Court may rule upon any motion addressed to the court by any party to a suit or proceeding, including, but not limited to, motions for summary judgment or other motions for judgment on the pleadings but not including motions for new trial.
24. **Pleadings: Judgments.** A postjudgment motion must be reviewed based on the relief sought by the motion, not based on the title of the motion.
25. **New Trial: Words and Phrases.** A new trial is defined as a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a trial and decision by the court.
26. **Evidence: Words and Phrases.** Newly discovered evidence has been defined as evidence which neither the litigant nor counsel could have discovered by the exercise of reasonable diligence.
27. **New Trial: Evidence.** Newly discovered evidence must be more than merely cumulative; it must be competent, relevant, and material, and of such character as to reasonably justify a belief that its admission would bring about a different result if a new trial were granted.
28. **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 Workers' Compensation Court: Daniel R. Fridrich, Judge. Affirmed.

Eric B. Brown, of Atwood, Holsten, Brown, Deaver & Spier Law Firm, P.C., L.L.O., for appellant.

Caroline M. Westerhold and Stephen J. Schultz, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

Pirtle, Riedmann, and Bishop, Judges.

Riedmann, Judge.

## INTRODUCTION

Debra Yost appeals, and Davita, Inc., cross-appeals, from the further award of the Workers' Compensation Court. On appeal, Yost argues that the compensation court erred in finding that Davita was not required to pay for the cost of her spinal cord stimulator.

On cross-appeal, Davita challenges the compensation court's finding that Yost suffered an increase in incapacity and is now at maximum medical improvement (MMI) for her mental injury. It also challenges the court's refusal to reopen the record for further evidence. We find no merit to the arguments made on appeal or cross-appeal and therefore affirm.

## BACKGROUND

On June 3, 2008, Yost suffered a work-related injury to her lower back. In an award dated November 25, 2009, the compensation court found that she reached MMI with respect to her low-back injury and sustained a 35-percent permanent loss of earning capacity. Davita was ordered to pay Yost's past and future medical expenses.

On May 26, 2010, Yost filed an application for modification, alleging that she suffered material and substantial changes in her physical condition and an increase in incapacity due to her work-related injuries. Yost and Davita entered into an agreement regarding modification of the award. The parties agreed that Yost suffered an increase in incapacity due solely to her work injury and again became temporarily totally disabled pending low-back surgery, which was approved by

Davita. The parties further stipulated that the worsening of Yost's back condition also caused or aggravated depression symptoms. Thus, she was entitled to all reasonable and necessary future medical care for her low-back injuries as well as her depression symptoms. The compensation court approved the parties' agreement and stipulations.

In January 2011, Yost underwent spinal fusion surgery at the L4-5 and L5-S1 levels of her spine. Following surgery, she began to experience back spasms and her pain continued. She underwent additional treatment, including pain management, therapy, and medication. Eventually, based on Yost's continued pain and problems stemming from her lower back, her spinal surgeon recommended a spinal cord stimulator, which he believed would provide her some relief. He referred her to an anesthesiologist and pain specialist who determined that Yost was a candidate for a trial spinal cord stimulator, which she received in March 2013. The trial was considered successful, and Yost received a permanent stimulator in April 2013.

At the time Yost was undergoing continued treatment for her back, she was also seeking treatment for depression, insomnia, and anxiety. In May 2011, Yost was diagnosed with major depression and prescribed antidepressant medication. In August, her treating psychiatrist opined that Yost's depression was secondary in large part to her June 2008 work injury. He did not believe that she was able to work at all given that her depression was impairing her concentration. In May 2013, her treating psychiatrist reported that her condition remained unchanged and that in his opinion, Yost remained permanently and totally disabled from a psychiatric standpoint.

Davita filed a petition for modification, alleging that Yost experienced a decrease in incapacity and had reached MMI. Yost filed an answer and counterclaim for modification, claiming that she had again reached MMI and requesting that the court find her permanently and totally disabled as

a result of her work-related injuries. She also requested that the court order Davita to cover the cost of her spinal cord stimulator.

Trial was held on the parties' requests for modification, and the compensation court entered a further award on February 13, 2015. The court found that Yost had reached MMI for her low-back condition as of October 19, 2012, and for her psychological condition as of June 18, 2014. Relying on the opinions of Drs. Robert Arias and Vithyalakshmi Selvaraj, the court determined that Yost is completely disabled as a result of her depression.

The court also found that Davita was not responsible for the cost of the spinal cord stimulator. The court acknowledged Yost's testimony that the stimulator alleviated some symptoms in her legs and feet, but it emphasized that she still has pain in her lower back. The court also noted that several physicians opined that the stimulator was not necessary and would not alleviate her symptoms. Further, the court observed that Yost testified that the stimulator helped her functionality but did not aid in her return to work.

On February 24, 2015, Davita filed a motion to reopen the evidence. Davita alleged that it had newly discovered evidence relevant to the issues in the case. At a hearing on the motion, an affidavit from Yost's former husband was received into evidence wherein he stated that he had personal knowledge regarding misrepresentations Yost made as to the cause and extent of her back injuries and manipulations she made of medical treatment for the purpose of increasing the value of her workers' compensation claim. The compensation court subsequently entered an order finding that it lacked authority to open the record to receive additional evidence after having already rendered its decision.

On March 3, 2015, Davita filed a motion for offer of proof requesting the opportunity to make an offer of proof to allow it to timely perfect an appeal from the denial of its request to reopen the evidence. On March 4, Yost filed a notice of

her intent to appeal the further award. A hearing on Davita's motion for offer of proof was held on March 6, and the compensation court determined that it no longer had jurisdiction over the matter because Yost had already filed her notice of appeal. Therefore, Davita's motion was dismissed. Yost timely appeals the further award, and Davita cross-appeals the denial of its postjudgment motions. The matters have been consolidated for our consideration.

## ASSIGNMENTS OF ERROR

On appeal, Yost assigns that the compensation court erred in failing to require that Davita pay for the spinal cord stimulator.

On cross-appeal, Davita assigns that the compensation court erred in finding that (1) Yost suffered an increase in incapacity due solely to her work-related accident and that she is at MMI for her mental injury, (2) it lacked authority to reopen the evidentiary record, and (3) it lacked jurisdiction over Davita's motion to make an offer of proof.

## STANDARD OF REVIEW

[1,2] Under Neb. Rev. Stat. § 48-185 (Cum. Supp. 2014), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 775 N.W.2d 179 (2009). On appellate review, the findings of fact made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.* If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is

precluded from substituting its view of the facts for that of the compensation court. *Id*.

## ANALYSIS

*Spinal Cord Stimulator.*

Yost asserts that the compensation court erred in finding that the cost of the spinal cord stimulator was not reasonable. We find no merit to this argument.

[3-5] Under Neb. Rev. Stat. § 48-120(1)(a) (Supp. 2015), an employer is liable for all reasonable medical, surgical, and hospital services which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment. Whether medical treatment is reasonable or necessary to treat a workers' compensation claimant's compensable injury is a question of fact. *Rodriguez v. Hirschbach Motor Lines*, 270 Neb. 757, 707 N.W.2d 232 (2005). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id*.

In the present case, in finding that Davita was not liable for the cost of the spinal cord stimulator, the compensation court relied upon the opinions of Drs. Timothy Burd, Charles Taylon, and Chris Cornett. In an office note dated June 18, 2011, Dr. Burd reported that after reviewing Yost's recent MRI, he did not identify any significant pathology or reasons for her spinal cord stimulator.

Similarly, in a report dated October 20, 2012, Dr. Taylon stated that he was unable to find any objective findings for Yost's continued pain. He stated that he "would challenge any predication by any doctor that further procedures on [Yost] could possibly make her better" and advised that further invasive procedures not be performed. In a report a month later, he specifically stated that he did not feel that Yost would benefit from a spinal cord stimulator. He reported that in his experience, such treatment is a "notorious

failure" in people with benign pain, especially those involved in litigation.

Dr. Cornett's report dated August 1, 2014, indicated that he agreed with Dr. Taylon. Dr. Cornett noted Yost's reports that the stimulator helped with some of her leg pain and toe numbness and tingling but did not really help her back pain, and she still rated her pain as a 6 or 7 out of 10 primarily in her lower back. Dr. Cornett agreed with Dr. Taylon's opinion that Yost was at MMI in October 2012 and therefore did not require additional treatment. Thus, he would not have recommended the spinal cord stimulator.

In its further award, the compensation court cited the opinions from Drs. Burd, Taylon, and Cornett in reaching its decision that the spinal cord stimulator was not reasonable treatment. Specifically, the court stated: "The [c]ourt simply does not believe that for the cost incurred the spinal cord stimulator was reasonable treatment in light of the limited benefit it provided." Yost interprets the court's statements as a finding that the cost for the spinal cord stimulator was not reasonable. Yost misinterprets the court's finding.

As stated above, under § 48-120(1)(a), an employer is liable for all reasonable medical, surgical, and hospital services which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment. The compensation court found that in light of Drs. Burd's, Taylon's, and Cornett's opinions, coupled with Yost's testimony that she still has pain in her lower back after the stimulator was implanted, the cost outweighed the benefit, resulting in a finding that it was not reasonable treatment. We find no error in this analysis.

[6,7] Yost cites to *Pearson v. Archer-Daniels-Midland Milling Co.*, 282 Neb. 400, 803 N.W.2d 489 (2011), to argue that the implementation of the stimulator was reasonable, and therefore compensable, because it alleviated some symptoms in her legs and feet. In *Pearson*, the Supreme Court observed that a procedure that provides relief from the *symptoms* of an

injury is compensable under § 48-120(1)(a) (Reissue 2010), regardless of whether those symptoms produce a permanent physical impairment or disability. (Emphasis in original.) It is important to note, however, that in *Pearson*, the Supreme Court remanded the cause for a factual determination as to whether the procedure for which the employee sought compensation "falls under the provisions of § 48-120." 282 Neb. at 408, 803 N.W.2d at 495. On remand, the Workers' Compensation Court found Pearson's procedure was not compensable because it was not required by the work-related injury and the Supreme Court affirmed. *Pearson v. Archer-Daniels-Midland Milling Co.*, 285 Neb. 568, 828 N.W.2d 154 (2013). In so doing, the court iterated that § 48-120(1)(a) requires three factors be established: that the service (1) is reasonable, (2) is required by the work injury, and (3) will relieve pain or promote or hasten the employee's restoration to health and employment.

In the present case, Yost focuses only on the factor dealing with relief of pain; she ignores the requirements that the service be reasonable and be required by the nature of the injury. Although the stimulator afforded relief to some of Yost's symptoms, she admitted that it did not go high enough to help her lower back, and when questioned by Dr. Cornett, she still rated the pain in her back as a "6 to 7 out of 10." Thus, although there was improvement in some secondary symptoms, the stimulator was not providing relief from the main symptom of her work-related injury, namely her low-back pain. Given the medical testimony of Drs. Burd, Taylon, and Cornett, and Yost's own testimony of the limited relief the stimulator provided, we cannot say the court was clearly wrong in determining that the spinal cord stimulator was not a reasonable service for which Davita was liable.

[8-10] We recognize that some of Yost's medical providers issued opposing viewpoints and opined that the spinal cord stimulator was causally related, reasonable, and necessary to treat her work-related injuries. However, the Workers'

Compensation Court is the sole judge of the credibility and weight to be given medical opinions, even when the health care providers do not give live testimony. *Damme v. Pike Enters.*, 289 Neb. 620, 856 N.W.2d 422 (2014). Resolving conflicts within a health care provider's opinion also rests with the compensation court, as the trier of fact. *Id*. When the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. *Id*. The compensation court chose to find the opinions of Drs. Burd, Taylon, and Cornett credible, and we do not reweigh that decision on appeal. Based on the record before us, we cannot say the compensation court was clearly wrong in determining that Davita was not liable for the costs of the stimulator.

*Increase in Incapacity.*

On cross-appeal, Davita claims that the compensation court erred in finding that Yost suffered an increase in incapacity due solely to her work-related accident. Davita argues that any increase in Yost's incapacity was not due solely to her work-related injury because the compensation court found that any pain and treatment related to the L2-3 level of Yost's spine was not related to the June 2008 work accident, and Yost's depression was exacerbated by her generalized back pain, which included pain at the L2-3 level. We find no merit to this argument.

[11-14] An applicant seeking modification of a workers' compensation award, or an approved agreement and stipulation, under Neb. Rev. Stat. § 48-141 (Reissue 2010) must prove by a preponderance of the evidence that an increase in his or her incapacity is due solely to the injury resulting from the original accident. See *Jurgens v. Irwin Indus. Tool Co.*, 20 Neb. App. 488, 825 N.W.2d 820 (2013). To establish a change in incapacity under § 48-141, an applicant must show a change in impairment and a change in disability. *Jurgens v. Irwin Indus. Tool Co., supra*. Impairment refers to a medical

assessment whereas disability relates to employability. *Id*. Whether an injured worker's incapacity has increased since the entry of an award of benefits so as to justify modification of the award is a finding of fact, and upon appellate review, the findings of fact made by the trial judge have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. See *Rader v. Speer Auto*, 287 Neb. 116, 841 N.W.2d 383 (2013).

In *Sands v. School Dist. Of City of Lincoln*, 7 Neb. App. 28, 581 N.W.2d 894 (1998), this court analyzed the meaning and effect of the phrase "due solely to the injury" to determine whether the evidence supported a finding that an employee's increased disability was due solely to a prior work injury. There, the employee suffered a work-related injury to her knee in 1983. She also had degenerative osteoarthritis which affected her knee. The employee later sought additional benefits based on increased disability.

At the modification hearing, the employee's physician testified that he found it difficult to separate how much disability was due to repeated traumatic events and the presence of arthritis but that the original work injury was a material and substantial factor as it related to the need for knee replacement and the impairment. He also testified that he was unable to determine the amount of impairment that was caused by the natural progression of the preexisting conditions or by new traumas other than the work accident. He further testified that there were several major contributing factors to the employee's treatment including the original work-related injury, the degenerative osteoarthritis, the multiple other incidents of trauma to her knees, and the natural aging process. Despite this testimony, the workers' compensation court found that the employee had suffered an increase in disability due solely to the original work accident and awarded compensation accordingly.

On appeal, we noted that in *Hohnstein v. W.C. Frank*, 237 Neb. 974, 468 N.W.2d 597 (1991), the Supreme Court stated

that the question to be considered was whether the worker's medical expert evidence sufficiently demonstrated the causal connection between the original work-related accident and the increased incapacity. We observed that in *Hohnstein*, the Supreme Court ultimately concluded that for medical testimony to be the basis for an award, it must be sufficiently definite and certain that a conclusion can be drawn that there was a causal connection between the accident and the disability. We reiterated that the compensation court is the sole judge of credibility and that an appellate court does not substitute its judgment for that of the lower court. We thus affirmed, holding that the record did not justify a finding that the trial court clearly erred in determining that the increase in incapacity was due solely to the original accident.

In the present case, in reaching its decision that Yost was permanently and totally disabled as a result of her psychological injury, the compensation court relied on the opinions of Drs. Arias and Selvaraj as well as a functional capacity evaluation. In a November 17, 2014, letter, Dr. Selvaraj wrote that although Yost experienced minor stress from family issues, it is her depression and psychological conditions associated with her work disability that is solely attributable to her incapacity and limitations on her ability to work. She further reported that all of the psychological and psychiatric treatment Yost received was reasonable and necessary to treat injuries resulting from the June 2008 work accident.

Similarly, Dr. Arias agreed that Yost's psychological conditions were causally related to injuries from her original work accident and complications from her back fusion surgery. The functional capacity evaluation accepted the opinions of Drs. Arias and Selvaraj and determined that Yost suffered a 100-percent loss of earning capacity. We cannot find that it was clear error when the compensation court relied on these medical opinions to find Yost's increased incapacity was due solely to her work injury.

We also note that the compensation court made a factual finding that the L2-3 level was not a pain generator based on an opinion by Dr. Cornett. This finding was not challenged on appeal. Thus, all of the pain Yost experiences in her back is, in fact, related to the work accident. And it is her back pain and limitations from her work-related back injury that have exacerbated her depression symptoms to the point that she is unable to work.

Based on the record before us, we find no clear error in the compensation court's decision. We therefore affirm the finding that Yost sustained a 100-percent loss of earning capacity based solely on the 2008 work-related injuries.

*MMI for Psychological Injury.*

Davita next contends that the compensation court erroneously determined that Yost was at MMI for her depression. We disagree.

[15-18] Under Neb. Rev. Stat. § 48-121 (Reissue 2010), a workers' compensation claimant may receive permanent or temporary workers' compensation benefits for either partial or total disability. "Temporary" and "permanent" refer to the duration of disability, while "total" and "partial" refer to the degree or extent of the diminished employability or loss of earning capacity. *Rodriguez v. Hirschbach Motor Lines*, 270 Neb. 757, 707 N.W.2d 232 (2005). Temporary disability ordinarily continues until the claimant is restored so far as the permanent character of his or her injuries will permit. *Id*. Compensation for temporary disability ceases as soon as the extent of the claimant's permanent disability is ascertained. *Id*. In other words, temporary disability should be paid only to the time when it becomes apparent that the employee will get no better or no worse because of the injury. *Id.*

[19-21] The term "maximum medical improvement," or MMI, has been used to describe the point of transition from temporary to permanent disability. See *id*. Once a worker has reached MMI from a disabling injury and the worker's

permanent disability and concomitant decreased earning capacity have been determined, an award of permanent disability is appropriate. *Id*. Generally, whether a workers' compensation claimant has reached MMI is a question of fact. *Id*.

Dr. Arias placed Yost at MMI for her depression as of June 18, 2014, which is the date the compensation court utilized for its findings. Dr. Selvaraj, Yost's treating psychiatrist, indicated that she hoped Yost could return to work and continued to treat her with the hope of improvement. Nevertheless, Dr. Selvaraj also placed Yost at MMI, albeit as of November 17, 2014. Dr. Selvaraj explained that if Yost's physical back injuries are not going to get any better, the prognosis for improvement for her mental condition is "pretty limited." It is undisputed that Yost is at MMI for her back injury, and she has declined additional treatment. Because Yost's depression is dependent upon her physical pain and limitations, the compensation court found that Yost is as good as she is going to get physically and, therefore, psychologically. Again, we recognize there were opinions to the contrary, including medical opinions that Yost was "malingering" and that her depression and anxiety were motivated by secondary gain. However, the compensation court recognized the conflicting evidence as well and nevertheless concluded that the preponderance of the evidence established that Yost had reached MMI for her psychological injury.

We repeat that the compensation court is the sole judge of the credibility and weight to be given medical opinions, even when the health care providers do not give live testimony. See *Damme v. Pike Enters.*, 289 Neb. 620, 856 N.W.2d 422 (2014). Resolving conflicts within a health care provider's opinion also rests with the court, as the trier of fact. *Id*. When the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. *Id*. As such, we find no clear error in the compensation court's factual finding that Yost reached MMI for her depression.

*Motion to Reopen Evidence.*

In filing a motion to reopen evidence, Davita requested that the court reopen the record, accept new evidence, and reconsider its decision contained in the further award. Davita now claims that the compensation court erred in denying its motion to reopen the evidence. We find no merit to this argument.

[22] The Nebraska Workers' Compensation Court may, on its own motion or on the motion of any party, modify or change its findings, order, award, or judgment at any time before appeal and within 14 days after the date of such findings, order, award, or judgment. Neb. Rev. Stat. § 48-180 (Cum. Supp. 2014). Thus, because Davita's motion was filed 11 days after entry of the further award and prior to Yost's appeal, the compensation court had the authority under § 48-180 to modify its findings.

[23] However, the compensation court's authority does not include the ability to rule on motions for new trial. The compensation court may rule upon any motion addressed to the court by any party to a suit or proceeding, including, but not limited to, motions for summary judgment or other motions for judgment on the pleadings but not including motions for new trial. Neb. Rev. Stat. § 48-162.03 (Cum. Supp. 2014). We must therefore determine whether the compensation court properly treated Davita's motion as a request for a new trial.

[24] We recognize that Davita's motion was entitled "Motion to Reopen the Evidence or in the Alternative Motion to Modify Further Award Pursuant to §[§ ]48-180, 48-162.03 and 48-141." At the hearing, Davita argued that in reality its requests were not alternative, but, rather, it was seeking to reopen the evidence and modify the further award. A postjudgment motion must be reviewed based on the relief sought by the motion, not based on the title of the motion. *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004).

[25-27] Under Nebraska law governing general civil procedure, a new trial is defined as a reexamination in the same

court of an issue of fact after a verdict by a jury, report of a referee, or a trial and decision by the court. See, Neb. Rev. Stat. § 25-1142 (Reissue 2008); *Woodhouse Ford v. Laflan, supra*. One of the bases upon which a new trial may be granted is newly discovered evidence. See § 25-1142(7). Newly discovered evidence has been defined as evidence which neither the litigant nor counsel could have discovered by the exercise of reasonable diligence. *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011). Newly discovered evidence must also be more than merely cumulative; it must be competent, relevant, and material, and of such character as to reasonably justify a belief that its admission would bring about a different result if a new trial were granted. *Id*.

In the case at hand, Davita asked the compensation court to reopen the record, accept newly discovered evidence, and reconsider its prior decision based upon its belief that the new evidence would bring about a different result. In other words, Davita asserted that if the compensation court weighed the newly discovered evidence, it might change its decision finding that Yost was totally and permanently disabled. Regardless of how Davita's motion was titled, it was seeking a new trial based upon newly discovered evidence, which is not permitted in the compensation court.

We recognize that in *Woodhouse Ford v. Laflan, supra*, the trial court treated a motion for new trial as a motion to alter or amend, a motion which could be heard in the compensation court. However, in that case, the moving party asked the court to consider newly discovered evidence and then alter its judgment after entry of summary judgment, in which the court only determined that there were no genuine issues of fact for it to decide. Under the definition of a new trial, a party is seeking a reexamination of *an issue of fact* after a verdict, report, or trial. Thus, in *Woodhouse Ford*, the moving party was not actually seeking a reexamination of an issue of fact because no factual findings were made in the entry of summary judgment. Here, the compensation court made factual findings

with respect to the nature and extent of Yost's disability and weighed the credibility of conflicting expert opinions. Thus, Davita was, in fact, seeking a reexamination of factual issues, and the court properly treated the motion as a motion for new trial. We therefore find that the court did not err in denying the motion to reopen evidence.

*Motion for Offer of Proof.*

[28] Davita also asserts that the compensation court erroneously denied its motion to make an offer of proof. Davita sought to make an offer of proof of the newly discovered evidence it obtained in order to complete the record for appellate purposes. Based upon our finding above that the compensation court properly found it did not have the authority to rule on the motion to reopen evidence, we need not address this assignment of error. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Tierney v. Four H Land Co.*, 288 Neb. 586, 852 N.W.2d 292 (2014).

## CONCLUSION

We find no merit to the arguments on appeal or cross-appeal and therefore affirm.

Affirmed.

**Nebraska Court of Appeals**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# State of Nebraska on behalf of Maddox S., a minor child, appellee, v. Matthew E., defendant and third-party plaintiff, appellant, and Stephanie S., third-party defendant, appellee.

873 N.W.2d 208

Filed January 12, 2016. No. A-15-080.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Visitation: Appeal and Error.** Parenting time determinations are also 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. **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.
4. ____: ____. A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result.
5. **Child Custody: Appeal and Error.** In child custody cases, where the credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
6. **Visitation.** The best interests of the children are the primary and paramount considerations in determining and modifying parenting time.
7. ____. The right of parenting time is subject to continuous review by the court, and a party may seek modification of a parenting time order on the grounds that there has been a material change in circumstances.

8. **Child Custody: Words and Phrases.** Neb. Rev. Stat. § 43-2922(11) (Cum. Supp. 2014) of the Parenting Act defines "joint legal custody" as "mutual authority and responsibility of the parents for making mutual fundamental decisions regarding the child's welfare, including choices regarding education and health."
9. **Child Custody.** A trial court's decision to award joint legal or physical custody can be made without parental agreement or consent so long as it is in the child's best interests.

Appeal from the District Court for Lancaster County: Steven D. Burns, Judge. Affirmed.

Terrance A. Poppe and Andrew K. Joyce, of Morrow, Poppe, Watermeier & Lonowski, P.C., for appellant.

Stephanie S., pro se.

Pirtle, Riedmann, and Bishop, Judges.

Bishop, Judge.

Matthew E. appeals from the decision of the district court for Lancaster County modifying the parties' paternity decree.

Prior to this most recent modification, Matthew and Stephanie S. shared joint legal and physical custody of their son, Maddox S. The parties had a "9/5" parenting time schedule so that in every 14-day period Matthew had Maddox 9 days and Stephanie had Maddox 5 days. As for the day-to-day decisionmaking, the parties' parenting plan provided that if the parties were in disagreement on any issue involving Maddox, they were to mediate the issue.

Pursuant to the current modification, the district court maintained the joint legal and physical custody of Maddox with the parties. The court modified the parenting time to reflect an equal 50-50 split with a weekly rotating parenting time schedule; ordered that the party having parenting time be the short-term decisionmaker for Maddox; ordered Stephanie to be the final decisionmaker with regard to extracurricular and sporting activities and recurring or long-term medical,

dental, and eye care needs; and ordered Matthew to be the decisionmaker with regard to Maddox's education and religious upbringing. We affirm.

## BACKGROUND

Matthew and Stephanie are the biological parents of Maddox, born in August 2007. A paternity decree was entered on September 30, 2008. Pursuant to the written stipulation of the parties, the court awarded legal and physical custody of Maddox to Stephanie, subject to Matthew's specific rights of parenting time. The court ordered Matthew to pay $400 per month in child support. Matthew was also ordered to provide health insurance for Maddox as long as it was available through his then-current employer or a subsequent employer at a reasonable cost.

In July 2010, Matthew sought to modify the paternity decree, and a modification order was filed on June 22, 2011. In its June 22 order, the district court approved the written stipulation of the parties and (1) awarded legal and physical custody of Maddox jointly to the parties with parenting time as allocated in the parenting plan, (2) ordered Stephanie to pay $145 per month in child support, and (3) ordered Matthew to provide health insurance for Maddox. Pursuant to the parenting plan, Stephanie was to have parenting time with Maddox "[e]very other weekend beginning on Wednesday at 5:00 p.m. (or the conclusion of school or school activities, whichever [was] later) until the following Monday at 8:00 a.m. (or the commencement of the school day, whichever [was] earlier)." This was a "9/5" parenting plan where, in each 14-day period, Matthew would have parenting time with Maddox 9 days and Stephanie would have parenting time 5 days. During the summers, the parties were to have alternate weeks of parenting time, with the transition occurring on Sundays at 5 p.m. A specific holiday schedule was set forth in the plan. As for the day-to-day decisionmaking, the parties' parenting plan provided that if the parties were in disagreement on

any issue involving Maddox, they were to mediate the issue; however, Matthew was given the authority to decide which school Maddox would attend after discussing the options with Stephanie. The parties also agreed that Maddox would be raised in the Catholic faith. The court ordered that all other terms and provisions "of the Order entered September 30, 2008 and subsequent Order of December 8, 2010 not hereinbefore specifically modified shall remain in full force and effect." (The December 2010 order does not appear in our record.)

In December 2011, Matthew again filed an application to modify, seeking to increase Stephanie's child support obligation and to further reduce her parenting time. In an order filed in June 2012, the district court "overruled" Matthew's application to modify, finding that there had not been a material change in circumstances since the June 2011 modification.

In July 2013, Matthew filed a motion for a court order prohibiting Stephanie from visiting, contacting, or entering on the premises of Maddox's daycare. The court entered a temporary order in August and a permanent order in September (apparently upon Stephanie's agreement), excluding Stephanie from the premises of the daycare except to pick up Maddox at the commencement of her parenting time or to drop him off at the commencement of school.

On October 22, 2013, Stephanie filed an "Application to Modify Parenting Plan," alleging that there had been a substantial and material change in circumstances warranting a modification. Stephanie alleged that in the previous 2 years, Matthew had not exercised all of his parenting time and allowed Maddox to spend a minimum of six overnights per 4-week schedule with his maternal grandparents. Stephanie asked the court to modify the parenting plan to allow for a true "50/50, week on week off" parenting schedule. Matthew filed a responsive pleading and "cross complaint" on February 19, 2014. He denied the allegations in Stephanie's application and asked the court to dismiss the same. In his "cross

complaint," Matthew sought a modification of Stephanie's child support obligation on the basis that her earnings and earning capacity had increased such that application of the Nebraska Child Support Guidelines would increase her obligation by more than 10 percent.

On October 22, 2013, Stephanie also filed an affidavit and application for order to show cause, asking the court for an order requiring Matthew to show cause why he should not be held in contempt for failing to maintain health insurance on Matthew as ordered and for repeatedly violating the parenting plan. An order to show cause was entered on November 1, directing Matthew to appear and show cause why he should not be held in contempt; the contempt action was heard at the same time as the modification hearing on March 17, 2014.

On February 25, 2014, Matthew filed an application for an order to show cause, asking the court for an order requiring Stephanie to appear and show cause why she should not be held in contempt for failing and refusing to allow Matthew to have parenting time on December 27, 2013, from noon to 7 p.m. as set forth in the court-ordered parenting plan. An order to show cause was entered on March 5, 2014, directing Stephanie to appear and show cause why she should not be held in contempt; the contempt action was heard at the same time as the modification hearing on March 17.

The hearing on the modification and contempt actions was held on March 17, 2014. Stephanie appeared pro se. She was 37 years old at the time of the hearing and had been unemployed since December 2013, but said she was interviewing for property management jobs. In the past, she had been an assistant property manager and a dancer. At the time of the hearing, friends were helping her with her living expenses.

Stephanie testified about the difficulties she has had with Matthew. Stephanie testified that Matthew had made "significant" religious decisions without her input; she said that Matthew had Maddox baptized and chose godparents without her agreement and that Matthew did not inform her of

the ceremony. Stephanie testified that Matthew would not let Maddox participate in extracurricular activities such as gymnastics or soccer. She testified that Matthew violated her "phone visitation" with Maddox by not taking her calls, not returning her calls, or interrupting or distracting Maddox when she was able to speak to him. Stephanie testified that Matthew failed to involve her in day-to-day decisionmaking and that if she requested mediation, Matthew said that they had already mediated and did not need to mediate again, even if the issue was new. Stephanie also testified that Matthew had repeatedly failed to provide health insurance for Maddox and that even when Maddox was insured, Matthew would not provide her with the insurance cards, causing her to incur out-of-pocket expenses for doctor visits and prescriptions. Stephanie testified that she thought Maddox needed counseling or therapy, but that Matthew would not cooperate or allow Maddox to attend. Stephanie testified that Matthew would threaten her with contempt if she did not agree with him.

Stephanie testified that Matthew let her father and her stepmother, with whom Stephanie had a difficult relationship (collectively maternal grandparents), have Maddox 6 overnights a month and that she only got Maddox 10 overnights each month. Stephanie asked the court to award joint legal and physical custody, with a "50/50" "week on/week off" parenting schedule. Stephanie told the court she wanted the right of first refusal if Matthew was not going to use all of his parenting time; there was no right of first refusal referenced in the June 2011 parenting plan. She also wanted updated insurance and prescription cards for Maddox. Stephanie wanted Maddox to be able to participate in extracurricular activities with the parties splitting the cost. She also wanted regular "phone visitation" with Maddox without interruptions or distractions.

Matthew was 41 years old at the time of the hearing and was self-employed selling insurance. He has three other children

besides Maddox, who is the youngest. Matthew testified that he was not aware of any court order requiring telephone parenting time between Stephanie and Maddox, but that he had allowed it to take place. He testified that he had Maddox "conditionally baptized" because Maddox's school required a baptismal certificate for kindergarten and Stephanie never provided Maddox's certificate to him; he did not invite Stephanie to the baptism because she would not produce the certificate, she did not invite him to the original baptism, and he did not want a "scene."

Matthew testified that Maddox was not involved in organized extracurricular activities at the time; Matthew has three other children and has them all during the same parenting time and said "it's just not conducive to the schedules." Matthew testified that his other children were not involved in activities until they were older. Matthew said that extracurricular activities at Maddox's age were "nothing more than a glorified recess" and that Stephanie could take Maddox on her time but that he, Matthew, had too much going on. Matthew said that it was more important for Maddox to spend time with him than to be involved in activities.

Matthew testified that Maddox was covered by Medicaid as of the month of the hearing and that there had been a couple months when he was not insured. Matthew testified that Stephanie never notified him when she set up doctor or dental appointments for Maddox—he just got the bills later. Matthew did not give Stephanie insurance cards in the past because he was "tired of just getting the bills" and not being able to participate in appointments.

Matthew testified that Maddox did well in school and had a good relationship with his siblings. Matthew testified that Maddox's maternal grandparents provided before and after school care for Maddox and also transported him to and from school. Matthew testified that Maddox had a good relationship with his maternal grandparents and spent one to two nights a week with them (on nights when Matthew did not

have parenting time with his other children). Matthew testified that he could "pick and choose" who Maddox saw, spent the night with, and associated with during his parenting time and that he chose to let Maddox spend time with his maternal grandparents.

Matthew testified that it was difficult to communicate with Stephanie and that she went "out of [her] way to try and make [him] look bad." Matthew testified that the week on/week off schedule proposed by Stephanie was not in Maddox's best interests because the parties did not get along and because Matthew did not believe that Maddox should be exposed to Stephanie's "outside activities and lifestyle"—he specifically referenced Stephanie's friends and the fact that she could not provide for herself. Matthew said that he did not think Stephanie was a fit parent. He said that she was more concerned about being Maddox's playmate than a caretaker. Matthew wanted sole legal and physical custody. He said he would still attempt to discuss issues involving Maddox with her, even if there was not a requirement to do so.

Ardith S., Stephanie's stepmother, testified that she had a "distant" relationship with Stephanie since Maddox was 3 years old. She testified that Stephanie confronted people all the time so she and her husband had "back[ed] away" from her. Ardith testified that she had no concerns with Maddox living with Matthew. Ardith saw Maddox six overnights per month and before and after school.

Maddox's preschool teacher testified that she taught Maddox during the 2012-13 school year. She testified that Stephanie enrolled Maddox and paid his tuition. She further testified that Matthew said he did not want Maddox to attend preschool; however at some point, he said he did not want to be financially responsible but would allow Maddox to attend. Matthew told the teacher that Maddox would not be attending the preschool graduation; the teacher thought it would be good for Maddox to attend. Maddox did attend graduation with Stephanie, but Matthew did not attend. The preschool teacher

said that Stephanie was always available and was a supportive mother.

Maddox's kindergarten teacher for the 2013-14 school year testified that Stephanie was a "volunteer homeroom captain" and helped with classroom parties. She testified that both Matthew and Stephanie attended parent-teacher conferences, but that they came at separate times. She testified that Maddox had some struggles with reading, but was doing well overall. The teacher testified that Stephanie was interested in Maddox and wanted to help him. She also testified that Maddox's grandfather usually picked him up from school.

In its order filed on April 15, 2014, the district court noted that this was the parties' third attempt to modify the September 2008 decree and that the pending contempt motions were the fifth and sixth requests since March 2010. The district court stated that both parties were focused more on their issues with each other than on how to jointly parent their son. The court set forth two "strategies" or alternatives meant to eliminate the "constant turmoil and bickering" and to provide a better environment for Maddox, and asked the parties to weigh in on the proposed alternatives within 14 days. The first option was to establish a framework for separate parenting, with Maddox living with each parent for 6 months or 1 year at a time, with no parenting time for the parent with whom Maddox did not live. The second alternative was to place legal custody of Maddox with the court and appoint a guardian ad litem (GAL); all decisions, even day-to-day decisions such as whether Maddox should be kept home from school while sick, would have to be approved by the GAL or the court.

In an order filed on May 9, 2014, the court stated that both parties were opposed to both of the court's proposals, but neither party addressed the "root issue" the court sought to have addressed by the proposals. The court therefore entered a temporary order "with the hope that both parents can modify their behavior to permit co-parenting of Maddox." The court

ordered parenting time on a "week on week off basis" with exchanges to occur on Monday morning at school drop off, or 8 a.m. during the summer; there was to be no deviation or trading of parenting time, nor was there to be holiday, special occasion, or midweek parenting time. Legal custody of Maddox was placed with the court, and a GAL was appointed for Maddox; all decisions "which would possibly impact Maddox during the other parent's parenting time" were to be made in writing by the GAL or by order of the court. The court ordered the parties to attend counseling together with Dr. Rick McNeese. A further evidentiary hearing was set for November 17.

At the further evidentiary hearing on November 17, 2014, both parties testified, as did the GAL. Matthew testified that the parties had been following a week on/week off parenting time arrangement since the temporary order was filed on May 9. When asked if it was his preference to do a "9/5" schedule as set forth in the June 2011 order, Matthew said, "No. I mean I — well, I'm agreeable with, you know, certain stipulations to 50/50 parenting time, but I do think that, you know, with that being said that someone ultimately needs to be the final decision maker[.]" Matthew's proposed parenting plan was received into evidence and proposed week on/week off parenting time with transitions to occur Sunday at 7 p.m.; he also proposed that he have the "final say" on all decisions except for which extracurricular activities that Maddox would be involved in (however, he was not to be involved in more than one activity per season). Matthew testified that Maddox had adjusted to the week on/week off arrangement and that such was in Maddox's best interests.

Stephanie also testified that she was willing to continue a week on/week off parenting arrangement and that Maddox had "[a]bsolutely" adjusted to that arrangement. Stephanie testified that she would like to make legal decisions for Maddox and would like to use the GAL to resolve issues instead of always filing in court.

Matthew testified that the parties had met with Dr. McNeese 12 to 15 times and were working on communication, respect for each other, and keeping Maddox out of the middle of things. Matthew believed that he and Stephanie could agree on issues involving Maddox. Stephanie testified that she tried to follow Dr. McNeese's recommendations when communicating with Matthew. She testified that they have continued to have issues since May 2014; she specifically referenced an occasion in July when Matthew was dropping Maddox off, and because Stephanie was not there exactly at 7 p.m., Matthew left and kept Maddox overnight—and he would not return her calls or e-mails until the next day. Stephanie testified that Matthew "enjoy[ed] playing games and manipulating things such as drop-off times."

The GAL testified that she believed that a week on/week off parenting time arrangement was appropriate and that Dr. McNeese agreed. She testified that the problem with the parties was that it was always a power struggle—who was in control and who had the power—and that Dr. McNeese was working with them on that issue.

Stephanie testified that she had been employed as a leasing consultant since September 2014 and that no one really helped her with her expenses now that she was working.

In its order filed on January 7, 2015, the district court noted that it had been 7 years since the case was originally filed and that both parties were still focused more on how to frustrate each other than on how to jointly parent their son. The court concluded that a parenting plan designed to minimize the need of the parents to communicate with, or have contact with, one another was in Maddox's best interests.

The district court maintained the joint legal and physical custody of Maddox with the parties. The court modified the parenting time to reflect a 50-50 split with a weekly rotating parenting time schedule; the court specifically stated there was not to be a separate holiday or special occasion schedule, except to provide that Maddox would be with Stephanie on

Mother's Day and Matthew on Father's Day and to provide time for each parent at Christmas. The court ordered that the party having parenting time be the short-term decisionmaker for Maddox; ordered Stephanie to be the final decisionmaker with regard to extracurricular and sporting activities and recurring or long-term medical, dental, and eye care needs; and ordered Matthew to be the decisionmaker with regard to Maddox's education and religious upbringing. The court ordered Matthew to pay $90 per month in child support. The court ordered Matthew to provide Stephanie with medical, dental, and eye care insurance cards for Maddox, and in the event he fails to provide such cards, he shall be solely responsible for the entirety of any medical, dental, or eye care provided to Maddox while in Stephanie's care. The court made further provisions, but such are not related to this appeal. The court also denied all requests for a finding of contempt.

Matthew timely appeals the district court's order.

## ASSIGNMENTS OF ERROR

Matthew assigns that the district court erred in (1) finding that a material change of circumstances existed and by modifying his parenting time from 9 to 7 days per 14-day period and (2) determining that joint legal custody was in Maddox's best interests.

## STANDARD OF REVIEW

[1] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015).

[2] Parenting time determinations are also 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. *Aguilar v. Schulte*, 22 Neb. App. 80, 848 N.W.2d 644 (2014).

[3,4] 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. *Schrag v. Spear, supra*. A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *Id*.

[5] In child custody cases, where the credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id*.

## ANALYSIS

*Modification of Parenting Time.*

Matthew argues that the district court erred by (1) finding that a material change of circumstances existed to modify the parenting plan and (2) reducing his parenting time from 9 to 7 days per 14-day period. Matthew contends that Stephanie sought modification of the parenting time based on the amount of time Maddox spent with his maternal grandparents and that this does not constitute a material change affecting Maddox's best interests. Further, Matthew argues that the parties' difficulties in communicating and coparenting could not form the basis for modification because "these issues were contemplated at the time that the previous order was entered." Brief for appellant at 16. Additionally, Matthew asserts that the district court "did not provide any justification why reducing [Matthew's] parenting time is in Maddox's best interests." *Id*. at 18. Therefore, "because the District Court's modification was not precipitated by a change in circumstances and because there was not adequate justification to reduce [Matthew's] parenting time, the District Court abused its discretion." *Id*. We disagree.

[6,7] The best interests of the children are the primary and paramount considerations in determining and modifying parenting time. See *Fine v. Fine*, 261 Neb. 836, 626 N.W.2d 526 (2001). The right of parenting time is subject to continuous review by the court, and a party may seek modification of a parenting time order on the grounds that there has been a material change in circumstances. See *Smith-Helstrom v. Yonker*, 253 Neb. 189, 569 N.W.2d 243 (1997).

The record before us and the district court's thorough order addressing the ongoing contentiousness between the parties reveals no abuse of discretion by the district court in modifying the parenting plan. The district court discussed the extensive 7-year history of litigation between the parties and stated in its order:

> The efforts at finding the opposing party in contempt of court have been sprinkled throughout this time, but primarily have found their way to the file near the time the complaints to modify have been filed.
>
> So, here we are, yet again, seven years after the case was originally filed with both parties still focused more on how to frustrate each other than on how to jointly parent their son. . . .
>
> It is not unusual that parents of a child involved in a divorce or paternity case begin the case having the mis-perception that they are ridding themselves of the other parent once and for all. So their rocky start was not so unusual. Most typically, after a few months or a couple of years, the parents figure out they are not ending a relationship with the other parent, they are merely reconfiguring it. Thankfully, it is seldom that after seven years, common sense and focus on the child does not prevail. Usually, parties fall into a pattern of conduct that works for them to raise their child free from interference or supervision by the courts. It has now been seven years and [Matthew] and [Stephanie] have been unable, and in some aspects unwilling to find that pattern.

> The adverse impact the parties' continued turmoil is having, and is likely going to have on Maddox in the future, has become a critical concern. . . .
>
> . . . .
>
> After considering all the evidence, the court has concluded that a parenting plan which is designed to minimize the need of the parents to communicate with, or have contact with, one another is in the best interests of Maddox at this time.

Clearly, at the time of the original decree and the initial modification, the district court did not anticipate that the parties would continue to engage in court battles over their son, as noted in the court's order set forth above. This was the parties' third attempt to modify the September 2008 decree, and the pending contempt motions were the fifth and sixth requests since March 2010.

In our de novo review, we conclude that there was a material change in circumstances affecting Maddox's best interests, namely, that his parents, who in the course of 7 years rarely agreed on anything, needed a modified parenting plan that would minimize opportunities for ongoing conflict. As the district court pointed out, it is "not unusual that parents of a child involved in a divorce or paternity case" may have a "rocky start," but that "typically, after a few months or a couple of years, the parents figure out they are not ending a relationship with the other parent, they are merely reconfiguring it," and the "parties fall into a pattern of conduct that works for them to raise their child free from interference or supervision by the courts." But in this case, even after 7 years, Matthew and Stephanie "have been unable, and in some aspects unwilling to find that pattern."

As to Matthew's argument that the district court failed to justify the reduction in Matthew's parenting time from 9 to 7 days per 14-day period, we note that the district court acknowledged the parties' agreement to a 50-50 split with a weekly rotating parenting time schedule. The record shows

that at the time of the further evidentiary hearing on November 17, 2014, the parties agreed to 50-50 parenting time; in fact, Matthew's proposed parenting plan to the court on that date proposed week on/week off parenting time. Matthew testified that Maddox had adjusted to the week on/week off arrangement and that such was in Maddox's best interests.

In light of Matthew's proposed parenting plan and his own testimony that the week on/week off parenting time was in Maddox's best interests, Matthew cannot now assert that it was error for the district court to adopt such an arrangement. See, e.g., *Linda N. v. William N.*, 289 Neb. 607, 856 N.W.2d 436 (2014) (party cannot complain of error which party has invited court to commit). See, also, *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000).

That said, we also agree with the district court's finding that there is "no substantially greater fault with one party or the other sufficient to warrant either more or less parenting time or parenting responsibilities. Likewise, neither party is such a better parent than the other to warrant favored treatment." The equal sharing of parenting time was agreed to by the parties and supported by the record. Accordingly, we find that the district court did not abuse its discretion in modifying the parenting plan to provide for an equal split of parenting time with a weekly rotating schedule.

*Joint Legal Custody.*

Matthew argues that the district court erred in determining that joint legal custody was in Maddox's best interests. He contends that since the district court observed that "the parties' inability to communicate has made effective co-parenting nearly impossible to achieve," then joint custody cannot be in a child's best interests, and sole custody should have been awarded. Brief for appellant at 20.

We first note that Matthew's "cross complaint" did not seek a change in legal custody, but that at the initial hearing on the modification and contempt actions held March 17, 2014,

Matthew testified that he should be awarded sole legal and physical custody. However, in Matthew's proposed parenting plan submitted to the court at the further evidentiary hearing on November 17, Matthew proposed joint legal custody (which the parties already had), but that he wanted final say in all decisions except extracurricular activities. Therefore, joint legal custody was maintained as requested by Matthew; and we conclude that Matthew's dissatisfaction with how the court divided the decisionmaking authority does not mean the court abused its discretion.

[8,9] The Parenting Act defines "[j]oint legal custody" as "mutual authority and responsibility of the parents for making mutual fundamental decisions regarding the child's welfare, including choices regarding education and health." Neb. Rev. Stat. § 43-2922(11) (Cum. Supp. 2014). We acknowledge that courts typically do not award joint legal custody when the parties are unable to communicate effectively. See, *Kamal v. Imroz*, 277 Neb. 116, 759 N.W.2d 914 (2009) (joint decisionmaking by parents not in child's best interests when parents are unable to communicate face-to-face and there is level of distrust); *Klimek v. Klimek*, 18 Neb. App. 82, 775 N.W.2d 444 (2009) (no abuse of discretion by district court's failure to award joint custody when minor child was confused by temporary joint legal and physical custody arrangement and parents had hard time communicating with one another). However, a trial court's decision to award joint legal or physical custody can be made without parental agreement or consent so long as it is in the child's best interests. Neb. Rev. Stat. § 42-364(3) (Cum. Supp. 2014) states:

> Custody of a minor child may be placed with both parents on a joint legal custody or joint physical custody basis, or both, (a) when both parents agree to such an arrangement in the parenting plan and the court determines that such an arrangement is in the best interests of the child or (b) if the court specifically finds, after a hearing in open court, that joint physical custody or joint legal custody, or both,

> is in the best interests of the minor child regardless of any parental agreement or consent.

And § 42-364 applies to custody disputes in paternity actions. See *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981).

Given that the GAL testified that the problem with the parties was that it was always a power struggle—who was in control and who had the power—we cannot say that the district court abused its discretion by maintaining the joint legal custody previously agreed to and awarded by the court in its June 22, 2011, order. The district court appropriately modified the parenting plan to specifically divide joint legal custody responsibilities between the parties in a manner that would minimize contact and conflict between them. Similar to the court's decision to allocate parenting time equally between the parties, it is clear that the district court also chose not to favor one parent over the other with regard to legal custody, since as it stated, neither parent warranted more or less parenting responsibilities than the other, nor did either parent warrant favored treatment. We agree with the court's assessment.

In its order, the district court stated that "a parenting plan founded on cooperative parenting, the preferred type, is not possible to be accomplished and further efforts at doing so is not in Maddox's best interest[s]." However, the court went on to state:

> Obviously, there are some things about which the parties must be required to communicate and have contact. Matters such as health and medical care and procedures, choice of school and religious matters, and involvement in extracurricular activities. However, one of the parties should be designated as the party who will make final decisions when it comes to these matters if a mutual agreement is not found.

The court ordered that the party having parenting time be the short-term decisionmaker for Maddox; ordered Stephanie to be the final decisionmaker with regard to extracurricular

and sporting activities and recurring or long-term medical, dental, and eye care needs; and ordered Matthew to be the final decisionmaker with regard to Maddox's education and religious upbringing. The court stated, "It is hopeful that by minimizing the amount of contact and communication the parents have through collateral parenting, they can find a means of cooperative parenting that is no longer disruptive to Maddox." Ultimately, by dividing responsibilities and designating which parent had the final say with regard to certain decisions, the court minimized the potential for conflict and the ongoing power struggle between the parties—something that is certainly in Maddox's best interests. We also point out that the court maintained the goal of "mutual agreement" between the parties as set forth in the above-quoted language; only now, the final say as to certain major issues rests with the designated parent if they cannot otherwise agree. This division of final say allows both parties to assume a primary role in decisionmaking for Maddox and avoids favoring one parent over the other, or giving one parent all the control over the other, which the district court clearly sought to avoid.

As previously stated, we recognize that appellate review of joint legal custody issues has often focused on the parties' ability to communicate. See, *Kamal v. Imroz*, 277 Neb. 116, 759 N.W.2d 914 (2009); *Klimek v. Klimek*, 18 Neb. App. 82, 775 N.W.2d 444 (2009). However, appellate courts review custody decisions for an abuse of discretion and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015). See, also, *Aguilar v. Schulte*, 22 Neb. App. 80, 848 N.W.2d 644 (2014). In affording such deference to the trial courts, appellate courts have in some instances declined to reverse trial court decisions where joint custody has been awarded or maintained even when the evidence demonstrates a lack of communication or cooperation between parents.

For example, in *State on behalf of Jakai C. v. Tiffany M.*, 292 Neb. 68, 871 N.W.2d 230 (2015), the Nebraska Supreme Court affirmed a district court's denial of a father's request to modify custody from joint legal custody (mother with physical custody) to sole legal and physical custody despite an apparent inability of the parties to parent cooperatively with one another. Despite finding, among other things, "'[t]hat both parties fail to appropriately communicate in regard to the child, which has caused numerous, unnecessary, problems for both parents,'" the district court nevertheless determined that there was not a change in circumstances warranting modification of custody and that a change in custody was not in the child's best interests. *Id.* at 85, 871 N.W.2d at 242. Our Supreme Court affirmed, stating: "Given the record in this case, and given our standard of review and deference to the trial court's determinations with respect to the credibility of the witnesses, we cannot say that the court's denial of the modification of custody was clearly untenable or an abuse of discretion." *Id*. at 87, 871 N.W.2d at 243.

Likewise, in *Kay v. Ludwig*, 12 Neb. App. 868, 686 N.W.2d 619 (2004), this court affirmed a district court's award of joint legal custody, with physical custody of the parties' minor son awarded to the mother, despite the failure of the parties to agree on joint legal custody. The mother appealed the joint legal custody award; her testimony at trial revealed that communication between herself and the father "had been nearly nonexistent and that they have had a number of confrontations since the separation." *Id*. at 873, 686 N.W.2d at 624. The mother further testified that she was frightened of the father, that he "had become enraged, used profane language, and verbally harassed her," had slammed a door, thrown a telephone, thrown a kitchen table and chairs, and made menacing telephone calls and left a menacing message, among other allegations. *Id*. at 877, 686 N.W.2d at 626. Importantly, in *Ludwig*, this court noted concern that giving the mother sole legal custody along with primary physical custody might

result in the mother not fostering the relationship between the father and their son in the manner contemplated by the Parenting Act.

Similarly in the case before us, we give deference to the district court's attempt to find a workable solution to best protect Maddox's best interests. Because of the power struggle between the parties, the district court was not willing to favor one parent over the other in allocating parental responsibilities or parenting time. Although still encouraging mutual decisionmaking, the court's specific division between the parties as to who has final say on the larger child-rearing decisions splits the parenting "control" and will hopefully minimize conflict between the parties. While such a uniquely tailored joint custody resolution is without precedent, we cannot say the district court abused its discretion given the facts of this case.

Accordingly, upon our de novo review of the record, we find that the district court did not abuse its discretion in maintaining the joint legal custody previously ordered, and in more specifically defining and allocating the responsibilities between the parties.

## CONCLUSION

For the reasons stated above, we affirm the district court's modification of the parties' paternity decree.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Donald L. Shandera III, father of the minor child Austyn M. Shandera, appellee, v. Kaitlyn Ann Schultz, appellant.

876 N.W.2d 667

Filed January 19, 2016. No. A-14-1158.

1. **Paternity: Appeal and Error.** In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Child Custody.** Nebraska's removal jurisprudence does not apply to a child born out of wedlock where there has been no prior adjudication addressing child custody or parenting time. However, it is proper to give some consideration to the factors in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), in determining custody based on the child's best interests.
3. ____. To prevail on a motion to remove a minor child, 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. ____. There are three broad considerations in deciding whether removal is in a child's best interests: (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.
5. ____. In deciding whether removal is in a child's best interests, the court considers the child's quality of life, which may be further broken

down into numerous factors that can be considered by the trial court in assessing the potential for enhancing the quality of life for the child and custodial parent.

6. **Evidence: Appeal and Error.** Where the 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.
7. **Jurisdiction: Appeal and Error.** When the jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court.
8. **Child Custody: Jurisdiction: States.** The Uniform Child Custody Jurisdiction and Enforcement Act was enacted to serve the following purposes: (1) to avoid interstate jurisdictional competition and conflict in child custody matters, (2) to promote cooperation between courts of other states so that a custody determination can be rendered in a state best suited to decide the case in the interest of the child, (3) to discourage the use of the interstate system for continuing custody controversies, (4) to deter child abductions, (5) to avoid relitigation of custody issues, and (6) to facilitate enforcement of custody orders.
9. ____: ____: ____. In order for a state to exercise jurisdiction over a child custody dispute, that state must be the home state as defined by the Uniform Child Custody Jurisdiction and Enforcement Act or fall under limited exceptions to the home state requirement specified by the act.
10. ____: ____: ____. The Uniform Child Custody Jurisdiction and Enforcement Act provides that a state has jurisdiction to make an initial custody determination only if it is the home state of the child on the date of the commencement of the proceeding or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from the state but a parent or person acting as a parent continues to live in the state.
11. **Paternity: Child Custody.** It is well settled that in paternity cases, an unwed mother is initially entitled to automatic custody of the child, but that the issue must ultimately be resolved on the basis of the fitness of the parents and the best interests of the child.
12. **Attorney Fees: Words and Phrases.** The term "frivolous," as used in Neb. Rev. Stat. § 25-824(2) (Reissue 2008), connotes an improper motive or legal position so wholly without merit as to be ridiculous.
13. **Actions.** Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.

Appeal from the District Court for Washington County: John E. Samson, Judge. Affirmed.

Karen S. Nelson, of Schirber & Wagner, L.L.P., for appellant.

Kelly T. Shattuck, of Vacanti Shattuck, for appellee.

Pirtle, Riedmann, and Bishop, Judges.

Pirtle, Judge.

## INTRODUCTION

Kaitlyn Ann Schultz (Kaitlyn) appeals from an order of the district court for Washington County finding that Donald L. Shandera III is the biological father of Austyn M. Shandera and awarding custody of Austyn to Donald. Based on the reasons that follow, we affirm.

## BACKGROUND

Kaitlyn and Donald were in a relationship and began living together in April 2010. In October 2012, Kaitlyn felt the relationship was no longer working and she moved out. She subsequently became pregnant and moved back in with Donald in May 2013. Austyn was born in August 2013.

Over Thanksgiving 2013, Kaitlyn went to visit her mother in Georgia, and upon returning, she ended her relationship with Donald and she and Austyn moved out of Donald's home. On December 4, Kaitlyn moved her belongings out of Donald's home. Kaitlyn then moved to Texas with Austyn, where they continued to live at the time of trial.

On December 9, 2013, Donald filed a petition to establish paternity and custody. A temporary order was entered on May 28, 2014, allowing Kaitlyn to stay in Texas pending trial and granting Donald five 2-week blocks of parenting time before the trial date.

Trial was held on September 3, 2014. Both parties testified, as well as several other witnesses. Donald testified that Kaitlyn had talked to him about moving with Austyn to Texas, but that he did not agree to the move, because he did not want Austyn

to leave. Kaitlyn told Donald and friends that she was leaving Nebraska to get a better job and better housing. Further, she told Donald that she had a job in Texas that was going to pay $35 an hour, but this turned out not to be true.

When Kaitlyn went on maternity leave, she was working at a nursing home in Omaha, Nebraska, making $18.22 an hour. When she went back to work in October 2013, she started working for a different nursing home located in Blair, Nebraska. She took a pay cut, earning $17 per hour, but it allowed her to be closer to Austyn because she no longer had to drive to Omaha. She worked from 2 to 10 p.m. on Mondays, Wednesdays, and Fridays. On the days she worked, she would take Austyn to daycare around 1:30 p.m. and Donald would pick her up around 6 p.m. Kaitlyn testified that on Tuesdays and Thursdays, she was the sole caregiver for Austyn until around 10 p.m. because Donald was taking college classes on those days after work. Kaitlyn testified that she was primarily responsible for feeding Austyn, changing diapers, clothing and bathing Austyn, attending doctor appointments, and putting Austyn down for naps. Kaitlyn also testified that she was often the primary caregiver on the weekends, because Donald was helping his family with harvesting.

Donald testified that while Kaitlyn was on maternity leave, he would routinely wake up each morning with Austyn and give her a bottle before he went to work and would put her to bed almost every night. When he got home from work, he would spend time with Austyn. Donald testified that when Kaitlyn went back to work after maternity leave and was working until 10 p.m., he would pick up Austyn from daycare around 6 p.m. and take care of her the rest of the evening. Kaitlyn acknowledged that Donald was a good father and that she did not have concerns about his parenting ability, but testified that his help with Austyn was generally at her request.

The evidence showed that Donald has lived in Nebraska for all but 2 years of his life, had recently completed college,

and had maintained steady employment. The home in Blair where Kaitlyn and Donald were living when Austyn was born was owned by Donald's parents. At the time of trial, Donald continued to live in the three-bedroom home. Donald's parents also live in Blair. Donald also testified that he has numerous family members that live within about an hour's drive of Blair. Kaitlyn's father lives in Texas, and her mother lives in Georgia. Kaitlyn acknowledged that her only family support in Texas was her father.

When Kaitlyn and Austyn first moved to Texas, they lived with Kaitlyn's father. At the time of trial, she had been renting a two-bedroom apartment for her and Austyn since April 2014, which was somewhere between 20 to 40 minutes from her father's home. When Kaitlyn first moved to Texas, she obtained a job earning $22 an hour. She did not have health benefits, and Austyn was on Medicaid. At the time of trial, she was working at a different job, where she was earning $23.50 an hour and had full benefits. Kaitlyn was also attending a community college, working toward a degree in nursing.

Kaitlyn acknowledged that there was no financial advantage to her move to Texas. She testified that from the time she went back to work after maternity leave until she moved to Texas, Austyn's daycare provider, who was a friend, had not charged her anything for daycare. Kaitlyn testified that at some point, the provider was going to start charging her $100 per week, or $400 per month. Kaitlyn testified that in Texas, she was incurring $580 per month in childcare.

Kaitlyn's mental health was also brought up as an issue of concern. Kaitlyn had been treated for attention deficit disorder and anxiety since she was 10 years old. She testified that at one point, she was taking the highest possible dosage of medication to treat her mental health issues. Due to safety concerns for the baby when she was pregnant, at the suggestion of her psychiatrist, she discontinued the medications during pregnancy and during the time she was breastfeeding Austyn. As

of the date of trial, Kaitlyn had not resumed her medication and had not seen a psychiatrist about what medication she should be taking.

Following trial, the court found that Donald was Austyn's biological father and awarded Donald sole custody of Austyn, subject to Kaitlyn's reasonable parenting time.

## ASSIGNMENTS OF ERROR

Kaitlyn assigns that the trial court erred in (1) applying Nebraska's removal jurisprudence to an initial custody determination in a paternity action, (2) failing to make findings under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), and (3) failing to give her preference in custody of Austyn.

## STANDARD OF REVIEW

[1] In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Citta v. Facka*, 19 Neb. App. 736, 812 N.W.2d 917 (2012).

## ANALYSIS

*Custody.*

Kaitlyn first assigns that the trial court erred in applying Nebraska's removal jurisprudence to an initial custody determination in a paternity action. In its order, the court found that both parties were fit parents and that therefore, the court needed only to determine the best interests of Austyn in regard to which parent should have sole custody. The court stated that a factor affecting the best interests of the child was the fact that Kaitlyn had moved to Texas and intended to stay in

Texas regardless of the outcome of the custody determination. The trial court noted that Nebraska's jurisprudence regarding the removal of minor children from the State of Nebraska did not mandatorily apply to a child born out of wedlock where there has been no prior adjudication addressing child custody and parenting time. However, the court stated that based on the instructive language in *Coleman v. Kahler*, 17 Neb. App. 518, 766 N.W.2d 142 (2009), it gave some consideration to the factors set forth in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999) (factors used to determine whether custodial parent should be allowed to remove child from state), in determining Austyn's best interests. The court further found that although it considered the removal factors, Kaitlyn did not have the burden of proof in regard to establishing the factors.

[2] In *Coleman v. Kahler, supra*, a father and mother were in a relationship from which two children were born, but they were never married. Various orders regarding paternity and child support were entered, but no custody determinations were made, and the mother eventually moved with the children out of state. *Id.* The trial court awarded custody of the parties' minor children to the mother, finding that it was in the best interests of the children to award the mother custody and to allow her to remove the children out of the state. *Id.* On appeal, the father asserted that the trial court erred in denying his request for custody and in allowing the mother to remove the children, because she did not meet the test set forth in *Farnsworth*. The mother argued that the *Farnsworth* test was inapplicable. *Coleman v. Kahler, supra*. This court held that Nebraska's removal jurisprudence does not apply to a child born out of wedlock where there has been no prior adjudication addressing child custody or parenting time. *Id.* However, we further held that it was proper to give some consideration to the *Farnsworth* factors in determining custody based on the child's best interests. The *Coleman* court then set out the three broad considerations enunciated in *Farnsworth*

used in considering whether removal is in the children's best interests, and applied them to the evidence presented in *Coleman*.

[3-5] *Farnsworth v. Farnsworth, supra*, provides that to prevail on a motion to remove a minor child, 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.* There are three broad considerations in deciding whether removal is in a child's best interests: (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. *Id.* The second consideration, the child's quality of life, may be further broken down into numerous factors that can be considered by the trial court in assessing the potential for enhancing the quality of life for the child and custodial parent. See *id.*

Kaitlyn contends that based on the court's holding in *Coleman v. Kahler*, 17 Neb. App. 518, 766 N.W.2d 142 (2009), it was proper for the trial court to give some consideration to the three broad considerations in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), to assist in determining Austyn's best interests, but that the court erred in doing a complete *Farnsworth* analysis. She contends that by weighing all the *Farnsworth* factors used to determine whether removal is in a child's best interests, the court failed to consider Austyn's best interests in regard to custody. Specifically, she suggests that the court failed to consider that she has been Austyn's primary caregiver since December 2013, when she moved to Texas when Austyn was 4 months old.

The *Coleman* court said that it was proper to give some consideration to the *Farnsworth* factors in determining custody and set out the three broad considerations enunciated

in *Farnsworth* used in considering whether removal is in the children's best interests. As previously stated, the *Farnsworth* case sets out many factors that can be considered under the quality-of-life consideration. The trial court in the present case specifically addressed a number of the quality-of-life factors. It also discussed whether Kaitlyn had a legitimate reason for leaving the state and her reasons for seeking the move. Therefore, the trial court did not do a complete *Farnsworth* analysis, as Kaitlyn contends. Other than the legitimate reason for leaving the state discussion, the trial court considered only the three broad considerations set out in *Farnsworth* and was following what the *Coleman* case held was appropriate to consider.

The trial court first discussed whether Kaitlyn had a legitimate reason to leave the state and concluded that there was no compelling economic reason which justified removing Austyn from the state and that Kaitlyn's motivation was solely to make herself happy.

The trial court next discussed each parent's motives for seeking or opposing the removal. The court mentioned that Kaitlyn testified that she was "miserable" in Nebraska and that she is happy in Texas. She also testified that she wanted to live near her father. The court found that her motive for removing Austyn to Texas was not entirely to keep Austyn away from Donald. The court further found that although Kaitlyn and Donald may have discussed Kaitlyn and Austyn's moving to Texas, there was not a mutual agreement about the relocation.

The trial court next discussed some of the quality-of-life removal factors as set forth in *Farnsworth*—specifically, the emotional, physical, and developmental needs of the child; the extent to which Kaitlyn's income will be enhanced; the degree to which housing and living conditions would be improved; the quality of the relationship between the child and each parent; and the strength of the child's ties to the community and extended family. In discussing these factors, the trial

court noted that the child was only 1 year old, but that once she reached school age, she would attend school in the Blair school district if she lived in Nebraska. There was evidence indicating this was an above-average school district, and there was no evidence regarding the quality of the school district she would attend in Texas. The court noted, as previously discussed, that there was no financial advantage to living in Texas for Kaitlyn. In regard to living conditions, Austyn had been living in a three-bedroom home in Blair before moving to Texas, whereas in Texas, she lives in an apartment. The court stated that if the child lives in Texas, she will have a relationship and bond with Kaitlyn, but that the relationship with Donald would be extremely limited. It stated that the quality of the relationship with both parents would be better if Austyn lived in close proximity to both parents, but that that would not be possible, given that Kaitlyn indicated she was going to stay in Texas regardless of whether she was awarded custody. The court noted that only Austyn's maternal grandfather lives in Texas. In Nebraska, however, there was a strong support system of family that lived within a 2-hour drive of Blair, including paternal grandparents, great-grandparents, aunts, uncles, and cousins.

[6] In addition to considering the factors in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), the trial court considered the credibility of the witnesses, stating that it was concerned about Kaitlyn's overall credibility and that it found Donald to be a more credible witness than Kaitlyn. Where the 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 *Citta v. Facka*, 19 Neb. App. 736, 812 N.W.2d 917 (2012).

The court also considered the stability of each parent and the physical environment offered by each parent. The trial court stated that Kaitlyn has had a series of jobs over the years and has had difficulty maintaining long-term employment for

miscellaneous reasons. It further noted that Kaitlyn moved to Texas with the child without having stable employment or a permanent residence before the move. Also, Kaitlyn admitted that she has been prescribed psychotropic medications and has taken such medications since she was 10 years old. She stopped taking the medications when she was pregnant, but was still off the medications and had not consulted with a doctor regarding her continued use of the medications. The court also mentioned that although Kaitlyn has been more actively involved in the physical care of the child, Donald was entrusted with the care of the child when the parties were living together and recently had been actively involved as a result of the temporary order which gave him parenting time.

The trial court considered many factors in making a custody decision in the best interests of Austyn. The court could not ignore the fact that Kaitlyn was living in Texas and Donald was living in Nebraska, and it took those circumstances into account in determining best interests. Based on *Coleman v. Kahler*, 17 Neb. App. 518, 766 N.W.2d 142 (2009), it was proper for the court to consider the removal factors set out in *Farnsworth v. Farnsworth, supra*, that it did in determining Austyn's best interests for custody purposes. Further, the trial court recognized that Kaitlyn did not have the burden of proof that she would have in a true removal case.

Based on our de novo review of the record, the trial court did not abuse its discretion in finding that it was in Austyn's best interests to award Donald sole custody.

*UCCJEA.*

Kaitlyn assigns that the trial court erred in failing to make a finding as to whether it had jurisdiction under the UCCJEA, Neb. Rev. Stat. §§ 43-1226 to 43-1266 (Reissue 2008 & Cum. Supp. 2014), to make a custody determination. She contends that the trial court, on its own motion, should have made a determination under § 43-1244 that it was an inconvenient forum and lacked jurisdiction, because by the time of trial,

Austyn had resided in Texas longer than in Nebraska and had significant connections with Texas.

[7] In considering whether jurisdiction existed under the UCCJEA, when the jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court. *Zimmerman v. Biggs*, 22 Neb. App. 119, 848 N.W.2d 653 (2014).

[8] The UCCJEA was enacted to serve the following purposes: (1) to avoid interstate jurisdictional competition and conflict in child custody matters, (2) to promote cooperation between courts of other states so that a custody determination can be rendered in a state best suited to decide the case in the interest of the child, (3) to discourage the use of the interstate system for continuing custody controversies, (4) to deter child abductions, (5) to avoid relitigation of custody issues, and (6) to facilitate enforcement of custody orders. *Zimmerman v. Biggs, supra.*

[9,10] The most basic proposition under the UCCJEA is that in order for a state to exercise jurisdiction over a child custody dispute, that state must be the home state as defined by the UCCJEA or fall under limited exceptions to the home state requirement specified by the act. § 43-1238; *Zimmerman v. Biggs, supra.* The UCCJEA provides that a state has jurisdiction to make an initial custody determination only if it is the home state of the child on the date of the commencement of the proceeding or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from the state but a parent or person acting as a parent continues to live in the state. § 43-1238; *Zimmerman v. Biggs, supra*. "Home state," defined in § 43-1227(7), means

> the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months

> of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

Austyn was born in Nebraska in August 2013 and remained in Nebraska until Kaitlyn took her to Texas in December 2013. Donald filed his complaint on December 9. There is some disagreement on whether Kaitlyn left Nebraska on December 4 or December 10; however, it is immaterial in determining whether the trial court had jurisdiction. The determination of whether the trial court had jurisdiction is based on whether Nebraska was Austyn's home state when the action was commenced. The UCCJEA defines "[c]ommencement" as "the filing of the first pleading in a proceeding." § 43-1227(5).

It is apparent from the record that Nebraska was the home state of Austyn when the action was filed. The record indicates that the current proceeding was the first to establish paternity of Austyn, and there is no indication of any prior custody order concerning Austyn.

Under § 43-1238, the district court had jurisdiction to make an initial custody determination. The trial court found that it had jurisdiction over the parties and the subject matter of this action when it entered the temporary order on May 28, 2014, and when it entered the decree on December 2. We also note that the record does not contain any request by Kaitlyn for the court to decline to exercise its jurisdiction because it was an inconvenient forum. Kaitlyn's assignment of error is without merit.

*Preference in Custody.*

[11] Kaitlyn next assigns that the trial court erred in failing to give her preference in determining custody of Austyn. She contends that in Nebraska, it is well settled that in paternity cases, an unwed mother is initially entitled to automatic custody of the child, but that the issue must ultimately be resolved on the basis of the fitness of the parents and the best interests

of the child. See *Citta v. Facka*, 19 Neb. App. 736, 812 N.W.2d 917 (2012). See, also, *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004). She argues, therefore, that she was "entitled to a presumption of custody unless [Donald] could overcome that presumption." Brief for appellant at 26-27.

Kaitlyn is correct in that an unwed mother is initially entitled to automatic custody of the child when the child is born. However, once an action to determine custody is filed, the issue of custody must ultimately be resolved on the basis of the fitness of the parents and the best interests of the child. *Citta v. Facka, supra*. In the present case, the trial court found both parents to be fit and, therefore, the only issue for the court to consider in determining custody was the best interests of Austyn. There is no merit to Kaitlyn's final assignment of error.

*Donald's Motion for Attorney Fees.*

During the pendency of this appeal, Donald's attorney filed a motion for attorney fees, in which he alleged: "[Kaitlyn's] appeal of this matter is frivolous and is a waste of this Court's resources." Kaitlyn's attorney filed an objection, in which she alleged Donald's motion was premature and asserted the appeal was not "frivolous."

[12,13] Neb. Rev. Stat. § 25-824(2) (Reissue 2008) provides:

> Except as provided in subsections (5) and (6) of this section, in any civil action commenced or appealed in any court of record in this state, the court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

The term "frivolous," as used in subsection (2) of this section, connotes an improper motive or legal position so wholly

without merit as to be ridiculous. *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002). Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question. *TFF, Inc. v. SID No. 59*, 280 Neb. 767, 790 N.W.2d 427 (2010).

Upon our de novo review of the record presented to us and the written briefs filed by the parties, and after granting and hearing oral argument in this matter, we find Kaitlyn's appeal was not frivolous or made in bad faith, and as a result, Donald's motion for attorney fees is denied.

## CONCLUSION

We conclude that the trial court did not err in considering some of the factors used in a removal case in making an initial custody determination in a paternity action. We further conclude that the trial court did not err in failing to make findings under the UCCJEA and did not err in failing to give Kaitlyn preference in custody of Austyn. Accordingly, the order of the trial court awarding Donald sole custody of Austyn is affirmed. Donald's motion for attorney fees is denied.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Perry D. Davis, appellant.

875 N.W.2d 450

Filed January 26, 2016. No. A-14-583.

1. **Postconviction: Right to Counsel.** There is no federal or state constitutional right to an attorney in state postconviction proceedings.
2. **Constitutional Law: Postconviction: Right to Counsel.** The rule that when counsel is court appointed, the defendant does not have a constitutional right to counsel of his or her choice, is equally applicable when counsel is appointed in postconviction cases.
3. **Postconviction: Proof: Appeal and Error.** In postconviction appeals, 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.
4. **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.
5. **Motions for New Trial: Evidence: Proof.** One moving for new trial on the basis of newly discovered evidence must show that the evidence was uncovered since the trial, that the evidence was not equally available before the trial, and that the evidence was not simply discovered by the exercise of belated diligence.
6. **Judgments: Proof: Appeal and Error.** One seeking a writ of error coram nobis has the burden to prove entitlement to such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
7. **Judgments: Evidence: Appeal and Error.** The purpose of the writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. It enables the court to recall some adjudication that was made while some fact existed which would have

prevented rendition of the judgment but which, through no fault of the party, was not presented.

8. **Convictions: Proof: Appeal and Error.** The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the plaintiff, and the alleged error of fact must be such as would have prevented a conviction; it is not enough to show that it might have caused a different result.
9. **Judgments: Appeal and Error.** The writ of error coram nobis is not available to correct errors of law such as claims of errors or misconduct at trial and ineffective assistance of counsel.
10. ____: ____. The use of coram nobis is limited because not only are all errors of law excluded, but also because all errors of fact which were, could have been, or should have been reviewed using any statutory remedy are likewise excluded.
11. **Criminal Law: Statutes.** Criminal procedures are unavailable in a criminal proceeding where they are not authorized by statute.

Appeal from the District Court for Sheridan County: Travis P. O'Gorman, Judge. Affirmed.

Perry D. Davis, pro se.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

Moore, Chief Judge, and Inbody and Bishop, Judges.

Inbody, Judge.

## INTRODUCTION

Perry D. Davis appeals from the April 28, 2014, order of the Sheridan County District Court denying his request for appointment of substitute counsel, his motion to submit newly discovered evidence, his writ of error coram nobis, and any postconviction relief sought, as well as dismissing "all filings and motions currently pending."

## PROCEDURAL BACKGROUND

In September 2007, a jury convicted Davis of first degree sexual assault, a Class II felony, and sexual assault of a child, a Class IV felony at the time. *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009). In March 2008, he was sentenced to

20 to 30 years' imprisonment on the former conviction and 4 to 5 years' imprisonment on the latter conviction. *Id.* Davis was represented by one attorney during trial and another attorney for sentencing and his direct appeal. On direct appeal, Davis alleged that the evidence was insufficient to support his convictions and that the sentences imposed were excessive. *Id*. Davis' convictions were affirmed by the Nebraska Supreme Court; however, due to changes in the felony sentencing statutes during the relevant time period, the court modified the Class IV felony sentence from 4 to 5 years' imprisonment to a term of 20 months' to 5 years' imprisonment. *Id*.

In February 2010, Davis filed a motion for postconviction relief, alleging various ways in which his trial and appellate counsel were ineffective and that there was prosecutorial misconduct during trial. That same day, Davis filed a motion to amend, in which he sought to expand his claims of ineffective assistance of counsel and also alleged that his trial counsel, along with the prosecutor and the court, conspired against him to fabricate the existence of a preliminary hearing. In November 2010, the district court denied Davis' motion without an evidentiary hearing or appointment of counsel. We affirmed the denial of his first motion for postconviction relief by memorandum opinion. *State v. Davis*, No. A-10-1212, 2012 WL 1869203 (Neb. App. May 22, 2012) (selected for posting to court Web site). We noted that because Davis was represented by different counsel on direct appeal, the only issue raised in his motion for postconviction relief which was not procedurally barred was his allegation of ineffective assistance of appellate counsel, and that this allegation was without merit. See *id*. Davis' other allegations, including ineffective assistance of trial counsel, violation of his right to due process, violation of his right against self-incrimination, and violation of his right to a fair trial, could have been raised on direct appeal and were procedurally barred. *Id*. Davis filed a motion for rehearing and a petition for further review, both of which were denied.

On August 17, 2012, Davis filed a "First Amended Verified Motion; or Second Verified Motion for Postconviction Relief and Incorporated Memorandum Brief." Three days later, the State filed a motion to dismiss without a hearing or the appointment of counsel.

In August 2012, Davis filed a "Request for Investigation; Motion for Rehearing on Defendant's Filed Motion to Take Judicial Notice of Postconviction Supplemental Pleadings That Were Not Ruled on and Remain Open; Motion to Amend Postconviction Motion Was Not Ruled on and Remain[s] Open; Proffered Evidence Was Not Ruled on and Remain[s] Open." A hearing was held on July 19, 2013, to address motions filed by Davis. During the course of this hearing, it was brought to the court's attention that the motion to submit newly discovered evidence previously filed by Davis had never been heard, so the court appointed counsel to assist Davis for purposes of the hearing on that motion. During the hearing, the State also informed the court that Davis' motion for postconviction relief filed in August 2012 had not been ruled upon. Finally, on the date of the hearing, Davis had filed an application for writ of error coram nobis. The court delayed ruling on these motions and told Davis that he would have an opportunity to discuss with his court-appointed attorney the best way to proceed.

Despite having an attorney appointed to represent him at the July 19, 2013, hearing, Davis continued to file numerous pleadings. On July 24, Davis filed a "Complaint and Objection and Motion to Alter or Amend Judgments," and in August, he filed an "Objection and Motion to Alter or Amend Judgment." In September, he filed a "Complaint and Motion Against Court Appointed Attorney." In October, he filed an "Objection to Deposition and Demand for Review of Deposition" and a "Motion to Amend Objection to Deposition and Demand for Review of Deposition," in which he objected to the deposition which had been taken of him by his own attorney.

Davis' prolific filing of motions continued in 2014, with him filing motions including a "Complaint and Motion for Hearing and Motion for Continuance" and a "Motion to Alter or Amend Judgment; Motion to Appoint New Counsel and Incorporated Evidence in Support Therof [sic]; Motion for Continuance; Motion for Hearing" in January; a "Motion to Submit Evidence in Support of Motion to Alter or Amend Judgment, Motion to Appoint New Counsel and Incorporated Evidence in Support Therof [sic], Motion for Continuance and Motion for Hearing" and a "Motion to Submit More Evidence in Support of Motion to Alter or Amend Judgment and Motion to Appoint New Counsel" in February; and a "Motion to Submit More Evidence in Support of Motion to Appiont [sic] New Counsel and in Support of Objection to Deposition; Objection to Deposition and Motion to Amend Deposition; Motion for Hearing" in March.

On February 28, 2014, a hearing was held on Davis' motion to appoint new counsel. The court denied this request in an order filed on April 28. In this order, the court also dismissed "all filings and motions currently pending." The court noted that none of the alleged "newly discovered evidence" was actually newly discovered; Davis' complaint that his son was not called to testify by trial counsel should have been raised previously and was procedurally barred because the witness was available at the time of trial, but simply was not called as a witness. The court similarly denied Davis' writ of error coram nobis, stating that there were no matters of fact unknown to Davis that would have changed the result in this case and that there was no basis in law or fact to his writ of error coram nobis. Finally, the court stated that to the extent that Davis sought postconviction relief, his request was denied. On May 6, Davis filed a motion to alter or amend the judgment, which was denied on June 5. Additionally, a motion to submit amended deposition of the defendant which Davis had filed in April was also denied. Davis filed his notice of appeal on June 30.

## ASSIGNMENTS OF ERROR

Davis' claims on appeal can be consolidated and restated into the following assignments of error: The district court erred in denying (1) his request for appointment of replacement counsel, (2) his motion for postconviction relief, (3) his motion to submit newly discovered evidence, and (4) his writ of error coram nobis, as well as in (5) dismissing "all filings and motions currently pending."

## ANALYSIS

*Appointment of Replacement Counsel.*

Davis contends that the district court erred in denying his request for appointment of replacement counsel.

[1,2] Under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 through 29-3004 (Reissue 2008 & Cum. Supp. 2014), it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant. See, *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005); *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). There is no federal or state constitutional right to an attorney in state postconviction proceedings. *State v. Wetherell*, 289 Neb. 312, 855 N.W.2d 359 (2014); *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010). Further, we find the rule that when counsel is court appointed, the defendant does not have a constitutional right to counsel of his or her choice, to be equally applicable when counsel is appointed in postconviction cases. See, *State v. Schlund*, 249 Neb. 173, 542 N.W.2d 421 (1996) (order disqualifying public defender did not affect substantial right of defendant, and thus was not final, appealable order that created appellate jurisdiction; when counsel is court appointed, defendant does not have constitutional right to counsel of his or her choice); *State v. Davis*, 6 Neb. App. 790, 577 N.W.2d 763 (1998) (district court properly decided that trial court's failure to appoint defendant substitute trial counsel did not afford grounds for postconviction relief). The district court found that the breakdown in the attorney-client relationship was primarily the result of Davis' refusal to work

with counsel. The court did not err in denying Davis' request for appointment of replacement counsel.

*Motion for Postconviction Relief.*

Davis contends that the district court erred in denying his motion for postconviction relief. Davis filed his first motion for postconviction relief in February 2010, which was denied by the district court. This denial was affirmed by this court by memorandum opinion. *State v. Davis*, No. A-10-1212, 2012 WL 1869203 (Neb. App. May 22, 2012) (selected for posting to court Web site).

[3,4] In postconviction appeals, 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. Diaz*, 283 Neb. 414, 808 N.W.2d 891 (2012); *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011). 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. Wetherell, supra*; *State v. Watkins*, 284 Neb. 742, 825 N.W.2d 403 (2012). Davis' second motion for postconviction relief does not affirmatively show on its face that his claims for relief were not available at the time he filed his first motion for postconviction relief, and as such, it is procedurally barred. Thus, the district court did not err in denying Davis' request for postconviction relief.

*Motion to Submit Newly Discovered Evidence.*

Davis contends that the district court erred in denying his request to submit newly discovered evidence.

[5] A new trial can be granted on various grounds materially affecting the substantial rights of the defendant, including "newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at the trial." Neb. Rev. Stat. § 29-2101(5) (Reissue 2008). One moving for new trial on the basis of newly

discovered evidence must show that the evidence was uncovered since the trial, that the evidence was not equally available before the trial, and that the evidence was not simply discovered by the exercise of belated diligence. *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004); *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002).

The district court noted that none of the alleged "newly discovered evidence" was actually newly discovered; Davis' complaint that his son was not called to testify by trial counsel should have been raised previously and was procedurally barred. Further, the court noted that the testimony was not newly discovered; the witness was available at the time of trial, but simply was not called as a witness. It is clear that Davis' evidence was not "newly discovered," and the district court properly denied his request.

*Writ of Error Coram Nobis.*

Davis also contends that the district court erred in denying his writ of error coram nobis.

[6] One seeking a writ of error coram nobis has the burden to prove entitlement to such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Diaz, supra*.

[7,8] The purpose of the writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. *State v. Sandoval*, 288 Neb. 754, 851 N.W.2d 656 (2014). It enables the court to recall some adjudication that was made while some fact existed which would have prevented rendition of the judgment but which, through no fault of the party, was not presented. *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000). The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the plaintiff, and the alleged error of fact must be such as would have prevented a conviction; it is not enough to show that it might have caused a different result. *Id*.

[9,10] The writ of error coram nobis is not available to correct errors of law such as claims of errors or misconduct at trial and ineffective assistance of counsel. *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014). Further, the use of coram nobis is limited because not only are all errors of law excluded, but also because all errors of fact which were, could have been, or should have been reviewed using any statutory remedy are likewise excluded. *State v. El-Tabech, supra*.

The district court denied Davis' writ of error coram nobis, finding that there were no matters of fact unknown to Davis that would have changed the result in his case and that there was "absolutely no basis in law or fact" to Davis' writ of error coram nobis. Davis' writ complains about a conspiracy to circumvent justice in his case and commit fraud upon the court. None of Davis' complaints are facts that would have prevented judgment in his case. The district court properly denied Davis' writ of error coram nobis.

*Dismissal of "All Filings and Motions Currently Pending."*

[11] Finally, Davis contends that the district court erred in dismissing all his filings and motions currently pending. Because criminal procedures are unavailable in a criminal proceeding where they are not authorized by statute, the district court did not err in dismissing Davis' remaining filings and motions on file. See *State v. Rodriguez-Torres*, 275 Neb. 363, 746 N.W.2d 686 (2008).

## CONCLUSION

Having considered Davis' assignments of error, as consolidated and restated by this court, we find them to be without merit. The decision of the district court is affirmed in its entirety.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Ross, Schroeder & George, LLC, a limited liability company, appellee, v. Lynn Artz and Dee Artz, appellants.

875 N.W.2d 457

Filed January 26, 2016. No. A-14-1065.

1. **Courts: Appeal and Error.** The district court and higher appellate courts generally review appeals from the county court for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. ____: ____. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are reviewed de novo on the record.
4. ____: ____. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict, which an appellate court will not disturb on appeal unless clearly wrong. And an appellate court does not reweigh the evidence but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party.
5. **Contracts.** Whether a contract exists is a question of fact; the meaning of a contract is a question of law.
6. **Contracts: Attorney and Client.** An attorney-client relationship ordinarily rests on contract, but it is not necessary that the contract be express or that a retainer be requested or paid. The contract may be implied from the conduct of the parties.
7. **Contracts: Attorney and Client: Proof.** An attorney-client relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney

expressly or impliedly agrees to give or actually gives the desired advice or assistance.

8. **Contracts: Attorney and Client.** No formal contract, arrangement, or attorney fee is necessary to create the relationship of attorney and client; the contract may be implied from the conduct of the parties.
9. **Contracts: Malpractice: Proof.** A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties themselves as to all of the details of the proposed agreement, and a contract may be implied from conduct and circumstances.
10. **Attorney Fees.** Counsel cannot recover fees when the representation is plainly in violation of the ethical requirements of the profession.

Appeal from the District Court for Buffalo County, John P. Icenogle, Judge, on appeal thereto from the County Court for Buffalo County, Linda S. Caster Senff, Judge. Judgment of District Court affirmed.

Jeffrey P. Ensz, of Lieske, Lieske & Ensz, P.C., L.L.O., for appellants.

Kent A. Schroeder, of Ross, Schroeder & George, L.L.C., for appellee.

Moore, Chief Judge, and Irwin and Inbody, Judges.

Moore, Chief Judge.

## INTRODUCTION

Ross, Schroeder & George, LLC (RSG), a limited liability company, filed an action in the county court for Buffalo County, seeking to collect the balance of a debt for attorney fees owed by Lynn Artz and Dee Artz for legal services provided to them. The county court found that an attorney-client relationship had been formed between the parties and entered judgment in favor of RSG. The Artzes appealed to the district court, which affirmed the decision of the county court, and then to this court. Finding no error, we affirm.

## BACKGROUND

This case involves a dispute over who is responsible for attorney fees incurred for services provided by Kent Schroeder, an attorney with RSG, in a custody case filed in the district court. The parties in the custody case were Nicole Hasselbalch and Rickey Jackson, the parents of Sydney Hasselbalch (Sydney). The Artzes are Hasselbalch's parents and Sydney's grandparents. At some point, Jackson's attorney in the custody case withdrew. The Artzes then contacted and met with Schroeder, who entered an appearance as counsel for Jackson in the pending custody case. Jackson was unsuccessful in the custody case, and this court affirmed the award of Sydney's custody to Hasselbalch. See *Jackson v. Hasselbalch*, No. A-10-1068, 2011 WL 3849483 (Neb. App. Aug. 30, 2011) (selected for posting to court Web site). RSG subsequently filed the present attorney fees collection action, which raises the issue of whether there was any agreement between RSG and the Artzes that would allow RSG to recover from the Artzes the reasonable value of the services Schroeder provided.

On November 30, 2011, RSG filed a complaint in the county court. RSG alleged that Schroeder, an attorney with RSG, was employed by the Artzes to represent them with respect to the interests of their granddaughter Sydney. RSG alleged that in April 2010, an initial office conference was held and the Artzes paid $2,500, which was deposited into RSG's trust account, and that the balance due from the Artzes to RSG was $18,442.38, for which RSG sought judgment.

In their answer, the Artzes admitted that they may have attended a conference at RSG's office but asserted that they never hired RSG to represent them and never guaranteed any fees to RSG. The Artzes denied the remaining allegations of the complaint and set forth various affirmative defenses, including an assertion that RSG's complaint should be dismissed because the purported agreement between the parties violated the statute of frauds.

Trial was held before the county court on March 7 and May 20, 2014. The parties stipulated that the charges by Schroeder's office of $18,442.38 were fair, customary, and reasonable and that the services charged for were in fact provided. The court proceeded to hear evidence on the issue of whether the Artzes were responsible for payment of those fees.

Copies of the transcript in the custody case and this court's memorandum opinion following the appeal in the custody case, as well as documents from the transcript in a guardianship case involving Sydney, were admitted into evidence as exhibits in this case. We briefly outline the background and history of those cases to provide context for the establishment of the parties' relationship in the present case.

Sydney was born to Hasselbalch and Jackson in 2002, at which time Hasselbalch and Jackson both resided in Lincoln, Nebraska. Hasselbalch and Jackson were not married to one another. Jackson had contact with Sydney of varying degrees from her birth until 2006 when Hasselbalch met and began cohabitating with Clinton Williams. Jackson had no contact with Sydney between summer 2006 and February 2009. Hasselbalch and Williams moved to Texas in 2008, and Sydney resided with the Artzes for a period of some months prior to returning to Hasselbalch's care in Texas. In February 2009, Hasselbalch was residing with Williams in Texas and experiencing difficulties caring for Sydney. She asked Dee to help, and Dee took Sydney into her physical custody and cared for her in Kearney, Nebraska. In February 2009, Jackson reestablished and maintained consistent contact with Sydney, including caring for her on weekends in Lincoln.

On December 10, 2009, Dee filed a petition in the county court seeking appointment as Sydney's guardian. The county court appointed Dee as temporary guardian. The temporary guardianship was vacated after a temporary custody order was entered in the custody case in March 2010. The guardianship case was dismissed by the court in March 2011 during the pendency of the appeal in the custody case.

On February 16, 2010, Jackson filed a complaint in the district court seeking custody of Sydney. At that time, Jackson was represented by an attorney other than Schroeder. Jackson requested temporary custody, and he alleged that Williams had abused Sydney and that Hasselbalch failed to protect her. On March 15, the court entered an order granting Jackson's request for temporary custody. Jackson, who was still living in Lincoln, allowed Sydney to remain in Kearney with the Artzes to complete the school year.

On March 24, 2010, Jackson's first attorney was allowed to withdraw as attorney of record in the custody case. Schroeder entered his appearance as counsel of record for Jackson on April 22.

Trial was held in the custody case on September 27, 2010, and on October 4, the district court entered an order placing primary legal and physical custody of Sydney with Hasselbalch, subject to parenting time with Jackson as set forth in the order. Schroeder filed a notice of Jackson's intent to appeal, and on October 4, 2011, this court issued our mandate affirming the decision in the custody case.

We now set forth the evidence with respect to the Artzes' relationship with Schroeder. The Artzes accompanied Jackson when he retained his first attorney of record in the custody case. Jackson did not have money to pay the retainer requested by the first attorney, so Lynn wrote the check for this $2,500 fee. The check has a notation stating, "Loan to . . . Jackson Legal Fees for Sydney." After Jackson's first attorney in the custody case withdrew, he asked the Artzes to help him find an attorney. Dee was also "very worried about [Sydney's] situation." The Artzes discussed the matter with "[their] attorney," who recommended Schroeder. The Artzes met with Schroeder on April 10, 2010. Jackson was supposed to attend the initial conference but was unable to leave work.

Dee testified that the RSG receptionist gave them a client questionnaire form to fill out without any further instructions. Dee filled out sections of the form. In the area of the form for

the client's name, Dee wrote "Lynn & Dee Artz," although she testified that "we weren't the clients." Schroeder testified that he relies upon this form to gather basic contact information and to "identify who [his] client is." There is a place on the form to indicate whether someone else will be responsible for the account, which Dee left blank. Dee testified that she did not complete this portion of the form because "the questionnaire wasn't even pertaining to us, because we weren't the clients." Schroeder testified that if the Artzes had indicated on the form that Jackson was going to be responsible for the bill, he would have had the Artzes sign a guarantee, but he did not ask them to do so because they left that portion of the form blank. Near the bottom of the form is the following printed statement: "DURING THE INITIAL CONFERENCE, YOU SHOULD DISCUSS THE LEGAL FEES EXPECTED TO BE INCURRED WITH THE ATTORNEY. IN MOST INSTANCES, [RSG] REQUIRE[S] THAT BOTH THE CLIENT AND THE ATTORNEY EXECUTE A CONTRACT FOR LEGAL SERVICES." It is undisputed that no such express contract was executed by the parties.

After the initial conference, the Artzes paid a retainer of $2,500 to RSG. The check was dated April 19, 2010. A notation on the check states, "Retain Fee . . . Schroeder[;] Lynn Loan . . . Jackson." A receipt given to the Artzes states that the $2,500 was received from "Lynn . . . for . . . Jackson."

Schroeder testified that he understood that the Artzes were his clients and that he would be representing Jackson "in a representative capacity" in the custody case. He testified that with respect to the custody case, the Artzes wanted to be able to provide Sydney a safe living environment with them and that the common goal of the Artzes and Jackson in that case was for Sydney to continue residing with the Artzes and attend school in Kearney. According to Schroeder, he told the Artzes that he would have to technically make an appearance of record for Jackson because he was the one who had standing to ask the court to determine Sydney's custody, but

that hopefully, if they prevailed, Jackson would continue to agree to allow Sydney to reside with the Artzes in Kearney. He testified that throughout the custody litigation, the Artzes were the ones who suggested trial strategies and he believed and understood he was working for the Artzes. The Artzes and Jackson all testified that Schroeder told the Artzes that they were not his clients and that Jackson was. Schroeder did not recall ever specifically telling Lynn, in the presence of Dee and Jackson, "[Lynn], I am not your attorney." Schroeder also testified, "I don't think I ever said that [Jackson] was my client. I said that I was his attorney of record." He testified further that he represented that he was Jackson's attorney because Jackson had to be the named plaintiff in the custody case.

After Schroeder entered an appearance in the custody case, the Artzes contacted him on a regular basis throughout the proceedings. While we have not detailed those contacts, the record shows that Schroeder had numerous contacts with the Artzes in person, by e-mail, and by telephone and had only limited contact with Jackson. The Artzes sought Schroeder's advice and gave him information concerning the case. When discovery was ongoing in the custody case, it was sent to the Artzes and not Jackson. The Artzes suggested to Schroeder questions to ask and witnesses to call at trial. Schroeder testified that with respect to decisions as to how the custody case was to proceed, the Artzes "called the shots."

A letter from Schroeder regarding the district court's final order in the custody case was addressed to both Jackson and Dee. The Artzes advised Schroeder that they wanted to appeal following the district court's decision in the custody case. The Artzes also provided a 5-page narrative of events that occurred after the custody decision, which they believed should be used in the appeal. Lynn hired a private detective to investigate whether Williams was still living with Hasselbalch in hopes of using the information to modify the custody decision. When Lynn received the report

from the private detective, he provided the information to Schroeder's office.

Schroeder did not have any conversations with the Artzes regarding how the bill would be sent for the services he was going to provide. He testified, however, that his understanding "from day one" was that his fee was going to be paid by the Artzes. In an e-mail to the Artzes, an employee of RSG asked them what arrangements they would be making to pay the bill. The record shows that monthly statements for Schroeder's services were addressed to Jackson in care of Dee and sent to the Artzes' address. The Artzes did not contact Schroeder and advise him to send the bills elsewhere.

Dee testified that they never promised to pay Schroeder for Jackson's legal fees. According to Dee, Lynn had given a loan to Jackson to make the initial fee payment. As of the trial date, Jackson had not paid any money toward the "alleged loans that [the Artzes] made him." Likewise, he had not made any payments directly to Schroeder or contacted Schroeder to make arrangements for payment. Dee testified that she gave the monthly statements to Jackson unopened. Jackson testified, however, that he only received one statement from Dee. Jackson testified that he believed Schroeder to be his attorney, that the bill is his responsibility, and that he intends to pay it.

On May 30, 2014, the county court entered judgment in favor of RSG for $18,442.38, plus costs and postjudgment interest in the statutory amount. The court applied the factors set forth by the Nebraska Supreme Court in *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991), and found the evidence clear that the Artzes had an attorney-client relationship with Schroeder. The court stated:

> A person can develop an attorney-client relationship with more than one party. It is clear that . . . Schroeder was the attorney of record for . . . Jackson and in that capacity had an attorney-client relationship with him[.] That does not preclude him from having an

> attorney-client relationship with the [Artzes] at the same time as long as no conflict exists. . . . Schroeder testified he believed there was no conflict. In the facts as related to the court, it did not appear that a conflict existed and none has been claimed. There are cases that hold that if an attorney represents a client in violation of the professional code of conduct that they may not be compensated for that representation. That is not the case here.

The court stated further:

> The [Artzes] should not be allowed to benefit from the services of . . . Schroeder and avoid payment for those services. Having considered all of the relevant evidence, the court finds that the relationship between . . . Schroeder and the [Artzes] was one of attorney-client. [RSG] is entitled to receive the reasonable value of the services rendered. The fair and reasonable value of those services is outlined in [the stipulation at trial].

The Artzes appealed to the district court, which entered an order affirming the judgment of the county court on October 30, 2014. The Artzes subsequently perfected their appeal to this court.

## ASSIGNMENTS OF ERROR

The Artzes assert that the district court erred in affirming the county court's finding that an attorney-client relationship existed between the Artzes and Schroeder and in its entry of judgment in favor of RSG.

## STANDARD OF REVIEW

[1-3] The district court and higher appellate courts generally review appeals from the county court for errors appearing on the record. *Griffith v. Drew's LLC*, 290 Neb. 508, 860 N.W.2d 749 (2015). 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.* In instances when an appellate court is required to review cases for error

appearing on the record, questions of law are reviewed de novo on the record. *Id.*

[4] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict, which an appellate court will not disturb on appeal unless clearly wrong. And an appellate court does not reweigh the evidence but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party. *Id.*

[5] Whether a contract exists is a question of fact; the meaning of a contract is a question of law. See *Braunger Foods v. Sears*, 286 Neb. 29, 834 N.W.2d 779 (2013).

## ANALYSIS

The Artzes assert that the district court erred in affirming the county court's finding that an attorney-client relationship existed between the Artzes and Schroeder and its entry of judgment in favor of RSG.

[6,7] In determining that an attorney-client relationship existed between the Artzes and Schroeder, the county court applied the three-factor test for the existence of an attorney-client relationship set forth by the Nebraska Supreme Court in *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991). In *McVaney*, the Supreme Court was required to determine whether an attorney-client relationship existed between the parties in connection with the plaintiff's malpractice lawsuit against the law firm. The Supreme Court observed that an attorney-client relationship ordinarily rests on contract, but it is not necessary that the contract be express or that a retainer be requested or paid. *Id.* The contract may be implied from the conduct of the parties. *Id.* The Supreme Court then determined that an attorney-client relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually

gives the desired advice or assistance. *Id*. See, also, *Swanson v. Ptak*, 268 Neb. 265, 682 N.W.2d 225 (2004). Although there was no express employment agreement in *McVaney*, the Supreme Court held that an attorney-client relationship existed where there was evidence of a longstanding relationship between the plaintiff and the attorney and there was both general and specific discussion of what action the plaintiff wanted the attorney to perform.

In the present case, the Artzes argue that the test for the existence of an attorney-client relationship set forth in *McVaney v. Baird, Holm, McEachen, supra*, is exclusively a test for determining the existence of such a relationship in attorney negligence cases. We disagree. There is nothing in *McVaney* limiting the test to application only in the context of claims of attorney negligence. And, contrary to the Artzes' assertion, the test has been applied in other contexts. See, *State ex rel. Stivrins v. Flowers*, 273 Neb. 336, 729 N.W.2d 311 (2007) (considering whether attorney-client relationship existed between attorney and witness seeking to assert attorney-client privilege); *Detter v. Schreiber*, 259 Neb. 381, 610 N.W.2d 13 (2000) (examining attorney-client relationship in context of closely held corporation to determine whether attorney should be disqualified from representing one shareholder in action against other shareholder); *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997) (in action to rescind purchase agreement, purchasers sought to disqualify law firm from representing sellers).

[8,9] The Artzes next argue that because no written agreement was created regarding Schroeder's services, the county court should have examined whether an implied contract existed between the Artzes and Schroeder. The Artzes assert that because there was no "meeting of the minds" between Schroeder and them, no implied contract existed. Brief for appellants at 11. In *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991), the Nebraska Supreme Court observed that no formal contract, arrangement, or

attorney fee is necessary to create the relationship of attorney and client; the contract may be implied from the conduct of the parties. The Supreme Court further observed that a binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties themselves as to all of the details of the proposed agreement, and a contract may be implied from conduct and circumstances. *Id.*

Applying the test set forth in *McVaney* to the facts of the present case, we find no error in the county court's determination that an attorney-client relationship existed between the Artzes and Schroeder. Although no written contract existed between the Artzes and Schroeder, an attorney-client relationship can be implied from their conduct. The Artzes sought advice or assistance from Schroeder, an attorney with many years of professional experience in the area of family law. They sought an office consultation, filled out a client questionnaire form identifying themselves as the clients, and paid the initial retainer amount of $2,500. Specifically, they asked Schroeder to appear as the attorney of record for Jackson in the custody case, a matter within Schroeder's professional competence, with the goal of providing Sydney a safe living environment and allowing her to continue residing with the Artzes and attending school in Kearney. There is no question that Schroeder actually gave the desired assistance. He entered an appearance in the custody case, interacted extensively with the Artzes during the course of those proceedings, represented Jackson at the trial, and pursued an appeal at the Artzes' request. We find no clear error in the county court's finding that an attorney-client relationship was created in this case between the Artzes and Schroeder, as there was competent evidence to support this finding.

[10] The Artzes next point to the county court's finding that an attorney-client relationship was also created between Schroeder and Jackson by virtue of Schroeder's appearance as attorney of record for Jackson in the custody case. They argue

that counsel cannot recover fees when the representation is plainly in violation of the ethical requirements of the profession. *In re Estate of Watson*, 5 Neb. App. 184, 557 N.W.2d 38 (1996).

Neb. Ct. R. of Prof. Cond. § 3-501.7 permits an attorney to represent more than one person if no conflict of interest exists. In this case, the county court found that Schroeder's attorney-client relationship with Jackson did not preclude him from having an attorney-client relationship with the Artzes as long as no conflict existed. The court found no evidence of a conflict and observed that none had been claimed. We find no error in this determination.

The Artzes do not argue a violation of § 3-501.7 on appeal. Instead, they argue that, to the extent the Artzes "called the shots" in the custody case, this was a violation of Neb. Ct. R. of Prof. Cond. § 3-505.4(c) which prohibits a lawyer from permitting someone who pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services. See brief for appellants at 21. However, Neb. Ct. R. of Prof. Cond. § 3-501.8(f) provides that a lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent. In this case, the record shows that the Artzes and Jackson had the same objective with respect to the custody case; namely, that Jackson be awarded custody of Sydney and that Jackson allow Sydney to continue residing with the Artzes in Kearney. Jackson clearly sought the Artzes' involvement and assistance in the custody case, including their sharing of relevant information with Schroeder. There is nothing to show that the Artzes directed or regulated Schroeder's legal judgment in a way that violated § 3-505.4(c) or § 3-501.8(f).

Next, the Artzes argue that, assuming the Artzes employed Schroeder to represent Jackson and agreed to pay his fees, any such agreement was not in writing and would thus be void as

a violation of the statute of frauds. In support of their argument, they cite Neb. Rev. Stat. § 36-202(2) (Reissue 2008), which provides that "every special promise to answer for the debt, default, or misdoings of another person" shall be void unless it is in writing. While the county court did not specifically address this statute of frauds defense, the court's rejection of this defense is implicit in its judgment. We conclude that the statute in question is inapplicable as RSG is not seeking in this case to have the Artzes answer for Jackson's debt, but, rather, for their own debt.

Finally, the Artzes argue that the county court improperly applied a benefit analysis to its ultimate finding. Specifically, they cite the court's finding that the Artzes should not be allowed to benefit from Schroeder's services and avoid payment for those services. This argument is without merit.

> "Unless the circumstances show that the services were intended to be gratuitous, where services are rendered by an attorney at the request of another, or where the benefits of such services are knowingly accepted, a promise to pay therefor will be presumed, particularly where it would be inequitable for the party benefited to share the benefit without contributing to the expense. Thus, where there is even slight proof of an employment of the attorney by the client, the fact that the latter stood by without objection and allowed the attorney to render valuable services in his behalf will estop him to deny the fact of employment. The acquiescence must be such as presumes volition on the part of the person sought to be charged, however, and there is no acquiescence where he has no choice but to avail himself of the efforts made by the attorney."

*In re Guardianship & Conservatorship of Tucker*, 9 Neb. App. 17, 22-23, 606 N.W.2d 868, 872 (2000), quoting 7A C.J.S. *Attorney & Client* § 288 (1980).

In this case, the circumstances do not show that the services rendered by Schroeder were intended to be gratuitous. As set

forth above, the record shows Schroeder's employment by the Artzes. Schroeder rendered valuable services on their behalf, and they knowingly accepted those services. The county court did not err in finding they were responsible for payment of those services.

## CONCLUSION

The district court did not err in affirming the judgment of the county court. The county court's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Clinton Brooks, appellant.

873 N.W.2d 460

Filed February 2, 2016. No. A-15-017.

1. **Trial: Evidence: Appeal and Error.** An appellate court reviews the trial court's conclusions with regard to evidentiary foundation for an abuse of discretion.
2. **Rules of Evidence: Witnesses.** Neb. Evid. R. 608, Neb. Rev. Stat. § 27-608 (Reissue 2008), allows the credibility of a witness to be attacked by evidence in the form of reputation or opinion, but such evidence may refer only to the witness' character for truthfulness or untruthfulness.
3. **Trial: Witnesses: Proof.** The reputation of a witness for truthfulness or untruthfulness must be proved by a witness qualified by an opportunity to obtain knowledge of it.
4. **Evidence: Words and Phrases.** Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
5. **Trial: Evidence: Appeal and Error.** A trial court's decision regarding relevancy determinations will not be reversed absent an abuse of discretion.
6. **Rules of Evidence: Words and Phrases.** Neb. Evid. R. 404(1)(a), Neb. Rev. Stat. § 27-404(1)(a) (Cum. Supp. 2014), allows a criminal defendant to offer evidence of a pertinent trait of his or her character. In a criminal action, pertinent traits are those involved in the crime on trial, such as honesty in a theft case.
7. **Evidence: Other Acts.** Evidence of a defendant's prior bad acts is not admissible to prove that the defendant acted in conformity therewith on the occasion in question.
8. **Trial: Jury Instructions: Pleadings: Evidence: 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 indicative of a probable miscarriage of justice. Nonetheless, whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence. Because of this duty, the trial court, on its own motion, must correctly instruct on the law.

9. **Criminal Law: Evidence: New Trial: Appeal and Error.** Upon finding error in a criminal trial, the reviewing court must determine whether all evidence admitted by the trial court was sufficient to sustain the conviction before remanding for a new trial.
10. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of the evidence admitted by a trial court would have been sufficient to sustain a guilty verdict.
11. **Evidence: New Trial: Appeal and Error.** When considering the sufficiency of the evidence in determining whether to remand for a new trial or to dismiss, an appellate court must consider all the evidence admitted by the trial court irrespective of the correctness of that admission.
12. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
13. **Evidence: Other Acts.** Prior conduct that is inextricably intertwined with the charged crime is admissible to complete the story or provide a total picture of the charged crime.
14. **Sentences: Words and Phrases.** Allocution is an unsworn statement from a convicted defendant to the sentencing judge in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence.
15. **Sentences: Parties.** The right to allocution is personal to the defendant.
16. **Sentences: Evidence.** At a sentencing hearing, evidence may be presented as to any matter that the court deems relevant to the sentence.
17. ____: ____. A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed.
18. **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, and motivation for the offense, as well as the nature of the offense and the violence involved in the commission of the crime.
19. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court

must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.

20. **New Trial.** A new trial can be granted on grounds materially affecting the substantial rights of the defendant.
21. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of discretion.
22. **Effectiveness of Counsel.** In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that he or she was prejudiced by such deficiency.
23. **Effectiveness of Counsel: Postconviction: Records: Appeal and Error.** Ineffective assistance of counsel claims are generally addressed through a postconviction action. This is frequently because the record is insufficient to review the issue on direct appeal.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Joe Nigro, Lancaster County Public Defender, and Yohance Christie for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

Moore, Chief Judge, and Irwin and Inbody, Judges.

Irwin, Judge.

## I. INTRODUCTION

Clinton Brooks appeals his convictions and sentences for theft by deception and the unauthorized practice of law. On appeal, Brooks argues that the district court erred in failing to allow testimony regarding a witness' reputation for untruthfulness, that the district court erred when it did not allow the testimony of four character witnesses on Brooks' behalf, that there was insufficient evidence to sustain his conviction for the unauthorized practice of law, that the district court provided erroneous instructions to the jury on the unauthorized

practice of law, that there was insufficient evidence to sustain his conviction for theft by deception, that the district court violated Brooks' right to allocution, that the district court considered improper evidence at the sentencing hearing, that Brooks received excessive sentences, that the district court erred in not granting Brooks' motion for a new trial, and that Brooks' trial counsel was ineffective.

Upon our review, we find that the district court erred in providing incorrect instructions to the jury with respect to the statute of limitations for the unauthorized practice of law. We reverse, and remand for a new trial on the unauthorized practice of law conviction. We find no merit to Brooks' other assertions on appeal. Accordingly, we affirm Brooks' conviction and sentence for theft by deception.

## II. BACKGROUND

On September 26, 2013, Brooks was charged by information with theft by deception involving $500 to $1,500. On December 11, the State amended the information to include a second charge of the unauthorized practice of law.

The events giving rise to this case began in the fall of 2011 in Lincoln, Nebraska, when Joshua Jordan Fitzgerald began contemplating dissolving his marriage. At the time, Joshua was 19 years old and had an infant son with his wife. Joshua and his mother, Sharon Fitzgerald, began looking for an attorney to help Joshua obtain a divorce and gain custody of his son. Despite meeting with two or three attorneys for consultations, Joshua and Sharon did not retain an attorney because they could not afford the fees.

While Joshua and Sharon were looking for an attorney, Sharon became aware that Brooks offered assistance to people with their legal problems. Sharon knew Brooks because he often came to her place of employment, George's Auto Sales, a car dealership and garage. Brooks was not and had never been an attorney licensed by the State of Nebraska. Brooks operated a business named "P.U.R.G.E., INC, People Utilizing Resources Gaining Education" (P.U.R.G.E.). P.U.R.G.E.

purported to help low-income individuals proceed pro se through the legal system by providing research assistance and guidance.

According to Sharon, Brooks offered to help Joshua with his divorce. Joshua and Sharon knew Brooks was not an attorney, but they hired Brooks because he offered to handle the paperwork for them for $1,500. On December 8, 2011, Sharon paid Brooks $750. Between December 2011 and April 2012, Joshua paid Brooks an additional $750 in $100 installments every 2 weeks.

On December 15, 2011, a complaint for dissolution of marriage listing Joshua as the plaintiff was filed in the district court for Lancaster County. A motion for ex parte order for temporary custody and a motion for leave to proceed in forma pauperis were also filed on Joshua's behalf. Joshua and Sharon, as well as Brooks, dispute whether Brooks drafted and filed these pleadings or whether Joshua and Sharon did.

On January 6, 2012, Joshua, Sharon, Joshua's father, and Brooks went to the Lancaster County District Court for a hearing. Brooks sat in the back of the courtroom. The hearing did not take place, because Joshua's wife had continued the proceedings. It later became apparent that Joshua's wife had filed for dissolution of marriage before Joshua had and that the January 6 hearing was for the case involving the wife's complaint for dissolution of marriage, not Joshua's. The wife's attorney had continued the hearing because Joshua had not yet been served. Although it is not entirely clear from the record, it appears that Joshua's complaint for dissolution of marriage was eventually returned to him due to the fact that Joshua's wife had already filed a complaint.

On January 13, 2012, there was another hearing in the dissolution of marriage case filed by Joshua's wife. At this hearing, Joshua and his wife presented evidence on temporary custody. The judge took the matter under advisement. On February 13, the court issued a written order granting temporary custody to Joshua's wife.

On March 5, 2012, a notice of appeal from the temporary custody ruling was filed on Joshua's behalf. The notice of appeal was accompanied by a motion to proceed on appeal in forma pauperis. On March 8, a motion to reconsider the temporary custody ruling was filed in the district court. Joshua and Sharon, as well as Brooks, dispute whether Brooks drafted and filed the appeal and motion to reconsider or whether Joshua and Sharon did. On April 13, the district court denied the motion for reconsideration, indicating it no longer retained jurisdiction over the case because Joshua had filed an appeal. Around June 4, Joshua received a letter dismissing the appeal. Joshua eventually hired an attorney in September 2012.

The attorney Joshua retained learned about Brooks' actions in the case, and the attorney's law firm notified the Nebraska State Bar Association, which referred the case involving Brooks to the Lancaster County Attorney. Brooks was consequently charged with theft by deception and the unauthorized practice of law.

A trial on the theft by deception and the unauthorized practice of law charges against Brooks was held from October 14 to 17, 2014. At the trial, Joshua testified that Sharon had first arranged for Joshua to meet with Brooks in early December 2011. At their first meeting, Brooks said he could "do the paperwork" for Joshua's divorce and custody case. Joshua testified that Brooks drafted and gave Joshua the completed complaint for dissolution of marriage and motion for ex parte order for temporary custody. According to Joshua, he signed the pleadings and returned them to Brooks. Joshua also testified that Brooks prepared the notice of appeal and the motion to reconsider. Joshua testified that he never personally filed any pleadings with the district court.

According to Joshua, after he received notice that the appeal had been dismissed, he called Brooks to make an appointment. Joshua testified that he called Brooks in "mid June to late June" and met with Brooks thereafter. At this meeting, Joshua and Brooks discussed "continuing the case." Brooks

advised Joshua to read some books "so [he] could better represent [him]self." Joshua testified that he had given up hope on Brooks, but that during the meeting, Brooks indicated he would continue to work on the case. Joshua testified that "the basic plan was just to do appeals."

Sharon also testified at the trial. Sharon testified that when she paid Brooks the $750 on December 8, 2011, she relied on his statement that he was a paralegal and that he would "handle all of the paperwork." Sharon testified she did not draft the complaint for dissolution of marriage, the motion for ex parte order for temporary custody, the motion for leave to proceed in forma pauperis, or the notice of appeal. Sharon also testified that she never filed any pleadings with the clerk of the court.

Sharon testified that after Joshua's appeal was dismissed, she also contacted and met with Brooks, separately from Joshua. According to Sharon, she first spoke with Brooks by telephone sometime after July 15, 2012. During this telephone conversation, Sharon expressed her frustration with Brooks and with how the case had proceeded. Sharon testified that during the telephone conversation, Brooks said "[they] would continue and get more paperwork filed."

Sharon testified she also met with Brooks in person after their telephone conversation. During the meeting, Sharon and Brooks discussed "[t]he paperwork that needed to be continued" and "which document [Brooks] wanted to file next." Sharon testified that she did not know what Brooks wanted to file, but stated, "I just know that there [were] more papers to file."

Brooks testified in his own defense. According to Brooks, he never claimed to be an attorney or a paralegal in his interactions with Joshua and Sharon. Brooks testified that he told Joshua and Sharon he could not represent them in court or file documents for them. Brooks' testimony was that he offered to help "navigate [Joshua and Sharon] through the judicial system." Brooks testified that he gave Joshua and Sharon advice

on styling the pleadings, but that he never drafted or filed any of the pleadings himself. According to Brooks, he advised Joshua and Sharon not to appeal the temporary custody ruling because it was not a final order. Brooks testified that he did not draft the motion to reconsider, but that he did review it and advised Sharon to make some changes to the motion before filing it.

After the trial, the jury found Brooks guilty of theft by deception and the unauthorized practice of law. The court sentenced Brooks to 15 to 35 months' imprisonment on the theft by deception conviction and 3 to 3 months' imprisonment on the unauthorized practice of law conviction, to be served consecutively. Brooks appeals from his convictions and sentences. Additional facts will be discussed, as necessary, in the analysis section of this opinion.

## III. ASSIGNMENTS OF ERROR

On appeal, Brooks assigns numerous errors. Restated and renumbered, those assigned errors are that (1) the district court erred in failing to allow testimony regarding Sharon's reputation for untruthfulness; (2) the district court erred when it did not allow four witnesses to testify about their prior positive interactions with Brooks nor to testify that Brooks never told them he was a paralegal; (3) there was insufficient evidence to sustain Brooks' conviction for the unauthorized practice of law because the evidence the State presented to support the conviction fell outside the statute of limitations; (4) the district court erred when it provided a jury instruction that allowed the jury to consider evidence outside the statute of limitations on the unauthorized practice of law charge; (5) there was insufficient evidence to sustain Brooks' conviction for theft by deception; (6) the district court violated Brooks' right to allocution when it refused to allow Brooks' wife to speak at the sentencing hearing; (7) the district court abused its discretion because when sentencing Brooks, it considered three letters from attorneys regarding Brooks' actions; (8) the sentences Brooks received were excessive; (9) the district court erred in

not granting Brooks' motion for new trial; and (10) Brooks' trial counsel was ineffective.

## IV. ANALYSIS

### 1. Testimony Regarding Sharon's Reputation for Untruthfulness

Brooks argues the district court erred when it excluded the testimony of one of Brooks' witnesses, Christine Johnson, as to Sharon's reputation for untruthfulness. Brooks argues that Johnson's testimony was admissible under Neb. Evid. R. 608, Neb. Rev. Stat. § 27-608 (Reissue 2008). Brooks failed to lay the proper foundation for the admission of Johnson's testimony regarding Sharon's untruthfulness. We find this assertion to be without merit.

[1-3] An appellate court reviews the trial court's conclusions with regard to evidentiary foundation for an abuse of discretion. *State v. Richardson*, 285 Neb. 847, 830 N.W.2d 183 (2013). Rule 608 allows the credibility of a witness to be attacked by evidence in the form of reputation or opinion, but such evidence may refer only to the witness' character for truthfulness or untruthfulness. *State v. Eldred*, 5 Neb. App. 424, 559 N.W.2d 519 (1997). The reputation of a witness for truthfulness or untruthfulness must be proved by a witness qualified by an opportunity to obtain knowledge of it. *Id*. Phrased another way, testimony regarding a witness' reputation for truthfulness or untruthfulness is admissible only after proper foundation has been laid. See *id.*

At the trial, Brooks called Johnson to the stand. Johnson testified that she worked at George's Auto Sales with Sharon and had known Sharon since 2011. According to Johnson, she had contact with Sharon "[o]n the days that [Sharon] would work." Johnson also testified that she had come into contact with other people who worked with Sharon. Brooks' attorney then asked, "As a result of your working with [Sharon], do you have an opinion as to her reputation for truthfulness and veracity in the work community?" Johnson indicated she did have an opinion as to Sharon's reputation for truthfulness. Brooks' attorney

asked whether Johnson's opinion of Sharon's reputation was "good or bad," and the State objected on relevance grounds. The court sustained the objection "on foundation."

After the court sustained the objection, there was a sidebar with both Brooks' attorney and the prosecutor. The court elaborated that foundation was lacking because Johnson "ha[d] not testified as to [Sharon's] reputation in the community." The court stated, "Now, maybe she has lied to this witness on an occasion, again, I'm not sure that that's relevant. But [Johnson] certainly has not laid the foundation to show that Sharon . . . has a character of not being honest."

After the sidebar, Brooks' attorney had the following exchange with Johnson:

> [Brooks' attorney:] As a result of working in the same community as [Sharon], have you had an opportunity to come to an understanding after interacting with other individuals in the working area as to what the reputation of Sharon . . . is for truth and veracity in that community? Yes or no.
>
> [Johnson:] So are you asking me do I have an opinion about her truth and veracity or what is my opinion?
>
> Q. Do you have an opinion as to what her reputation is in the community.
>
> A. Yes. I do, yes, sir.
>
> Q. For truth and veracity?
>
> A. Yes, sir, I do.
>
> Q. And is that good or bad?
>
> [The State]: I'm going to object —
>
> [Johnson]: Bad.

The court sustained the State's objection and ordered the jury to disregard whatever part of Johnson's answer it heard.

Following the second sustained objection to Johnson's testimony, Brooks' attorney questioned Johnson as follows:

> Q. And did you become aware of [Sharon's] reputation in the work community by interaction with other members of the work community at George's Auto [Sales]?

A. Yes. Well, I mean, and myself, too. I'm included, correct?

Q. Right.

And you did that by listening to other co-workers in that community and speaking to other co-workers in that community?

A. Yes, that and my own interactions.

Q. Okay. And is that what you based your opinion on? It is the fact that you've talked to other people and heard other people —

A. Some of it, yes.

Q. Okay.

A. And some of my own interactions.

Q. Okay. And you based your opinion that you expressed on those factors as well; is that correct?

A. Yes.

. . . .

Q. . . . Based upon factors and things that we discussed, is her reputation for truth and veracity in your community good or bad?

After this exchange, the State again objected, on foundation and relevance grounds. The court sustained the objection. Johnson was excused as a witness.

As a preliminary matter, we note that Brooks causes confusion by assigning as error the district court's exclusion of Johnson's "reputation *or opinion* evidence as to [Sharon's] untruthfulness." Brief for appellant at 4 (emphasis supplied). We conclude and the record reflects, however, that Brooks' trial attorney was attempting to elicit only reputation testimony, not opinion testimony, from Johnson. It is true that Brooks' attorney used the word "opinion" when he asked Johnson for her "opinion as to [Sharon's] reputation for truthfulness and veracity." However, when Johnson asked, "So are you asking me do I have an opinion about her truth and veracity or what is my opinion," Brooks' attorney clarified the question to be, "Do you have an opinion *as to what her reputation* is in the community[?]" (Emphasis supplied.) Furthermore,

the third and final time Brooks' attorney attempted to elicit Johnson's testimony, he phrased the question solely in terms of reputation: "Based upon factors and things that we discussed, is her reputation for truth and veracity in your community good or bad?" It is therefore apparent that despite Brooks' attorney's phrasing the question in terms of Johnson's "opinion," he was attempting to elicit only testimony regarding Sharon's reputation.

The parties do not cite, and we are unable to locate, a case from the Nebraska appellate courts detailing the foundational requirements for the admission of testimony regarding a witness' reputation for untruthfulness. Cases from other jurisdictions, however, have addressed when foundation is adequate to admit reputation testimony. For example, the Supreme Judicial Court of Maine ruled on the admissibility of reputation testimony in *State v. Tucker*, 968 A.2d 543 (Me. 2009). The pertinent Maine rule of evidence is worded similarly to Nebraska's rule 608. Compare Me. R. Evid. 608 with Neb. Evid. R. 608.

In *Tucker*, the defendant was charged with sexual assault. At trial, the defendant attempted to call a witness to testify about the victim's reputation for untruthfulness. *Id.* The Supreme Judicial Court upheld the trial court's exclusion of the reputation testimony due to lack of foundation. *Id.* The court stated:

> To be admissible, reputation evidence "must embody the collective judgment of the community and must be derived from a group whose size constitutes an indicium of inherent reliability." . . . "The community in which the impeached party has the reputation for untruthfulness must be sufficiently large; if the group is too insular, its opinion of the witness'[s] reputation for truthfulness may not be reliable because it may have been formed with the same set of biases."

*Id.* at 547 (citation omitted) (alteration in original). The witness indicated that the victim's reputation for being untruthful came from a group of eight teenagers "who socialized together

and generally had a narrow set of experiences with the victim." *Id.* at 548. The appellate court concluded that the trial court had properly excluded the reputation testimony because there was insufficient foundation to show that the witness based the reputation on a sufficiently large and diverse community. *Id.*

In the case at hand, Brooks similarly failed to show that Johnson's testimony regarding Sharon's reputation for untruthfulness was based on a sufficiently large and diverse community. Johnson testified that she had spoken with Sharon's coworkers at George's Auto Sales, but there was no evidence regarding how many employees worked at George's Auto Sales. Additionally, there was no foundation to demonstrate that the employees of George's Auto Sales formed a diverse group and that Johnson's opinion regarding Sharon's alleged reputation for untruthfulness was based on a broad set of experiences with this community. Like the foundation on an insular group of eight teenagers in *Tucker*, there was insufficient foundation here to demonstrate that Johnson's testimony regarding Sharon's reputation for untruthfulness was based on a sufficiently large and diverse community. See *id*. The trial court did not abuse its discretion when it excluded Johnson's testimony on the basis of insufficient foundation.

### 2. Brooks' Character Witnesses

Brooks asserts that the trial court erred when it excluded the testimony of four of Brooks' witnesses. The testimony of these witnesses pertained to positive interactions the witnesses had previously had with Brooks and the fact Brooks had never told any of the witnesses that he was a paralegal. Brooks argues the witnesses' testimony should have been admissible as an exception to hearsay for a declarant's state of mind, or as relevant character evidence of a pertinent trait—honesty. However, the offers of proof demonstrate that no hearsay was involved in the proposed testimony and that the witnesses would not have testified regarding Brooks' character trait of honesty. We find Brooks' assignment of error in this respect to be without merit.

[4,5] Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006). A trial court's decision regarding relevancy determinations will not be reversed absent an abuse of discretion. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

[6] Neb. Evid. R. 404(1)(a), Neb. Rev. Stat. § 27-404(1)(a) (Cum. Supp. 2014), allows a criminal defendant to offer "[e]vidence of a pertinent trait of his or her character." In a criminal action, pertinent traits are those involved in the crime on trial, such as honesty in a theft case. *State v. Vogel*, 247 Neb. 209, 526 N.W.2d 80 (1995).

Before trial, the State filed a motion in limine to exclude the testimony of four witnesses that Brooks intended to call. The State asked the court to prevent these witnesses from testifying about their prior interactions with Brooks and from testifying that Brooks never called himself a paralegal. The State argued that it was improper impeachment of the State's witnesses, that the evidence was irrelevant, and that the testimony constituted inadmissible hearsay.

In response to the State's motion in limine, Brooks argued that the evidence was relevant because Brooks had helped the four witnesses on legal matters in the past, just as he claimed to have helped Joshua and Sharon. Brooks also argued the testimony would be admissible under Neb. Evid. R. 803(2), Neb. Rev. Stat. § 27-803(2) (Cum. Supp. 2014), the hearsay exception for a declarant's then-existing state of mind.

The trial court sustained the State's motion in limine. The court stated that the witnesses' testimony would not be relevant, because it did not relate to the incident between Joshua and Sharon and Brooks. As the trial court phrased it, "[T]he fact that somebody walked into a bank and talked to tellers 100 times and then on the 101st time went in and said, stick 'em up, I don't think those 100 transactions that the guy walked into the bank . . . and didn't say anything [are] relevant." The

court went on to state that even if the evidence were relevant, the court believed its probative value would be outweighed by its prejudicial effect.

In addition to ruling that the witnesses' testimony was not relevant, the court also stated that "to the extent this is character evidence," Neb. Evid. R. 405, Neb. Rev. Stat. § 27-405 (Reissue 2008), would prevent the witnesses from testifying to specific instances of Brooks' conduct, such as their prior interactions with him. The court explained that under rule 405, inquiry into specific instances of conduct is permissible only on cross-examination. Lastly, the court declined to address whether the testimony would be hearsay and whether it would fall under an exception to the hearsay rule.

At trial, Brooks did not call the four witnesses to testify. Instead, Brooks made offers of proof as to what the witnesses' testimony would have been in order to preserve the issue for appeal.

The first offer of proof demonstrated the first witness would have testified that he had known Brooks for 20 years and that Brooks had never said he was a paralegal. The witness would have testified that he was familiar with Brooks' company, P.U.R.G.E., and that his understanding was that Brooks helped his clients with the procedure of the legal system.

The second witness would have testified that she was the secretary and treasurer of P.U.R.G.E. She also would have testified that Brooks helped a friend of hers regain custody of her daughter. Lastly, the offer of proof demonstrated that the witness would have testified that Brooks "doesn't do the paralegal work, he just does research."

Third, Brooks offered the testimony of a witness who, according to the offer of proof, would have testified that he worked in the same building out of which Brooks operated P.U.R.G.E. Brooks' offer of proof demonstrated this third witness would have testified that Brooks helped him with a few tickets and an assault case and that Brooks never said he was an attorney or paralegal.

The fourth and last witness would have testified that Brooks had helped her with several legal matters. According to the offer of proof, Brooks never filed any documents on her behalf, but helped her research how to navigate the legal system herself. Lastly, she would have testified that she never heard Brooks refer to himself as a paralegal.

As in the motion in limine, the State objected to the testimony of the witnesses as irrelevant. The court sustained the State's objections and excluded the testimony of all four witnesses.

First, we note that the proposed testimony of Brooks' four witnesses did not involve hearsay. The offers of proof demonstrate the witnesses would have testified to something Brooks did *not* say: that he was a paralegal. Because no hearsay is involved, the state of mind exception found in rule 803(2) is inapplicable.

Next, we address Brooks' contention on appeal that the four witnesses identified in Brooks' offers of proof should have been permitted to testify under rule 404(1)(a) as providing evidence of a character trait—honesty—pertinent to the crimes with which he was charged. We agree that honesty would likely be a character trait pertinent to a crime involving fraud, such as theft by deception. See *State v. Vogel*, 247 Neb. 209, 526 N.W.2d 80 (1995).

However, at the hearing on the State's motion in limine and during his offers of proof at trial, Brooks did not reference rule 404(1)(a) as a basis for admitting the testimony in question. Even if Brooks had alerted the court that he was attempting to admit evidence of a pertinent character trait under rule 404(1)(a), Brooks' offers of proof reveal that none of these witnesses would have testified regarding Brooks' honesty. The witnesses' testimony pertained to Brooks' business, his prior interactions with clients, and the fact he never said he was a paralegal, not Brooks' character of truthfulness or honesty. As such, the testimony in question was not admissible as evidence of a pertinent character trait under rule 404(1)(a).

[7] We agree with the trial court that the four witnesses' proposed testimony was not relevant. It is well accepted that evidence of a defendant's prior bad acts is not admissible to prove that the defendant acted in conformity therewith on the occasion in question. *State v. Myers*, 15 Neb. App. 308, 726 N.W.2d 198 (2006). See, also, rule 404(2). Courts applying character evidence rules similar to those in Nebraska have also stated that evidence of prior *good* acts is inadmissible to prove that a defendant acted in conformity therewith on a given occasion. See, e.g., *United States v. Burke*, 781 F.2d 1234, 1243 (7th Cir. 1985) ("[e]vidence that the defendant frequently performs lawful or laudable acts does not often establish that some subsequent act is also lawful or laudable"); *United States v. Russell*, 703 F.2d 1243, 1249 (11th Cir. 1983) ("'[e]vidence of noncriminal conduct to negate the inference of criminal conduct is generally irrelevant'"). Therefore, evidence that Brooks had favorable prior business relationships with other people is not relevant to his interactions with Joshua and Sharon in the present case. The trial court did not abuse its discretion when it excluded the testimony of Brooks' four character witnesses.

### 3. Erroneous Jury Instructions

Brooks contends that the district court erred when it instructed the jury to consider periods of time that occurred outside the statute of limitations in determining whether or not Brooks was guilty of the unauthorized practice of law. Brooks argues the trial court also erred in refusing to give his proposed instruction, which he claims properly stated the statute of limitations. At the trial, Brooks did not object to the portion of the jury instructions providing the improper time period. Furthermore, Brooks' proposed jury instruction did not correctly state the statute of limitations period. Nevertheless, we conclude the trial court committed plain error by giving an incorrect jury instruction. We reverse, and remand for a new trial on the unauthorized practice of law conviction.

[8] 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 indicative of a probable miscarriage of justice. *State v. Abdulkadir*, 286 Neb. 417, 837 N.W.2d 510 (2013). Nonetheless, whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence. *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). Because of this duty, the trial court, on its own motion, must correctly instruct on the law. *Id.*

The unauthorized practice of law is a Class III misdemeanor. Neb. Rev. Stat. § 7-101 (Reissue 2012). The statute of limitations for a misdemeanor requires that a person be charged within 1 year 6 months after committing the offense. *Id.*; Neb. Rev. Stat. § 29-110(2) (Cum. Supp. 2014).

In the present case, the State filed its amended information on December 11, 2013, alleging that Brooks committed the unauthorized practice of law. Therefore, the conduct constituting the unauthorized practice of law must have occurred on or after June 11, 2012, in order for the filing of the amended information to be considered timely. Brooks' conduct occurring before June 11 could not have been used to support Brooks' conviction for the unauthorized practice of law, because the statute of limitations had already run for that time period.

During the trial, Brooks and the State submitted proposed jury instructions. With respect to the unauthorized practice of law count, Brooks' proposed instruction listed the elements of the crime, including the following statement regarding the applicable time period:

> The material elements which the State must prove by evidence beyond a reasonable doubt to convict . . . Brooks of the Unauthorized Practice of Law are:
>
> . . . .
>
> 3. That the actions of . . . Brooks took place on, about or between December 1, 2011, and July 31, 2012, in Lancaster County, Ne.

Brooks' proposed instruction also contained the following:

> As to Count [II], if you find beyond a reasonable doubt that . . . Brooks is guilty of Count II, you must also make a finding of the last day [t]hat . . . Brooks[']s conduct ended as charged in this count:
>
> We find beyond a reasonable doubt that . . . Brooks[']s conduct ended in Count II on or about _____ ___, 201__.

The trial court's jury instructions listed the elements of the crimes in instruction No. 4. Instruction No. 4B listed the elements of the unauthorized practice of law. Instruction No. 4B stated, in part:

> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict . . . Brooks of the Unauthorized Practice of Law are:
>
> . . . .
>
> 3. That the actions of . . . Brooks took place on or about or between December 1, 2011, and July 31, 2012, in Lancaster County, Nebraska.

The court's final jury instructions did not contain Brooks' proposed instruction requiring the jury to make a finding regarding the day on which Brooks' conduct ended.

After presenting the jury instructions to the parties, the court held a conference. Brooks' attorney objected to the court's instruction listing the elements of the unauthorized practice of law because it did not require the jury to specify the timeframe of the conduct. The court overruled Brooks' objection. Brooks did not object to the portion of jury instruction No. 4B which stated that an element of the unauthorized practice of law was that "the actions of . . . Brooks took place on or about or between December 1, 2011, and July 31, 2012."

The court's jury instructions incorrectly stated that the jury could convict Brooks of the unauthorized practice of law based on conduct that occurred prior to June 11, 2012. However, Brooks did not preserve error regarding the fact that instruction No. 4B included a period of time beyond the statute of limitations. Brooks did not object to the instruction after it

had been submitted for his review. See *State v. Abdulkadir*, 286 Neb. 417, 837 N.W.2d 510 (2013). Additionally, Brooks' proposed instruction included the same timespan (December 1, 2011, to July 31, 2012) as the court's final instructions. Brooks' contention that the trial court erred in not giving his proposed instruction is therefore also without merit.

Nevertheless, we find the trial court committed plain error by erroneously instructing the jury that it could base its guilty verdict on conduct that occurred before June 11, 2012. Brooks' conduct prior to June 11 could not have supported his conviction for the unauthorized practice of law, because the statute of limitations would have run with respect to that conduct by the time the State filed its amended information. See *State v. Loyd*, 275 Neb. 205, 745 N.W.2d 338 (2008). Although Brooks did not specifically object to jury instruction No. 4B or request an instruction which listed the proper time period, the court still had a duty to correctly instruct the jury on the applicable law, including the statute of limitations. See *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). We conclude the trial court committed plain error when it instructed the jury that it could rely on Brooks' conduct prior to June 11, 2012, in finding him guilty of the unauthorized practice of law. We reverse Brooks' conviction for the unauthorized practice of law. We next must address whether Brooks can be retried for the unauthorized practice of law.

### 4. Retrial on Unauthorized Practice of Law

Brooks asserts there was insufficient evidence to support his conviction for the unauthorized practice of law. We address Brooks' sufficiency of the evidence claim in order to determine whether the Double Jeopardy Clause bars a retrial. We conclude Brooks can be retried for the unauthorized practice of law.

[9-11] Upon finding error in a criminal trial, the reviewing court must determine whether all evidence admitted by the trial court was sufficient to sustain the conviction before

remanding for a new trial. See *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007). See, also, *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988). The Double Jeopardy Clause does not forbid a retrial so long as the sum of the evidence admitted by a trial court would have been sufficient to sustain a guilty verdict. *McCulloch, supra*. When considering the sufficiency of the evidence in determining whether to remand for a new trial or to dismiss, an appellate court must consider all the evidence admitted by the trial court irrespective of the correctness of that admission. *Id.*

Section 7-101 prohibits the unauthorized practice of law:

> [N]o person shall practice as an attorney or counselor at law, or commence, conduct or defend any action or proceeding to which he is not a party, either by using or subscribing his own name, or the name of any other person, or by drawing pleadings or other papers to be signed and filed by a party, in any court of record of this state, unless he has been previously admitted to the bar by order of the Supreme Court of this state.

The Nebraska Supreme Court has elaborated that the practice of law includes the direct examination and cross-examination of witnesses, argument to the court, the trial of cases in court, and the giving of legal advice to persons regarding their rights. *In re Estate of Cooper*, 275 Neb. 297, 746 N.W.2d 653 (2008); *State, ex rel. Hunter, v. Kirk*, 133 Neb. 625, 276 N.W. 380 (1937).

There was evidence presented at the trial that Brooks drafted and filed numerous pleadings in Joshua's dissolution and custody case. See § 7-101. The evidence also supported a finding that Brooks gave Joshua legal advice concerning his rights, including what documents to file, how to proceed with the case after Joshua's ex-wife was granted temporary custody, and how to move forward with the case after Joshua's appeal was denied. See *Kirk, supra*.

Brooks correctly observes that all of the pleadings were filed in Joshua's dissolution and custody case prior to June 11, 2012.

Brooks asserts that the pleadings cannot support his conviction because they were drafted and filed outside the statute of limitations period. However, in determining whether sufficient evidence was adduced at trial in order to permit Brooks to be retried, we consider all the evidence the court admitted, including erroneously admitted evidence. See *McCulloch, supra*. We conclude that there was sufficient evidence adduced at trial to sustain Brooks' conviction for the unauthorized practice of law. Thus, Brooks is not entitled to dismissal of the charges against him and can be retried for the unauthorized practice of law. However, we address the admissibility of evidence from outside the statute of limitations because we believe it is an issue likely to recur on retrial.

[12] An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *State v. Edwards*, 286 Neb. 404, 837 N.W.2d 81 (2013). In arguing that the evidence was insufficient to sustain his conviction for the unauthorized practice of law, Brooks appears to contend that the jury should not have been permitted to hear any evidence of Brooks' conduct that occurred outside the statute of limitations. We note that, given our prior discussion, evidence from outside the limitations period cannot be used to convict Brooks for the unauthorized practice of law on retrial. However, evidence of Brooks' conduct from outside the limitations period is admissible to provide context to evidence from within the limitations period.

[13] Prior conduct that is "inextricably intertwined with the charged crime" is admissible to "complete[] the story or provide[] a total picture of the charged crime." *State v. Powers*, 10 Neb. App. 256, 262, 634 N.W.2d 1, 7, 8 (2001), *disapproved on other grounds, State v. Smith*, 267 Neb. 917, 678 N.W.2d 733 (2004). For example, in *Powers*, the defendant was charged with terroristic threats for sending a letter to the Attorney General. In the letter, the defendant stated, "'I'm writing to you in regards to all of the threatening letter's [sic]

that I've written to you in the past'" and "'I'll . . . do all that I told you I would do. . . .'" *Id.* at 257, 634 N.W.2d at 4 (alteration in original). The Court of Appeals held that the trial court had properly admitted the defendant's past threatening letters into evidence because they were inextricably intertwined with the charge of terroristic threats and were necessary to show the details and context of his threats in the most current letter. *Powers, supra*.

In the case at hand, Brooks had conversations with Joshua and Sharon after June 11, 2012, about "continuing the case" and "papers to file." Evidence of Brooks' acts prior to June 11 is admissible to give context to these statements. The evidence shows that prior to June 11, Brooks had advised Joshua and Sharon on which documents to file and had drafted and filed pleadings on their behalf. This background is inextricably intertwined with Brooks' representations after June 11 that he would continue working on the case and file additional pleadings. On retrial, the court may properly admit evidence from outside the statute of limitations to provide necessary context to Brooks' alleged unauthorized practice of law occurring within the limitations period.

We reverse Brooks' conviction for the unauthorized practice of law and remand that matter for a new trial.

### 5. Insufficient Evidence of Theft by Deception

Brooks asserts there was insufficient evidence to sustain his conviction for theft by deception. According to Brooks, he lacked the intent required for theft by deception because he did not believe he was violating any laws by helping Joshua on his court case. The evidence demonstrates that Brooks knew his actions were contrary to the statute banning nonattorneys from practicing law and that he intended to create the impression he could give Joshua legal advice and assistance in order to obtain money from Joshua and Sharon. As such, this assignment of error is without merit.

As stated above, an appellate court reviewing the sufficiency of the evidence asks 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. Hale*, 290 Neb. 70, 858 N.W.2d 543 (2015).

A person commits theft by deception if he or she obtains property by intentionally "creat[ing] or reinforc[ing] a false impression, including false impressions as to law, value, intention, or other state of mind." Neb. Rev. Stat. § 28-512(1) (Reissue 2008).

Brooks misstates this assignment of error in his brief. Specifically, Brooks' third and fifth assignments of error are identical. Both assignments of error state, "The evidence adduced at trial was insufficient to sustain a conviction for *the unauthorized practice of law*." (Emphasis supplied.) However, it appears to us after reading Brooks' argument section that Brooks intended to assign the sufficiency of the evidence to support his theft by deception conviction as his fifth assignment of error rather than repeating his third assignment of error.

The State's theory at trial was that Brooks intentionally created a false impression as to what the law allowed him to do as a nonattorney in order to induce Joshua and Sharon to pay him the $1,500. Brooks argues that he lacked the intent to create a false impression because he did not know what the law prohibited nonattorneys from doing and therefore lacked the intent to deceive Joshua and Sharon. The evidence presented at trial contradicts Brooks' assertion.

At trial, Brooks himself testified that he told Joshua and Sharon he could neither represent them in court nor file documents for them because he was a nonattorney. Yet Joshua and Sharon both testified that Brooks said he would "handle all of the paperwork" for them. Joshua's and Sharon's testimony also supported a finding that Brooks drafted and filed the pleadings in Joshua's dissolution and custody case. This

testimony demonstrates that Brooks understood what was prohibited by the law, but that he nevertheless created the false impression that he could advise Joshua and draft and file pleadings in Joshua's case in order to obtain $1,500 from Joshua and Sharon.

This evidence, when viewed in a light most favorable to the State, provides a basis for a rational jury to find Brooks guilty of theft by deception. There is no merit to Brooks' assignment of error.

### 6. Allocution

Brooks argues the district court violated his right to allocution when it did not let his wife speak at the sentencing hearing. We disagree.

[14] Allocution is an unsworn statement from a convicted defendant to the sentencing judge in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence. *State v. Pereira*, 284 Neb. 982, 824 N.W.2d 706 (2013). The right to allocution is codified at Neb. Rev. Stat. § 29-2201 (Reissue 2008), which states, in relevant part, "Before the sentence is pronounced, the defendant must be . . . asked whether he has anything to say why judgment should not be passed against him."

A sentencing hearing was held on December 23, 2014. At the hearing, Brooks indicated his wife wanted to make a statement to the court. The court denied the request because Brooks had not previously submitted a written statement from his wife.

After Brooks' request for his wife to speak was denied, Brooks spoke at the sentencing hearing. His allocution lasts nearly nine pages in the bill of exceptions. After Brooks' allocution, he again asked the court to hear from his wife. The court stated it required statements from individuals speaking at sentencing to be presented in writing ahead of time. The court indicated it required prior written statements so that the State had an opportunity to review the statements. For these

reasons, the court again denied Brooks' request that his wife be allowed to speak.

The State argues Brooks did not preserve this issue for appeal because he did not object to the court's refusal to allow Brooks' wife to speak. The record of the sentencing hearing reveals that Brooks twice asked the court to allow his wife to speak. Although Brooks did not use the word "objection" during the second request, he did bring his disagreement with the initial ruling to the court's attention by repeating his request.

[15] However, even if we determine that Brooks preserved error on this issue, his assertion that the court violated his right to allocution is without merit. The right to allocution is personal to the defendant. The statute indicates that "*the defendant* must be . . . asked" whether he wishes to say anything. § 29-2201 (emphasis supplied). Similarly, the Supreme Court defines allocution as a "'statement *from a convicted defendant*.'" *Pereira*, 284 Neb. at 985, 824 N.W.2d at 709 (emphasis supplied). Brooks exercised his right to allocution and made a lengthy statement to the court. His right to allocution did not require the court to allow his wife to speak as well. Brooks' assignment of error in this regard is without merit.

### 7. Letters From Attorneys at Sentencing

Brooks also alleges the district court abused its discretion at the sentencing hearing by considering letters from attorneys in the community that indicated Brooks had continued to engage in the unauthorized practice of law following his conviction. Brooks asserts that the letters lacked corroborating information and that the court stated that it believed the letters were only half true. This assignment of error is without merit.

[16,17] At a sentencing hearing, evidence may be presented as to any matter that the court deems relevant to the sentence. *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005). A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining

the kind and extent of the punishment to be imposed. *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

As part of the presentence report, the court received one e-mail and two letters from local attorneys. The e-mail was from a deputy county attorney to Brooks' presentence investigation officer. The e-mail indicated that Brooks came into a courtroom where the deputy county attorney was interviewing pro se defendants and said he was "present 'amicus curiae.'" The deputy county attorney did not personally see Brooks engaging in the unauthorized practice of law. The deputy county attorney stated, however, that she believed two other attorneys had witnessed Brooks giving legal advice to their clients.

The two letters accompanying the presentence report were from the attorneys mentioned in the deputy county attorney's e-mail. The attorneys represent individuals facing contempt of court charges due to nonpayment of child support. The first attorney indicated that one of the attorney's clients brought Brooks to a private meeting with the attorney. During the meeting, Brooks encouraged the client "to proceed to trial . . . and that, should he lose, he could merely appeal the decision." The attorney indicated that this was contrary to the advice he had given the client and that in the attorney's opinion, "Brooks was engaging in the unauthorized practice of law."

The second attorney's letter told a similar story. The second attorney had been in a courtroom where Brooks was also present. Brooks "was speaking loudly and answering questions from multiple persons," including advising people on the amount of child support a court could order someone to pay. The attorney opined that Brooks' recommendations were misleading and constituted the giving of legal advice.

In his allocution, Brooks admitted to being at the courthouse during one incident described in the letters. Brooks claimed, however, that he was there with his cousin. Brooks further asserted he did not give anyone legal advice, but merely advised his cousin to read the statute by saying, "[A]ll you have to do is go to [chapter] 42."

At the time of sentencing, the court made the following statement regarding the attorneys' letters:

> I can't ignore letters to me from attorneys that within months of a jury verdict say to me that you're up here giving people legal advice.
>
> And whether you dispute that or not, whether you think that they didn't — they misreported that, these are attorneys that have gone to some length to write and say, I believe an individual — this individual — was engaging in the unauthorized practice of law by advising my clients. . . .
>
> . . . .
>
> . . . I can't ignore those things even if they're only half true.

Brooks claims the trial court abused its discretion because "[t]hings that are half true should be ignored by the sentencing court." Brief for appellant at 41. However, the trial court's statement that it could not ignore the letters "even if they're only half true" does not appear to be an indication that the court believed the letters were partially untrue, but a turn of phrase. The court was apparently expressing its disapproval of Brooks' behavior by indicating that if even half of the misconduct alleged by the attorneys were true, it would still be so egregious as to warrant consideration by the court during sentencing. The court may also have been referencing the fact that, by Brooks' own admission, the letters were "half true" because Brooks admitted to being at the courthouse with his cousin and advising him to read "[chapter] 42." We cannot say that the district court abused its discretion by finding the attorneys' letters to be more credible than Brooks' version of events. It was not error for the court to consider the letters at the sentencing hearing.

### 8. Excessive Sentences

Brooks also asserts the district court imposed excessive sentences by not giving proper weight to evidence that Brooks

was trying to better himself and the fact that the offenses were nonviolent.

[18,19] When imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education and experience, social and cultural background, past criminal record, 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. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011). Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

At the sentencing hearing, the court indicated it had considered all the statutory factors and reviewed the presentence report. The court also referenced the attorneys' letters demonstrating that Brooks continued to engage in the unauthorized practice of law. The court concluded that a jail sentence was appropriate:

> I think this is dangerous behavior. And the fact that you're willing to do this after being convicted by a jury of a felony just says to me that if I put you on probation, this isn't going [to] change. And I didn't hear one word from you today that suggested to me that this would change.
>
> . . . [Q]uite frankly, I feel a period of incarceration is appropriate because anything less would depreciate the seriousness of what you've done and promote disrespect for the law.

The district court sentenced Brooks to imprisonment for 15 to 35 months on the theft by deception conviction and 3 to 3 months on the unauthorized practice of law conviction. The court ordered that the sentences be served consecutively.

Brooks' sentences were within the statutory limits. See, Neb. Rev. Stat. § 28-518(2) (Cum. Supp. 2014) (stating that theft by

deception is Class IV felony when it involves more than $500 and not over $1,500); Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014) (providing sentencing range of 0 to 5 years' imprisonment for Class IV felony); § 7-101 (stating that unauthorized practice of law is Class III misdemeanor); Neb. Rev. Stat. § 28-106 (Cum. Supp. 2014) (providing sentencing range of 0 to 3 months' imprisonment for Class III misdemeanor). We therefore review Brooks' sentences only for an abuse of discretion by the district court. See *Casares, supra*.

Brooks argues the trial court did not properly consider that Brooks had taken steps to better himself, including going to school and having little contact with law enforcement in recent years. Brooks also argues the court should have considered the nonviolent nature of the crimes as a mitigating factor. However, the record reveals that the district court relied upon evidence that Brooks had not taken steps to better himself, but had instead continued to engage in the unauthorized practice of law, following his conviction. Furthermore, the court noted that Brooks' crimes were "dangerous behavior" because other people's legal interests were at stake, even if the crimes were not violent offenses. We cannot find an abuse of discretion in the sentences imposed in this case.

### 9. Motion for New Trial

Brooks argues the trial court erred in failing to grant his motion for new trial. Brooks asserts he was entitled to a new trial because the district court erred when it excluded Johnson's testimony about Sharon's reputation for untruthfulness, when it excluded Brooks' four character witnesses, when it determined there was sufficient evidence to support the unauthorized practice of law conviction, and when it determined there was sufficient evidence to support Brooks' conviction for theft by deception. This assignment of error is meritless.

[20,21] A new trial can be granted on grounds materially affecting the substantial rights of the defendant. *State v. Dunster*, 270 Neb. 773, 707 N.W.2d 412 (2005). A motion for new trial is addressed to the discretion of the trial court,

whose decision will be upheld in the absence of an abuse of discretion. *State v. Harris*, 264 Neb. 856, 652 N.W.2d 585 (2002).

Brooks does not assert any new issues in this assignment of error, but, rather, argues that the trial court should have granted him a new trial based on other assigned errors already addressed. For the reasons discussed above, Brooks' assertions are without merit. The district court did not abuse its discretion in refusing to grant Brooks' motion for new trial.

### 10. Ineffective Assistance of Counsel

Brooks asserts that his trial counsel failed to provide effective assistance. He argues that his trial counsel was ineffective with regard to (1) failing to cite § 27-608 when the court asked for relevant authority supporting the admission of Johnson's testimony; (2) failing to lay proper foundation for Johnson's testimony; (3) failing to lay proper foundation for the admission of Brooks' four character witnesses; (4) failing to file a motion in limine or object at trial to prevent the introduction of evidence outside the statute of limitations on the unauthorized practice of law charge; (5) failing to impeach Sharon about inconsistent statements between her trial testimony and her interview with an investigator; (6) failing to object to jury instruction No. 4B, which permitted the jury to convict Brooks of the unauthorized practice of law based on evidence outside the statute of limitations; and (7) failing to move for the trial judge to recuse himself because he presided over another case in which Brooks was involved. We find that effectiveness of counsel in these regards cannot be addressed on direct appeal because the record is insufficient at this time.

[22,23] In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that he or she was prejudiced by such deficiency. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011). Ineffective assistance of counsel claims

are generally addressed through a postconviction action. *State v. Rocha*, 286 Neb. 256, 836 N.W.2d 774 (2013). This is frequently because the record is insufficient to review the issue on direct appeal. *Id.*

As an initial matter, we note that our earlier discussion of the trial court's erroneous inclusion of dates outside the statute of limitations in jury instruction No. 4B eliminates the need to address that allegation of ineffectiveness. With respect to the six remaining allegations of ineffective assistance of counsel, the record is insufficient for us to evaluate counsel's actions in each respect in which Brooks asserts the performance was deficient. Brooks' assertions require an evaluation of counsel's trial strategy, for which the record is insufficient. See *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014). Thus, we do not address the merits of this assignment of error.

## V. CONCLUSION

Upon our review, we find that the district court erred when it instructed the jury that it could convict Brooks of the unauthorized practice of law based on conduct occurring outside the statute of limitations. We reverse Brooks' conviction for the unauthorized practice of law and remand that matter for a new trial. We find no merit to Brooks' other assertions on appeal. Accordingly, we affirm Brooks' conviction and sentence for theft by deception.

Affirmed in part, and in part reversed and remanded for a new trial.

**Nebraska Court of Appeals**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# In re Interest of Miah T. and DeKandyce H., children under 18 years of age. State of Nebraska, appellee, v. DeKarlos H., appellant.

875 N.W.2d 1

Filed February 2, 2016. Nos. A-15-417, A-15-694.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. 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.
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 court from which the appeal is taken.
4. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** Juvenile court proceedings are special proceedings, and an order in a juvenile special proceeding is final and appealable if it affects a parent's substantial right to raise his or her child.
5. ____: ____: ____: ____. An order which is entered after a child is adjudicated to be within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2014) and which requires a parent to complete some sort of rehabilitation plan affects a substantial right of the parent and is, thus, generally, a final, appealable order.
6. **Juvenile Courts: Final Orders: Time: Appeal and Error.** 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.

7. **Juvenile Courts: Jurisdiction.** When a juvenile court finds a child to be within the meaning of Neb. Rev. Stat. § 43-247 (Cum. Supp. 2014), it is vested with jurisdiction not only over the child but also over the child's parents.
8. **Juvenile Courts: Parental Rights.** A juvenile court has the discretionary power to prescribe a reasonable program for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code.
9. ____: ____. The provisions of a rehabilitation plan must be reasonably related to the plan's ultimate objective of reuniting parent with child.
10. **Juvenile Courts: 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. **Child Custody: Parental Rights.** The parental preference doctrine holds that in a child custody controversy between a biological parent and one who is neither a biological nor an adoptive parent, the biological parent has a superior right to custody of the child.

Appeal from the Separate Juvenile Court of Lancaster County: Roger J. Heideman, Judge. Affirmed.

Joy Shiffermiller, of Shiffermiller Law Office, P.C., L.L.O., for appellant.

Joe Kelly, Lancaster County Attorney, and Christopher M. Reid for appellee.

Moore, Chief Judge, and Irwin and Inbody, Judges.

Irwin, Judge.

## I. INTRODUCTION

DeKarlos H. appeals from two separate orders entered by the separate juvenile court of Lancaster County. In case No. A-15-417, DeKarlos appeals from the juvenile court's order which requires him to attend both a domestic violence batterers' intervention course and a victims' impact group prior to the court's considering DeKarlos as a viable placement for his daughter, DeKandyce H. In case No. A-15-694,

DeKarlos appeals from the juvenile court's order which continued DeKandyce's placement in a foster home, rather than placing her with DeKarlos. The two appeals were consolidated for briefing in this court, and we consolidate them for opinion as well.

Upon our de novo review of the record, we affirm the orders of the juvenile court in their entirety.

## II. BACKGROUND

This appeal involves DeKarlos and his daughter, DeKandyce, born in October 2007. The juvenile court proceedings below also involve DeKandyce's mother, Everlyn B., and DeKandyce's half sister, Miah T. However, Everlyn and Miah are not involved in this appeal and their involvement in the juvenile court proceedings will only be discussed to the extent necessary to provide context for the circumstances giving rise to this appeal.

On July 14, 2014, the State filed a petition alleging that DeKandyce, who was then 6 years old, was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2013) due to the faults or habits of Everlyn, DeKandyce's custodial parent. Specifically, the petition alleged that on or about July 11, Everlyn was under the influence of alcohol and threatened to strike or stab Miah, who was then 11 years old. Although DeKandyce was not the target of Everlyn's violent behavior, she was present during this incident. Ultimately, DeKandyce and Miah were removed from Everlyn's home and placed in the temporary custody of the Department of Health and Human Services (Department) for out-of-home placement.

A few days after the petition was filed, on July 16, 2014, the juvenile court appointed DeKarlos with an attorney to represent his interests in the proceedings. DeKarlos was permitted to have unsupervised visitations with DeKandyce, subject to "random drop-ins" by Department workers.

On September 22, 2014, Everlyn pled no contest to the allegations in the petition. As a result of Everlyn's plea,

DeKandyce was adjudicated to be a child within the meaning of § 43-247(3)(a). Subsequently, on January 21, 2015, the juvenile court entered a dispositional order requiring Everlyn to comply with a rehabilitation plan which was designed to remedy the circumstances which resulted in DeKandyce's adjudication. In addition, in the January 21 order, the juvenile court required DeKarlos to participate in "domestic violence education" if he wanted to be considered for placement of DeKandyce.

On April 1, 2015, a review hearing was held. DeKarlos did not appear at this hearing. During this hearing, the family's Department case manager testified that since the January 2015 dispositional hearing, DeKarlos had not completed a domestic violence education program. Although he had enrolled in such a program, DeKarlos was discharged unsuccessfully for failing to regularly attend the classes and for lying to the instructor. DeKarlos indicated to the Department that he did not plan on reenrolling in a domestic violence education program. However, the case manager testified that the Department continued to recommend that DeKarlos attend such a program prior to being considered as a placement for DeKandyce. In addition, the court report authored by the case manager and offered, without objection, by the State at the review hearing reveals that the Department's recommendation that DeKarlos attend domestic violence education stemmed from DeKarlos' criminal history. DeKarlos had been arrested for incidents of domestic violence on multiple occasions, including in August 2014, after the current juvenile court proceedings had been initiated. The victim in the August 2014 incident was Everlyn.

After the April 1, 2015, review hearing, the juvenile court entered an order. As a part of that order, the court required DeKarlos to attend and successfully complete both a domestic violence batterers' intervention course and a victims' impact group if he wished to be considered as a placement for DeKandyce. In addition, immediately after the review hearing,

on April 2, the State filed a supplemental petition alleging that DeKandyce was a child within the meaning of § 43-247(3)(a) (Cum. Supp. 2014) due to the faults or habits of DeKarlos. Specifically, the petition alleged that although DeKarlos knew that DeKandyce had been removed from Everlyn's home and placed in foster care, DeKarlos had "failed to fully participate in the neglect case involving DeKandyce . . . and/or ha[d] failed to place himself in a position to have placement of DeKandyce . . . and/or assume the care and custody of DeKandyce."

DeKarlos appealed from the court's April 2015 order in case No. A-15-417.

Approximately 1 month after DeKarlos filed his appeal in case No. A-15-417, DeKandyce's foster parents, who were DeKarlos' cousin and his wife, notified the Department that they did not want to care for DeKandyce and Miah any longer. The foster parents reported that they felt like both Everlyn and DeKarlos were harassing them.

As a result of the foster parents' request that DeKandyce and Miah be removed from their home, the Department placed the girls in a nonrelative foster home and filed a motion for approval of a placement change with the juvenile court. The juvenile court approved the placement change pending a hearing, which was scheduled for June 25, 2015.

At the June 25, 2015, hearing, the family's case manager testified. She indicated that both DeKandyce and Miah were removed from the home of DeKarlos' cousin at the request of his cousin's wife. It was reported to the case manager that the foster parents were being harassed by both Everlyn and DeKarlos. Specifically, as to DeKarlos, it was reported that DeKarlos made derogatory comments about his cousin and his cousin's wife while he was intoxicated. In addition, DeKarlos almost got into an altercation with his cousin due to these derogatory remarks.

The case manager testified that when DeKandyce was removed from her foster home, DeKarlos was not considered

as a possible placement for DeKandyce. The Department did not consider DeKarlos because he had not completed any domestic violence education; because he had multiple entries on a child abuse and neglect registry indicating that he had previously emotionally or physically neglected seven different children; and because in the 11 months the juvenile court proceedings had been pending, DeKarlos had been incarcerated three different times. In addition, at the time of the June 25, 2015, hearing, DeKarlos had an outstanding warrant for his arrest due to his failure to pay child support.

The case manager did indicate, however, that both DeKandyce and Miah had been placed with DeKarlos during a prior juvenile court case and for a few days around the Christmas holiday during the current juvenile court case. The case manager was not aware of any concerns reported during these placements.

DeKarlos also testified at the hearing. He denied ever harassing his cousin's family. He indicated that he was not happy with DeKandyce's new foster home because he received fewer telephone calls and visits with DeKandyce since she had been moved. He testified that he wanted both DeKandyce and Miah to be placed with him. He believed that he was capable of providing a safe environment for the girls. He also refuted the case manager's testimony about his inclusion on the child abuse and neglect registry because he was working to get those entries expunged.

After the hearing, the juvenile court entered an order approving the current placement of DeKandyce in a nonrelative foster home.

DeKarlos also appeals from this order.

## III. ASSIGNMENTS OF ERROR

In case No. A-15-417, DeKarlos alleges that the juvenile court erred in requiring him to attend a domestic violence batterers' intervention course and a victims' impact group before he would be considered as a placement for DeKandyce.

In case No. A-15-694, DeKarlos alleges that the juvenile court erred in failing to place DeKandyce in his home.

## IV. ANALYSIS

### 1. 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. 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. *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012).

### 2. Appeal in Case No. A-15-417

In case No. A-15-417, DeKarlos appeals from the juvenile court's April 2015 order which requires him to attend a domestic violence batterers' intervention course and a victims' impact group before he would be considered as a placement for DeKandyce. However, before we address the merits of DeKarlos' argument on appeal, we must first determine whether the April 2015 order DeKarlos is appealing from is a final, appealable order.

[2-4] 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 Octavio B. et al.*, 290 Neb. 589, 861 N.W.2d 415 (2015). 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. *Id.* Juvenile court proceedings are special proceedings, and an order in a juvenile special proceeding is final and appealable if it affects a parent's substantial right to raise his or her child. See *id.* Thus, if the juvenile court's order requiring DeKarlos to attend a domestic violence batterers' intervention course and a victims' impact group before he would be considered as a placement for DeKandyce affected his substantial right to

raise DeKandyce, the order was final and appealable. But if the order did not affect a substantial right, we lack jurisdiction and must dismiss the appeal.

[5] A substantial right is an essential legal right, not a mere technical right. *Id*. 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. *Id*. An order which is entered after a child is adjudicated to be within the meaning of § 43-247(3)(a) and which requires a parent to complete some sort of rehabilitation plan affects a substantial right of the parent and is, thus, generally, a final, appealable order. See, *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003); *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998). As such, it would appear that the April 2015 order requiring DeKarlos to attend a domestic violence batterers' intervention course and a victims' impact group before he would be considered as a placement for DeKandyce affected his substantial right to raise DeKandyce and is a final, appealable order.

[6] However, the State argues that the April 2015 order is not a final, appealable order because it "merely alters" the juvenile court's order from January 2015 which required DeKarlos to attend domestic violence education before he would be considered as a placement for DeKandyce. Brief for appellee at 13. It is well settled that 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. See, e.g., *In re Interest of Mya C. & Sunday C.*, 286 Neb. 1008, 840 N.W.2d 493 (2013). Stated another way, a dispositional order which merely continues a previous determination of the juvenile court is not an appealable order. *In re Interest of Octavio B.*

*et al., supra*; *In re Interest of Diana M. et al.*, 20 Neb. App. 472, 825 N.W.2d 811 (2013). See *In re Interest of Mya C. & Sunday C., supra*.

We recognize that the juvenile court's April 2015 order which requires DeKarlos to attend a domestic violence batterers' intervention course and a victims' impact group before he would be considered as a placement for DeKandyce is similar to its January 2015 order which required DeKarlos to attend domestic violence education before he would be considered as a placement for DeKandyce. But, even though the orders are similar, they are not the same. The April 2015 order is much more specific about exactly which domestic violence education classes DeKarlos is required to attend. In addition, the April 2015 order actually requires DeKarlos to attend two separate courses: a domestic violence batterers' intervention course and a victims' impact group. The practical effect of the court's decision to require DeKarlos to attend two separate courses may be that it takes DeKarlos a longer period of time to complete the courses and, thus, takes him a longer period of time to obtain placement of DeKandyce.

Because of the fundamental and material differences between the requirements prescribed in the January 2015 order and in the April 2015 order, we conclude that the April 2015 order is not merely a continuation of the previous order. An order that adopts a case plan with a material change in the conditions for reunification with a parent's child is a crucial step in proceedings that could possibly lead to the termination of parental rights. See *In re Interest of Mya C. & Sunday C., supra*. As such, we conclude that the April 2015 order affects a substantial right of DeKarlos and is appealable.

Having concluded that the April 2015 order is final and appealable, we now discuss the substance of DeKarlos' arguments on appeal. DeKarlos asserts that the juvenile court erred in requiring him to attend a domestic violence batterers' intervention course and a victims' impact group before he would be considered as a placement for DeKandyce because

he "is not an adjudicated parent" and his participation in these classes would not correct the circumstances which gave rise to DeKandyce being adjudicated as a child within the meaning of § 43-247(3)(a). Brief for appellant at 19. DeKarlos also asserts that there was insufficient evidence to show that DeKarlos' admittedly undesirable behavior has in any way impacted DeKandyce. Upon our de novo review of the record, we cannot say that the juvenile court erred in its April 2015 order.

DeKarlos asserts that the court erred in requiring him to attend a domestic violence batterers' intervention course and a victims' impact group before he would be considered as a placement for DeKandyce because DeKandyce was adjudicated as a child within the meaning of § 43-247(3)(a) only as to Everlyn, not as to DeKarlos. He suggests that the juvenile court lacks the authority to impose requirements and restrictions on him before he is subject to formal adjudication proceedings. DeKarlos' assertion in this regard is without merit.

[7] Section 43-247(5) provides that the juvenile court shall have jurisdiction of "[t]he parent, guardian, or custodian of any juvenile described in this section." The plain language of this subsection suggests that when a juvenile court finds a child to be within the meaning of § 43-247, it is vested with jurisdiction not only over the child but also over the child's parents.

In *In re Interest of Devin W. et al.*, 270 Neb. 640, 707 N.W.2d 758 (2005), the Supreme Court analyzed the language of § 43-247(5) as it was then written. Neb. Rev. Stat. § 43-247(5) (Cum. Supp. 2002) provided that the juvenile court shall have jurisdiction over "[t]he parent, guardian, or custodian who has custody of any juvenile described in this section." The court determined that "pursuant to the plain meaning of [§ 43-247(5)], the juvenile court's jurisdiction is extended to parents who have custody of any juvenile who has been found to be a child described in § 43-247." *In re Interest of Devin W. et al.*, 270 Neb. at 652, 707 N.W.2d at

766-67. The court then held that, because of this statutory language, the juvenile court had jurisdiction over the child at issue and the child's custodial father, even though the child was adjudicated to be a child within the meaning of § 43-247(3)(a) only due to the acts of his mother. The court specifically disapproved of the concept that a child is "adjudicated as to" one parent or the other because it is the child, not the parent, that is adjudicated in order to protect the child's rights. The court distinguished that the parents' rights are determined in the dispositional phase of the case, not the adjudication phase.

In 2008, a few years after the Supreme Court decided *In re Interest of Devin W. et al., supra*, § 43-247(5) was amended such that the language which indicated that a juvenile court's jurisdiction extended only to a *custodial* parent, guardian, or custodian whose child has been found to be within the meaning of § 43-247 was eliminated. See § 43-247 (Reissue 2008). As we stated above, § 43-247(5) (Cum. Supp. 2014) currently provides that the juvenile court shall have jurisdiction of "[t]he parent, guardian, or custodian of any juvenile described in this section." As a result of this change to the statutory language, the juvenile court's jurisdiction is now extended to any parent or guardian of a child who has been found to be within the meaning of § 43-247.

DeKandyce was adjudicated to be a child within the meaning of § 43-247(3)(a). Due to DeKandyce's adjudication, the juvenile court has jurisdiction over DeKandyce, Everlyn, and DeKarlos. And, because the court has jurisdiction over DeKarlos, it had the authority to require DeKarlos to submit to domestic violence education courses prior to considering him for placement of DeKandyce.

Now that we have determined that the juvenile court had the authority to enter the April 2015 order which requires DeKarlos to participate with a rehabilitation plan by attending a domestic violence batterers' intervention course and a victims' impact group, we now must determine whether such

an order was proper under the circumstances of this case. On appeal, DeKarlos asserts that the provisions of the rehabilitation plan were unreasonable and unrelated to the circumstances which caused DeKandyce to be adjudicated pursuant to § 43-247(3)(a). Upon our de novo review, we affirm the juvenile court's order.

[8,9] A juvenile court has the discretionary power to prescribe a reasonable program for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code. *In re Interest of Rylee S.*, 285 Neb. 774, 829 N.W.2d 445 (2013). The provisions of a rehabilitation plan must be reasonably related to the plan's ultimate objective of reuniting parent with child. See, *id*; *In re Interest of C.D.C.*, 235 Neb. 496, 455 N.W.2d 801 (1990).

In this case, DeKandyce was adjudicated to be a child within the meaning of § 43-247(3)(a) because she was placed at risk of harm when she witnessed her mother act aggressively and violently toward DeKandyce's half sister, Miah, and because she lacked a safe and stable home. While the specific circumstances leading to DeKandyce's adjudication involved only Everlyn and not DeKarlos, there was evidence presented during the juvenile court proceedings which indicated that DeKarlos also may not be able to provide DeKandyce a safe and stable home free from domestic violence.

This evidence revealed that DeKarlos has a history of engaging in acts of domestic violence. In fact, DeKarlos was involved in an altercation with Everlyn after the current juvenile court proceedings were initiated. Given this evidence, it was reasonable for the juvenile court to require DeKarlos to participate in a domestic violence batterers' intervention course and a victims' impact group before considering him for placement of DeKandyce. Such domestic violence education will assist DeKarlos in his efforts to provide DeKandyce with a safe and stable home which is free from domestic violence. In addition, the courses may help DeKarlos better understand how

to parent DeKandyce given that she has previously witnessed an incident of domestic violence. Although there was no evidence that DeKandyce has ever witnessed DeKarlos engage in domestic violence, the evidence that DeKarlos does have a history of such behavior coupled with DeKandyce's experience with domestic violence, in general, justifies the order requiring DeKarlos to attend the classes.

### 3. Appeal in Case No. A-15-694

In case No. A-15-694, DeKarlos appeals from the juvenile court's June 2015 order which continued DeKandyce's placement in a nonrelative foster home rather than placing her with DeKarlos. Specifically, he argues that he is a fit parent who can provide DeKandyce with a safe and stable home environment. Upon our de novo review of the record, we affirm the order of the juvenile court continuing DeKandyce's placement in a nonrelative foster home.

[10] Neb. Rev. Stat. § 43-285 (Cum. Supp. 2014) provides that once a child has been adjudicated under § 43-247(3), the juvenile court must ultimately decide where a child should be placed. And, juvenile courts are accorded broad discretion in determining the placement of an adjudicated child and to serve that child's best interests. *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012). However, this discretion, while broad, is not without limitation because of the parental preference doctrine.

[11] The parental preference doctrine holds that in a child custody controversy between a biological parent and one who is neither a biological nor an adoptive parent, the biological parent has a superior right to custody of the child. *In re Interest of Stephanie H. et al.*, 10 Neb. App. 908, 639 N.W.2d 668 (2002). And,

> "[a] court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is *affirmatively shown* that such parent is unfit to perform the duties imposed by the relationship or has forfeited

> that right; neither can a court deprive a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child."

*Id*. at 924, 639 N.W.2d at 681, quoting *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996).

Because of the parental preference doctrine, the propriety of the juvenile court's June 2015 order concerning DeKandyce's placement depends on whether there is affirmative evidence that DeKarlos is presently unfit to care for DeKandyce. The evidence presented during the juvenile court proceedings revealed that DeKarlos has failed to complete any domestic violence education classes despite being ordered to do so by the juvenile court before he would be considered as a placement for DeKandyce and despite having a history of engaging in domestic violence. In addition, there was evidence that DeKarlos has a history of neglecting children in his care. In fact, he is currently listed on the child abuse and neglect registry. In April 2015, the State filed a supplemental petition alleging that DeKandyce was at risk for harm because of DeKarlos' neglect of her. And, DeKarlos has had recent and repeated contacts with law enforcement. During the 11 months the juvenile court proceedings were pending, DeKarlos was incarcerated three different times. In addition, at the time of the June 25 hearing, DeKarlos had an outstanding warrant for his arrest due to his failure to pay child support.

Based upon our review of this evidence, we conclude that there was sufficient evidence presented to demonstrate that DeKarlos is currently not fit to care for DeKandyce. We do recognize that there was limited evidence presented which suggested that DeKarlos had cared for DeKandyce during previous juvenile court proceedings and had provided respite care for her for a couple of days over the holidays during the current juvenile court proceedings. And, although DeKarlos suggests that this evidence indicates that there should be no concern about his ability to appropriately care for DeKandyce,

we cannot characterize the evidence in this way. Caring for a child on a limited basis and with what appears to have been a moderate amount of supervision by Department workers is much different than long-term, permanent placement without such supervision. The evidence presented by the State created significant doubts about DeKarlos' present ability to provide DeKandyce with a safe and stable home environment. Evidence of his limited contact with DeKandyce during the juvenile court proceedings does not mitigate this doubt.

We affirm the June 2015 order of the juvenile court which continued placement of DeKandyce in a nonrelative foster home.

## V. CONCLUSION

Upon our de novo review of the record, we affirm the orders of the juvenile court in cases Nos. A-15-417 and A-15-694 in their entirety.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Cody Olbricht, also known as Cody Olbrich, appellant.

875 N.W.2d 868

Filed February 9, 2016. No. A-15-404.

1. **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.
2. ____: ____. The relevant question when an appellate court reviews a sufficiency of the evidence claim is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **Criminal Law: Judgments: Appeal and Error.** While in a bench trial of a criminal case the court's findings have the effect of a verdict and will not be set aside unless clearly erroneous, an appellate court has an obligation to reach an independent, correct conclusion regarding questions of law.
4. **Criminal Law: Minors: Words and Phrases.** For the purposes of Neb. Rev. Stat. § 28-707(7) (Cum. Supp. 2014), the statute criminalizing knowing and intentional child abuse resulting in serious bodily injury, serious bodily injury is defined as bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body.
5. **Criminal Law: Minors: Convictions: Appeal and Error.** Child abuse convictions will be upheld where the evidence establishes that the defendant was the sole caregiver for the victim at the time the abuse occurred.

6. **Double Jeopardy: Evidence: Appeal and Error.** The Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient.

Appeal from the District Court for Scotts Bluff County: Randall L. Lippstreu, Judge. Reversed and vacated.

Leonard G. Tabor for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

Moore, Chief Judge, and Irwin and Inbody, Judges.

Irwin, Judge.

## I. INTRODUCTION

Cody Olbricht, also known as Cody Olbrich, appeals his conviction and sentence for knowing and intentional child abuse resulting in serious bodily injury. On appeal, Olbricht argues that there was insufficient evidence to support his conviction, the trial court erred in overruling his motions for directed verdict and new trial, the trial court erred in making numerous evidentiary rulings, and Olbricht received an excessive sentence. Upon our review, we find that there was insufficient evidence to support Olbricht's conviction. Accordingly, we reverse Olbricht's conviction and vacate his sentence.

## II. BACKGROUND

On September 28, 2014, a 3-year-old child, A.M., was admitted to an emergency room in Scottsbluff, Nebraska. A.M. had bruising on her face, torso, arms, and legs. Doctors also observed that A.M. was not interactive, appeared sleepy, and had bleeding in the white part of her left eye. Due to A.M.'s symptoms, doctors suspected she might be suffering from a "subdural hemorrhage" (brain bleed). A CAT scan revealed a brain bleed and infarct in A.M.'s brain. Further examination revealed that A.M. also had a laceration on the

left lobe of her liver. Due to the severity of her brain injury, she was transferred by helicopter to a hospital in Denver, Colorado, for treatment.

A.M. had been transported to the emergency room by her maternal grandmother, Lynelle Pahl. Cassandra Miller, who is A.M.'s mother, and Olbricht, who is Miller's boyfriend, also came to the emergency room shortly after A.M. was admitted. Olbricht is not A.M.'s biological father, but Olbricht, Miller, and A.M. lived together, along with the couple's son.

Olbricht and Miller informed the doctors at the emergency room that A.M. had not been feeling well for the past week. They explained that A.M. was less active, had a headache, and had vomited throughout the week. Olbricht and Miller also expressed their belief that A.M. might have a bleeding disorder that caused her bruises. Laboratory tests revealed that she did not suffer from a bleeding disorder that would have caused her bruising or the brain bleed.

The emergency room doctor suspected that A.M. may have been abused and notified the authorities. Olbricht was subsequently charged with knowing and intentional child abuse resulting in serious bodily injury to A.M. See Neb. Rev. Stat. § 28-707(1) and (7) (Cum. Supp. 2014).

The matter proceeded to a bench trial held on March 20, 23, and 24, 2015. The State subpoenaed Miller to testify. Miller testified that she and Olbricht had been "boyfriend and girlfriend" for 2½ years. According to Miller, A.M. referred to Olbricht as "daddy."

Miller testified that A.M. had previously received various injuries while in Olbricht's care. First, Miller testified that in March 2014, A.M. cut her bottom lip while Olbricht was watching her. In another incident that Miller said she believed occurred in September 2014, A.M. received burns to her lip and face while under Olbricht's supervision. With regard to the burning incident, Miller testified that A.M. was in the shower when Miller got home and that A.M.'s face was red. Miller next testified that A.M. suffered bruises to her right hip in

September 2014. During that incident, A.M. was home with Olbricht while Miller was at work. Olbricht told Miller that A.M. had fallen playing on rocks in the backyard. Next, Miller testified that she was at work on September 20 while Olbricht cared for A.M. When Miller returned home, she noticed the white of A.M.'s left eye was red.

Miller also testified regarding the events of the day before A.M. was admitted to the emergency room, September 27, 2014. Miller testified that she worked outside the home from approximately 10 a.m. to 3:40 p.m. while Olbricht watched A.M., the couple's son, and Olbricht's two other children. According to Miller, A.M. received a bruise to her cheek just after Miller got off work while A.M. was playing with the other children. Miller testified that she and Olbricht were in another room when one of Olbricht's children yelled that another child had hit A.M.

Miller testified that Olbricht took his other children back to their mother's care at some point after Miller returned home from work. Miller testified that she and Olbricht then took A.M. to a fast-food restaurant "to get something to eat" and drove her to a babysitter in Lyman, Nebraska. Miller testified that just as they arrived at the gas station in Lyman to drop A.M. off with the babysitter, A.M. vomited. According to the babysitter, Miller changed A.M.'s clothes and then she and Olbricht left A.M. with the babysitter for the night.

The babysitter testified that she knew Olbricht and Miller because she worked with Pahl, Miller's mother. The babysitter testified that when she met Olbricht and Miller to pick up A.M. on September 27, 2014, A.M. had just vomited on herself. According to the babysitter, Olbricht was upset with A.M. for vomiting and was telling her to stop. The babysitter noticed that A.M. had marks on her face, neck, and back. The babysitter testified that she took a picture of A.M.'s bruises and sent them to Pahl. According to the babysitter, A.M. was lethargic and vomited numerous times that night. The babysitter also testified over objection that when she informed

A.M. her grandmother, Pahl, was going to pick her up, A.M. seemed scared to go home:

> She seemed terrified and she didn't want to go home. She kept expressing to me she didn't want to go home.
>
> . . . .
>
> . . . And then when I asked her if somebody was hurting her at home and she explained to me that, yes, and I said who and she said, "daddy." And I said, "where does daddy hurt you?" She pointed to her shin and she pointed to her foot. And I had rubbed her head and I felt lumps all along her head and I said, "did he hit your head, too," and she said yes.

The State did not ask the babysitter if A.M. had indicated a timeframe for when she was hurt or hit by Olbricht.

Pahl testified that she was at work when the babysitter texted her the photograph of A.M.'s bruises around 8 p.m. on September 27, 2014. Pahl spoke with the babysitter by telephone and decided that Pahl would pick up A.M. in the morning. Pahl testified that when she picked A.M. up on September 28, A.M. was frail, lethargic, and could not hold her head up. Pahl transported A.M. to the emergency room and notified Olbricht and Miller.

Pahl testified that she had seen A.M. twice during the week leading up to A.M.'s hospitalization. On Monday, September 22, 2014, Pahl watched A.M. alone at her house for approximately an hour. On either September 24 or 25, Olbricht and Miller brought A.M. to visit Pahl at work. It is not entirely clear from the record, but it appears that Pahl was not alone with A.M. during the work visit.

The emergency room doctor who had treated A.M., Jeffrey Salisbury, also testified at the trial. Dr. Salisbury opined that the subdural hemorrhage and infarct in A.M.'s brain were injuries that presented a substantial risk of death. Dr. Salisbury also testified that "a significant liver laceration that is bleeding [is] the most life threatening" because the liver, unlike some other organs, cannot be removed. According to Dr. Salisbury,

there was no way to tell exactly how old A.M.'s brain injury was at the time she came to the emergency room. Dr. Salisbury opined that the brain injury was "acute," meaning it could have been anywhere from 5 minutes to 2 weeks old.

The State also presented the testimony of Dr. Andrew Sirotnak, a forensic pediatrician and a member of the medical team that treated A.M. at the hospital in Denver. Dr. Sirotnak testified that he had diagnosed A.M. as a "battered child," meaning "a child that's been injured in a multi system manner over time." According to Dr. Sirotnak, A.M.'s injuries were likely nonaccidental because some occurred over soft tissue and others displayed a bruising pattern that indicated they were inflicted with an object. With respect to the injuries on A.M.'s legs and hip, Dr. Sirotnak opined that she had been hit with a wire hanger because the bruises were triangular in shape.

Dr. Sirotnak testified that A.M.'s brain injury posed a substantial risk of death because untreated brain injury can "progress[] to seizures and . . . lead to brain dysfunction, [and] respiratory or cardiac arrest as well." With respect to A.M.'s lacerated liver, Dr. Sirotnak testified, "[T]he liver injury in isolation, the way it was graded or seen on CT, I believe it was a laceration, and it was handled nonoperatively, there's also a risk that these things can bleed and, of course, recurrent trauma concerns that can bleed."

With respect to what caused A.M.'s injuries, Dr. Sirotnak testified that her liver laceration was likely caused by blunt trauma akin to the amount of force seen in a car accident. Dr. Sirotnak gave his opinion that based on A.M.'s medical history, there was no accidental explanation for her liver injury. Dr. Sirotnak testified that A.M.'s brain injury was "clearly something that was inflicted" and that the injury was likely the result of being "thrown from something or thrown by something."

On cross-examination, Dr. Sirotnak testified that the timing of A.M.'s injuries "would vary depending on the type

of mechanism that caused it." Dr. Sirotnak testified that he believed A.M.'s brain injury occurred "within . . . a day or two" or within a "few days" of her hospitalization. Dr. Sirotnak testified that he could not tell when the liver injury occurred.

At the close of the State's case, Olbricht moved for a directed verdict, arguing "the State failed to present a prima fa[cie] case." The court overruled the motion for directed verdict.

Olbricht then proceeded to present his defense. Olbricht called numerous family members and acquaintances who testified that A.M. was always healthy, happy, and clean and that Olbricht had never abused her. Olbricht also called Miller to the stand. Miller testified that, in addition to the prior incidents in which A.M. was injured while in Olbricht's care, A.M. had also suffered injuries in Miller's care. Miller testified that in August or September 2014, both she and Olbricht were home when A.M. fell down the stairs. Miller also testified that on September 16, she was with A.M. at the park when A.M. got hit in the head by a swing.

Lastly, Olbricht took the stand in his own defense. Olbricht provided explanations for A.M.'s previous injuries. According to Olbricht, A.M. received the bruise on her right hip while playing on bricks behind the family's apartment on September 20, 2014. With respect to the bruises on A.M.'s leg, Olbricht testified that she had been bumped in the leg by the children's motorized toy car. Olbricht testified that he had not seen the bruises on A.M.'s ribs before she was hospitalized. According to Olbricht, the white of A.M.'s left eye became red after she had been playing with the couple's son. With respect to A.M.'s cut lip, Olbricht testified that he had been bathing A.M. and left to get a towel. A.M.'s lip was bleeding when Olbricht returned to the bathroom, leading Olbricht to believe she had slipped and cut her lip on the shower railing. With respect to the burns A.M. had suffered to her face and mouth, Olbricht testified that he had left her in the shower to change

the diaper of the couple's son and that she had turned the water to hot. Lastly, Olbricht testified regarding the incident in which A.M. received a bruise on her cheek after Miller had returned home from work on September 27, 2014. Olbricht testified that one of his children had hit A.M. with either his hand or a toy while he and Miller were in another room. Olbricht denied abusing A.M.

The court found Olbricht guilty of knowing and intentional child abuse resulting in serious bodily injury and issued a written verdict. In the written verdict, the court found that both A.M.'s brain bleed and her lacerated liver created a substantial risk of death. The court noted that neither Olbricht nor Miller could provide an explanation for A.M.'s injuries. The court also referenced Dr. Sirotnak's diagnosis of A.M. as a battered child based on her many injuries, her bruises in various stages of healing, and the pattern of her bruises. The court stated that "[t]he majority, if not all, of [A.M.'s] documented injuries occurred when she was in the sole physical care of . . . Olbricht." Lastly, the court noted the evidence that A.M. was scared of Olbricht and had told the babysitter that Olbricht had hurt her. Based on this evidence, the court found Olbricht guilty of child abuse.

After the verdict, Olbricht moved for a new trial, arguing that "the evidence was just too weak by the State." The court overruled Olbricht's motion for new trial.

At the sentencing hearing, the court pronounced Olbricht's sentence to be 15 to 30 years' imprisonment, although the written journal entry and judge's notes for the sentencing reflect a sentence of 18 to 30 years' imprisonment. Olbricht appeals from his sentence and conviction.

## III. ASSIGNMENTS OF ERROR

Olbricht assigns five errors: (1) The evidence was insufficient to support his conviction for child abuse, (2) the trial court erred when it overruled Olbricht's motion for directed verdict at the close of the State's case, (3) the trial court erred

in admitting six items of evidence over Olbricht's objections, (4) the trial court erred in overruling Olbricht's motion for new trial, and (5) Olbricht received an excessive sentence.

## IV. ANALYSIS

Olbricht first argues that there was insufficient evidence adduced at the trial to sustain his conviction for knowing and intentional child abuse resulting in serious bodily injury. We agree that there was insufficient evidence to prove that Olbricht was the person who caused A.M.'s brain bleed or lacerated liver. We conclude this because the evidence presented never showed, directly or circumstantially, that A.M.'s serious bodily injuries occurred during a discrete timeframe when Olbricht was the only adult in her presence.

[1,2] 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. Hale*, 290 Neb. 70, 858 N.W.2d 543 (2015). The relevant question 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.*; *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

[3] While in a bench trial of a criminal case the court's findings have the effect of a verdict and will not be set aside unless clearly erroneous, an appellate court has an obligation to reach an independent, correct conclusion regarding questions of law. *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003).

[4] Olbricht was charged with knowingly and intentionally committing child abuse resulting in serious bodily injury. See § 28-707(7). "Serious bodily injury" is defined as "bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of

any part or organ of the body." Neb. Rev. Stat. § 28-109(20) (Reissue 2008).

[5] Nebraska courts have upheld child abuse convictions where the evidence established that the defendant was the sole caregiver for the victim at the time the abuse occurred. For example, in *State v. Robinson*, 278 Neb. 212, 769 N.W.2d 366 (2009), the Nebraska Supreme Court determined that there was sufficient evidence to sustain the defendant's conviction for knowing or intentional child abuse resulting in death. The child had died of trauma to the head and abdomen, which a doctor labeled as nonaccidental. *Id.* A pediatric physician testified that the child would have been unconscious within 15 to 20 minutes after sustaining the injuries. *Id.* The child's mother testified that she left the victim with the defendant for the entire afternoon and that the child was already unconscious and cold when she picked her up. *Id.* The court stated, "[E]vidence that [the child] was in [the defendant's] sole care during the time she suffered injuries was circumstantial evidence from which the jury could have inferred that he caused the injuries." *Id.* at 222, 769 N.W.2d at 373-74.

Similarly, in *State v. Chavez*, 281 Neb. 99, 793 N.W.2d 347 (2011), the court upheld the defendant's conviction for intentional child abuse resulting in death. The doctor who performed the autopsy opined that the cause of death was blunt force head injury consistent with shaking and that the injury occurred within a couple hours of the child's being found not breathing. *Id.* The child's mother testified that she left the child alone with the defendant from 5:45 to 7:30 a.m. and discovered the child was not breathing about a half an hour later. *Id.* The court concluded that "[t]he evidence . . . established that [the child's] death was the result of shaken baby syndrome and that [the defendant], *as sole caregiver*, had shaken her during the relevant timeframe." *Id.* at 110, 793 N.W.2d at 356 (emphasis supplied).

In *State v. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003), the defendant was convicted of first degree assault for injuring

an 18-month-old child in her care. The child had been dropped off at the defendant's home daycare at 7:50 a.m. *Id.* The defendant's husband left the home around 10 a.m. *Id.* At 10:55 a.m., the defendant summoned her neighbor for help because the child was in distress. *Id.* A doctor testified that the child had suffered a brain injury indicative of shaking. *Id.* The doctor opined that the symptoms would have manifested themselves within minutes. *Id.* The court upheld the defendant's conviction, stating, "The testimony of witnesses was such that the jury could reasonably find that [the defendant] was the sole adult in [the child's] presence at the time [the child] sustained her injury." *Id.* at 148, 662 N.W.2d at 630. See, also, *State v. Kuehn*, 273 Neb. 219, 236, 728 N.W.2d 589, 604 (2007) (upholding defendant's conviction for negligent child abuse because "[the child] was injured while he was in [the defendant's] care"); *State v. Jim*, 13 Neb. App. 112, 688 N.W.2d 895 (2004) (affirming trial court's denial of defendant's motion to dismiss or for directed verdict in case of child abuse resulting in death where evidence demonstrated that defendant was alone with child from 4:35 to 11:30 p.m. and child's body was found stiff in his bed the next morning, indicating he had been dead for number of hours); *State v. Fitzgerald*, 1 Neb. App. 315, 493 N.W.2d 357 (1992) (finding sufficient evidence supported defendant's conviction for intentional child abuse where evidence demonstrated that defendant was alone with child all morning and child had been intentionally burned by hot water sometime in late morning).

In contrast, there was no evidence adduced at trial indicating a definite period of time when A.M.'s abuse must have occurred and during which Olbricht was her sole caregiver. Dr. Salisbury testified that A.M.'s brain injury presented a substantial risk of death. Dr. Salisbury also opined that a liver laceration was "life threatening" because the liver, unlike other organs, cannot be removed. Similarly, Dr. Sirotnak testified that A.M.'s brain injury could have led to seizures, brain dysfunction, and respiratory or cardiac arrest. With respect to

A.M.'s liver injury, Dr. Sirotnak opined that there was a risk of bleeding and recurrent trauma. Viewed in the light most favorable to the State, the doctors' testimony supports a finding that either A.M.'s brain injury or her liver injury were serious bodily injuries within the meaning of § 28-109(20). There was no testimony that A.M.'s other injuries—the bruises on her cheek, legs, hip, torso, or back; the cut on her lip; or the burns to her face—involved a substantial risk of death. Therefore, none of these other injuries could be the basis for convicting Olbricht of knowing and intentional child abuse resulting in serious bodily injury.

According to the evidence at trial, the timeframe in which A.M.'s serious bodily injuries were inflicted was broad. Specifically, Dr. Salisbury testified that A.M.'s brain injury was "acute," meaning it could have occurred anywhere from 5 minutes to 2 weeks before she came to the emergency room. Dr. Sirotnak testified that A.M.'s brain injury occurred within "a day or two" of her hospitalization. Neither doctor provided a specific timeframe in which the liver injury occurred.

A.M. was not in Olbricht's sole care for the week or the "day or two" before she was hospitalized. For example, Miller was with both Olbricht and A.M. during the afternoon and evening of September 27, 2014, the day before A.M. was hospitalized. Additionally, A.M. was alone with Pahl for approximately an hour 6 days before her hospitalization. Furthermore, the night before her hospitalization, A.M. was in the care of the babysitter and neither Olbricht nor Miller was present. Therefore, pursuant to Dr. Sirotnak's opinion that the injury occurred within "a day or two" of A.M.'s hospitalization, Olbricht, Miller, and the babysitter cared for A.M. during the relevant timeframe. Pursuant to Dr. Salisbury's opinion that A.M.'s brain injury was between 5 minutes and 2 weeks old, Olbricht, Miller, the babysitter, and Pahl all cared for A.M. during the relevant timeframe. With respect to A.M.'s liver injury, neither doctor provided a timeframe during which the injury was inflicted, thereby making it impossible to establish

that Olbricht was A.M.'s sole caregiver when the liver laceration occurred. The North Carolina Supreme Court articulated the rule well when it stated, "Where an adult has *exclusive custody* of a child for a period of time and during such time the child suffers injuries which are neither self-inflicted nor accidental, the evidence is sufficient to create an inference that the adult inflicted an injury." *State v. Perdue*, 320 N.C. 51, 63, 357 S.E.2d 345, 353 (1987) (emphasis supplied). Here, the lack of evidence that Olbricht had exclusive custody of A.M. during the time when her substantial injuries were inflicted prevents the conclusion that Olbricht committed child abuse.

In urging us to find sufficient evidence to sustain Olbricht's conviction, the State relies on the district court's comment that "[t]he majority, if not all, of [A.M.'s] documented injuries occurred when she was in the sole physical care of . . . Olbricht." Brief for appellee at 12. It is true that Olbricht and Miller testified about a number of injuries that occurred while Olbricht was supervising A.M. However, the record does not support a finding that Olbricht caused either of the two injuries that could have supported his conviction: A.M.'s brain bleed and lacerated liver. Specifically, the State failed to adduce evidence that A.M. was in Olbricht's sole care at the time she received the injuries that led to the brain bleed or lacerated liver.

We note that there was some circumstantial evidence that A.M. was afraid of Olbricht, that she said Olbricht hurt her, and that she had previously suffered injuries while in Olbricht's care. However, this evidence is insufficient to overcome the fact that at least two other individuals could not be excluded as having caused the brain bleed and lacerated liver that are of significance in this case.

Viewing the evidence in the light most favorable to the State, a rational trier of fact could not have found beyond a reasonable doubt that Olbricht was the one who inflicted A.M.'s serious bodily injuries. We say this because the

evidence presented never showed, directly or circumstantially, that A.M.'s serious bodily injuries occurred during a discrete timeframe when Olbricht was the only adult in her presence. Accordingly, we reverse Olbricht's conviction for knowing and intentional child abuse resulting in serious bodily injury and vacate his sentence.

[6] The Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient. *State v. Welch*, 275 Neb. 517, 747 N.W.2d 613 (2008). Because we find the evidence legally insufficient to support Olbricht's conviction, Olbricht cannot be retried.

We do not reach Olbricht's additional assignments of error because we conclude there was insufficient evidence to sustain his conviction. Similarly, because we vacate Olbricht's sentence, we need not address the discrepancy between the oral sentence pronounced at the sentencing hearing and the sentence recorded in the trial transcript.

## V. CONCLUSION

Upon our review, we find that there was insufficient evidence to support Olbricht's conviction for knowing and intentional child abuse resulting in serious bodily injury. We reverse Olbricht's conviction and vacate his sentence.

Reversed and vacated.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Joseph R. Lowery, appellant.

875 N.W.2d 12

Filed February 23, 2016. No. A-14-721.

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. **Arrests: Warrants: Search and Seizure: Police Officers and Sheriffs.** The interests protected by arrest warrants and search warrants differ: An arrest warrant primarily serves to protect an individual from an unreasonable seizure, whereas a search warrant safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police.
3. **Constitutional Law: Arrests: Warrants: Probable Cause.** If a person is arrested pursuant to a valid arrest warrant, it does not matter whether the arrest occurs in his or her own home or in the home of another, as long as there is either reasonable belief or probable cause to believe that the subject of the arrest warrant is within the home; no search warrant, consent, or exigent circumstances are required in order to protect the Fourth Amendment rights of the subject of the arrest warrant.
4. **Constitutional Law: Search and Seizure: Standing.** A "standing" analysis in the context of search and seizure is nothing more than an inquiry into whether the disputed search and seizure has infringed an interest of the defendant in violation of the protection afforded by the Fourth Amendment.
5. **Constitutional Law: Search and Seizure.** The test used to determine if a defendant has an interest protected by the Fourth Amendment is

whether the defendant has a legitimate or justifiable expectation of privacy in the premises. Ordinarily, two inquiries are required: First, an individual must have exhibited an actual (subjective) expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable.

6. ____: ____. An overnight guest has an expectation of privacy in his or her host's home, which society is willing to recognize as reasonable, and, therefore, the overnight guest has standing to assert Fourth Amendment violations.
7. ____: ____. An overnight guest's legitimate expectation of privacy does not extend to areas of the host's home which are off limits to the guest or of which the guest has no knowledge.
8. **Search and Seizure: Standing.** A defendant can prevail on a fruit of the poisonous tree claim only if he has standing regarding the violation which constitutes the poisonous tree.

Appeal from the District Court for Scotts Bluff County: Leo Dobrovolny, Judge. Affirmed.

Jose L. Rodriguez, Deputy Scotts Bluff County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Pirtle, Riedmann, and Bishop, Judges.

Bishop, Judge.

Following a jury trial, the district court for Scotts Bluff County, Nebraska, convicted Joseph R. Lowery of possession with intent to distribute a controlled substance (methamphetamine). Lowery appeals, arguing the district court erred in overruling his motion to suppress evidence. We affirm.

## BACKGROUND

On January 8, 2014, the chief of police of Mitchell, Nebraska, Michael Cotant, recognized a green, Chevy pickup truck (with a "14 County, Nebraska" license plate) parked in the driveway of George Valles' home on Center Avenue in Mitchell. Chief Cotant had previously seen the Chevy on several occasions

in December 2013 at a trailer park in Mitchell; Valles lived in the trailer park at the time. When Chief Cotant "ran" the Chevy's license plate number, he learned that it was registered to Lowery and another person, with an address in Roseland, Nebraska. On January 9, Chief Cotant followed up on Lowery's name, which he recognized, and learned that Lowery and his brother had warrants out for their arrests for unpaid fines and court costs. Chief Cotant prepared a packet of information containing photographs of Lowery and his brother, the registration information for the Chevy, and copies of the arrest warrants for Lowery and his brother, and left it for Officer Joshua Catlin of the Mitchell Police Department.

When Officer Catlin came on duty the morning of January 10, 2014, he received the packet of information prepared by Chief Cotant. Officer Catlin recognized the description of the Chevy from having seen it prior to that day, and he said he "ran the plate" himself. He drove by the residence on Center Avenue at approximately 8:25 a.m. and observed the Chevy parked on the street in front of the residence. Officer Catlin then contacted Deputy Sheriff David Ojeda of the Scotts Bluff County Sheriff's Department (who had been tasked with finding and arresting Lowery's brother) to see if he would be able to assist Officer Catlin in arresting Lowery. Officer Catlin and Deputy Ojeda met around 9 a.m. in Mitchell and updated each other on the information they had. Deputy Ojeda then had the Chevy's "license plate run" again. Deputy Ojeda was advised by the communications center that there was a protection order on Lowery out of Adams County and that he should use caution because Lowery was known to carry a gun, was violent toward other people, and had fled when the protection order was being served on him. At that point, Officer Catlin went back to the residence to monitor the Chevy, while Deputy Ojeda called for additional assistance.

Law enforcement arrived at the residence around 10 a.m. The group of seven split up and surrounded the residence. Officer Catlin was part of the group that went around to the

back of the house. Deputy Ojeda and his group went to the front door. Deputy Ojeda knocked, and Valles' wife answered the door holding a baby. She stated that she lived in the residence. Deputy Ojeda then asked her several times whether Lowery was in the house, and each time she said that she did not know. Deputy Ojeda asked Valles' wife if they could come in, and she motioned them into the house. Once inside, Deputy Ojeda continued to ask Valles' wife about whether Lowery was in the house. At that point, Valles walked into the living room and said he was the owner of the house. Deputy Ojeda asked Valles if Lowery was in the house, and Valles stated that he did not know. At some point, Deputy Ojeda heard on his radio that officers behind the residence saw somebody "peeking through the shades in the back room." Deputy Ojeda asked Valles if Lowery was "in the back of the house," and he said no. Deputy Ojeda told Valles that they had an arrest warrant for Lowery and his brother, that the green Chevy outside was registered to Lowery, that officers had seen someone peeking through the back windows, and that Deputy Ojeda thought Valles was hiding either Lowery or his brother. Valles told Deputy Ojeda he "needed to step outside as he didn't see a warrant." The officers stepped outside, and Deputy Ojeda radioed Officer Catlin to bring the arrest warrants to the front door, which were then shown to Valles. Valles told the officers that no one was in the house but him, his wife, and their child.

After showing Valles the arrest warrants, the officers again entered the house and Valles took them to the back bedroom. How that came to pass is not entirely clear from our record. Officer Catlin testified that officers behind the residence again radioed there was movement in the back bedroom and that because he and Deputy Ojeda could see Valles, his wife, and the baby, Deputy Ojeda told Valles they were going to search and Valles needed to take the officer to the back bedroom. Deputy Ojeda, however, testified that he urged Valles to let them in (as neighbors were starting to come out of their houses

and he did not want to make a scene) and that they would arrest Lowery and leave; he said that Valles stepped back inside and started walking to the back of the house and Deputy Ojeda followed him. Either way, officers ended up back inside the house and at the door of the back bedroom. Officer Catlin testified that Valles knocked on the door and said, "'If there is anybody in there, open the door, come out.'" At that point, Lowery came out of the room and was arrested and taken outside to a patrol car. Deputy Ojeda testified that Valles knocked on the door, and someone inside said, "'Who is it?'" Valles responded, "'It's the cops.'" Then Lowery opened the door and was arrested.

After Lowery was arrested, Deputy Ojeda asked Valles about another room, which was locked (earlier when Deputy Ojeda was on the way to the back bedroom where Lowery was found, he had tried to turn the doorknob to this other room, but it was locked). Valles said it was his room, he always kept it locked, and nobody ever went in there. Officers told Valles to get the key and open the door; the officers apparently thought Lowery's brother might be in there. Valles retrieved the key and unlocked the door. Upon entering the room, officers saw in plain view drug paraphernalia and "designer baggies" known to be commonly used to package controlled substances; they also saw a shotgun case and handgun in the closet when checking to make sure no one was hiding in the closet. This evidence formed the basis for a later search warrant. Law enforcement subsequently executed the search warrant that same day and found drugs, paraphernalia, and other incriminating evidence in Valles' room, the room Lowery had been in, and other areas of the home. Among the items found in the room Lowery had been in was more than 10 grams of methamphetamine in a wood box under the bed.

Lowery was charged with possession with intent to distribute a controlled substance (methamphetamine), a Class II felony.

Lowery filed a motion to suppress all relevant evidence on the ground that it had been obtained in violation of the Fourth

Amendment. At the hearing on the motion to suppress, Lowery specifically challenged the two initial searches (the search for Lowery and the search of Valles' locked bedroom) and argued that the affidavit offered in support of the search warrant was inadequate, in that it was based on the fruits of those prior, allegedly illegal searches. At the hearing on the motion, Officer Catlin, Deputy Ojeda, and Chief Cotant generally testified to the facts set forth above, and copies of the search and arrest warrants were received into evidence.

The district court overruled Lowery's motion to suppress. The court determined that the officers' initial entry into the house was proper because a resident of the house, Valles' wife, let them in. The court also determined that the reentry into the house to search for Lowery was proper because officers had an arrest warrant for him and reasonably believed that he was in the house. However, the court determined that the search of Valles' locked room was unlawful, that the fruits of that search formed the basis for the search warrant, and that the good faith exception did not apply. Nevertheless, the court overruled Lowery's motion because he failed to prove that he had standing to challenge the search of Valles' locked room; the court found the evidence insufficient to show that Lowery was an overnight guest, but that even if he was an overnight guest, he had no expectation of privacy in Valles' locked room, which is where the contraband was found that formed the basis for the warrant.

At trial, Officer Catlin, Deputy Ojeda, and Chief Cotant testified. Their testimony was generally consistent with what they had testified to at the hearing on the motion to suppress, though Officer Catlin's testimony was geared toward other aspects of the investigation, such as obtaining the search warrant and the collection of evidence; Deputy Ojeda and Chief Cotant provided more of the background information. During Deputy Ojeda's testimony, Lowery objected on the grounds raised in his earlier motion to suppress, which objection was overruled, but Lowery was granted a continuing objection.

Lowery again objected during Officer Catlin's later testimony and added to his continuing objection the alleged insufficiency of the affidavit for the search warrant. Other officers testified regarding their involvement in the case, including the execution of the search warrant, the identification of the drugs, and the various indicia of drug distribution. Thereafter, the State rested.

Lowery then put on his defense, which consisted of the testimony of a friend, Lowery's brother, and Lowery. Lowery's brother testified that Valles was a friend of his and that Valles allowed Lowery to stay the night at his house. Lowery testified that he stayed the night at Valles' house the night of January 9, 2014, with Valles' permission. Lowery also testified that none of the contraband found at the house belonged to him. At no point during Lowery's case in chief did he renew his motion to suppress or ask the court to reconsider its earlier ruling.

The jury found Lowery guilty of possession with intent to distribute a controlled substance (methamphetamine). He was later sentenced to 36 to 60 months' imprisonment and given 193 days' credit for time served.

Lowery has timely appealed to this court.

## ASSIGNMENT OF ERROR

Lowery assigns that the trial court erred by failing to suppress evidence obtained during an unlawful search and seizure.

## 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. *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015). Regarding historical facts, an appellate court reviews the trial court's findings for clear error. *Id*. 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. *Id.*

## ANALYSIS

*Arrest of Lowery in Third Party's Home Did Not Violate Lowery's Fourth Amendment Rights.*

[2] Lowery argues that the evidence upon which he was convicted was the result of an unlawful search and seizure. He argues primarily that law enforcement unlawfully entered Valles' residence without a search warrant in their attempt to arrest Lowery pursuant to an arrest warrant. Lowery argues that in *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981), the U.S. Supreme Court held that absent exigent circumstances or consent, law enforcement officers may not legally search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant. Lowery argues that "by entering the Valles residence without a valid search warrant in order to search for [Lowery], law enforcement conducted an illegal search," and that "none of the relevant warrantless search exceptions are applicable in a manner that would cure the illegality of [the officers'] search." Brief for appellant at 18. However, in *Steagald*, the Court specifically stated that "the narrow issue before [the Court was] whether an arrest warrant—as opposed to a search warrant—is adequate to protect the Fourth Amendment interests *of persons not named in the warrant.*" 451 U.S. at 212 (emphasis supplied). As stated in *Steagald*, the interests protected by the two warrants differ; an arrest warrant "primarily serves to protect an individual from an unreasonable seizure," whereas a search warrant "safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police." 451 U.S. at 213.

The Eighth Circuit, citing to *Steagald, supra*, for the proposition that "absent exigent circumstance or consent, an arrest warrant does not justify entry into a third person's home to search for the subject of the arrest warrant," stated that "[t]hus, 'if the suspect is just a guest of the third party, then the police must obtain a search warrant for the third party's dwelling in order to use evidence found *against the third party*.'" *U.S. v.*

*Risse*, 83 F.3d 212, 215, 216 (8th Cir. 1996) (emphasis supplied). *Risse* is similar to *Steagald* in that both were concerned only with the Fourth Amendment rights of the person not named in the arrest warrant. We have found no U.S. Supreme Court case addressing whether the subject of an arrest warrant has had his or her Fourth Amendment rights violated when law enforcement enters the home of a third party without first obtaining a search warrant in an attempt to execute a valid arrest warrant of the subject.

[3] As we explain below, according to the overwhelming majority of the case law, if a person is arrested pursuant to a valid arrest warrant, it does not matter whether the arrest occurs in his or her own home or in the home of another, as long as there is either reasonable belief or probable cause to believe that the subject of the arrest warrant is within the home; no search warrant, consent, or exigent circumstances are required in order to protect the Fourth Amendment rights of the subject of the arrest warrant. And because Lowery was arrested pursuant to a valid arrest warrant and there was probable cause to believe that he was in Valles' home, Lowery's Fourth Amendment rights were not violated when law enforcement entered Valles' home without a search warrant to arrest Lowery.

In his brief, Lowery also cites us to *State v. Gorup*, 279 Neb. 841, 782 N.W.2d 16 (2010), for the proposition that without a search warrant, police may only search for the subject of an arrest warrant in the home of a third party if a warrantless search exception applies; we do not read the *Gorup* opinion to say what Lowery claims. Rather, at issue in *Gorup* was the admissibility of evidence seized following law enforcement's entry into the defendant's apartment after his arrest outside the apartment, which was later followed by the defendant's consent to search the apartment. The discussion in *Gorup* on attenuation, or break in the causal connection between the illegal conduct and the consent to search, does not help us here.

A copy of Lowery's arrest warrant was received into evidence at the suppression hearing without objection; the warrant was for unpaid fines and court costs, and the underlying offenses were infractions. Although Lowery does not challenge the validity of the arrest warrant, we note that the arrest warrant was in fact valid. See *State v. Wenke*, 276 Neb. 901, 905-06, 758 N.W.2d 405, 409 (2008) ("[w]here an arrest is pursuant to a warrant . . . the validity of the arrest turns on whether the county court had probable cause to issue the arrest warrant. On its face, the warrant pursuant to which [defendant] was arrested affirmatively states facts giving rise to probable cause based upon the issuing judge's personal review of the court file. This is sufficient to establish probable cause").

Because there was a valid arrest warrant for Lowery, officers did not need a search warrant to arrest Lowery in Valles' home, regardless of whether Lowery enjoyed overnight guest status which would entitle him to a reasonable expectation of privacy in Valles' home. We now explain.

We begin by considering the well-established law regarding law enforcement's ability to enter the home of the subject of an arrest warrant. "[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton v. New York*, 445 U.S. 573, 603, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Although the holding in *Payton* occurred in the context of a felony arrest, other courts have extended the holding in *Payton* to permit entry into a suspect's residence to execute a valid arrest warrant, even when the underlying offense was not a felony. See *United States v. Spencer*, 684 F.2d 220 (2d Cir. 1982) (court's decision in *Payton* permits entry into residence to effectuate valid arrest warrant, regardless of precise nature of underlying warrant). See, also, *Welsh v. Wisconsin*, 466 U.S. 740, 750, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984) ("[w]hen the government's

interest is only to arrest for a minor offense . . . the government usually should be allowed [to enter the home] to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate"); *U.S. v. Gooch*, 506 F.3d 1156 (9th Cir. 2007) (officers were justified in entering residence of suspect named in misdemeanor bench warrant for failure to appear); *U.S. v. Lloyd*, 396 F.3d 948 (8th Cir. 2005) (deputies were entitled to enter defendant's residence to execute misdemeanor arrest warrant for defendant); *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011) (State was required to offer misdemeanor arrest warrants and affidavits into evidence in order for district court to determine whether officers had valid arrest warrants and therefore had legal right to be in defendant's home). As will be discussed further next, given law enforcement's authority to enter a suspect's own residence to execute a valid arrest warrant, courts have generally held that a suspect should expect no greater protection in a third party's residence.

Nearly every court of appeals to consider the issue has held that law enforcement officers do not need a search warrant in addition to an arrest warrant to enter a third party's residence in order to effect an arrest. See, *U.S. v. Hollis*, 780 F.3d 1064 (11th Cir. 2015); *U.S. v. Jackson*, 576 F.3d 465 (7th Cir. 2009); *U.S. v. McCarson*, 527 F.3d 170 (D.C. Cir. 2008); *U.S. v. Agnew*, 407 F.3d 193 (3d Cir. 2005); *U.S. v. Kaylor*, 877 F.2d 658 (8th Cir. 1989); *United States v. Underwood*, 717 F.2d 482 (9th Cir. 1983); *United States v. Buckner*, 717 F.2d 297 (6th Cir. 1983). But see, *U.S. v. Glover*, 746 F.3d 369 (8th Cir. 2014) (contradicting *Kaylor, supra*, which it still cites as precedent); *U.S. v. Weems*, 322 F.3d 18 (1st Cir. 2003) (assuming but not deciding that suspect can challenge search of third party's home incident to suspect's arrest). As stated by the 11th Circuit in *Hollis*, 780 F.3d at 1068, quoting *Agnew, supra*:

> "A person has no greater right of privacy in another's home than in his own. If an arrest warrant and reason to

> believe the person named in the warrant is present are sufficient to protect that person's [F]ourth [A]mendment privacy rights in his own home, they necessarily suffice to protect his privacy rights in the home of another."

In the instant case, there was a valid arrest warrant for Lowery, and therefore, the officers did not need a search warrant to arrest Lowery in Valles' home. We want to be clear that we are concerned only with Lowery (the subject of the arrest warrant) and whether his Fourth Amendment rights were violated; we do not address whether the rights of any third party were violated when law enforcement entered Valles' home without a search warrant to arrest Lowery.

Although officers do not need a search warrant to execute an arrest warrant in a third party's home, they do need some basis for believing that the suspect is actually present in the home. *Jackson, supra*. The *Jackson* court noted the split among the circuits as to what level of suspicion officers need in order to enter a home to execute an arrest warrant.

> In *Payton* [*v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)], the Supreme Court held that an arrest warrant "carries with it the limited authority to enter a dwelling when there is *reason to believe* the suspect is within." 445 U.S. at 602, 100 S.Ct. 1371 (emphasis added).
>
> Our sister circuits disagree about what "reasonable belief" actually entails and whether its meaning is different from probable cause. By our count, three circuits have explicitly concluded that reasonable belief requires a lesser degree of knowledge than probable cause. *See United States v. Thomas*, 429 F.3d 282, 286 (D.C.Cir.2005); *Valdez v. McPheters*, 172 F.3d 1220, 1227 n. 5 (10th Cir.1999); *United States v. Lauter*, 57 F.3d 212, 215 (2d Cir.1995). The courts in these cases conclude that the Supreme Court "used a phrase other than 'probable cause' because it meant something other than 'probable cause.'" *Thomas*, 429 F.3d at 286.

> Four other circuits have disagreed, holding that "reasonable belief" amounts to the same thing as "probable cause." *See United States v. Hardin*, 539 F.3d 404, 416 n. 6 (6th Cir.2008); *United States v. Barrera*, 464 F.3d 496, 501 (5th Cir.2006); *United States v. Gorman*, 314 F.3d 1105, 1111 (9th Cir.2002); *United States v. Magluta*, 44 F.3d 1530, 1535 (11th Cir.1995). As Judge Clay explained in a concurring opinion, the Supreme Court tends to use phrases like "reasonable grounds for belief" as "grammatical analogue[s]" for probable cause. *United States v. Pruitt*, 458 F.3d 477, 490 (6th Cir.2006) (Clay, J., concurring) (citing cases). To wit, in *Maryland v. Pringle*, 540 U.S. 366, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003), the Court appears to use "reasonable belief" to *define* probable cause. *Id.* at 371, 124 S.Ct. 795 ("[T]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt.").

*U.S. v. Jackson*, 576 F.3d 465, 468-69 (7th Cir. 2009). The *Jackson* court said that if it had to reach the issue, it "might be inclined to adopt the view of the narrow majority . . . that 'reasonable belief' is synonymous with probable cause." 576 F.3d at 469. However, the *Jackson* court stated that it did not need to decide the issue, because in the case before it the police had enough evidence to satisfy a probable cause standard.

Similarly, we need not decide whether reasonable belief requires probable cause or something less, because in the instant case, officers had probable cause to believe that Lowery was in Valles' home. Officer Catlin observed Lowery's Chevy parked on the street in front of Valles' home. Officers informed Valles and his wife that they were looking for Lowery and asked if he was in the house; both Valles and his wife stated that they did not know if Lowery was in the house, and in fact, Valles told officers that no one was in the house except for himself, his wife, and their child (whom his wife was holding). While speaking with Valles and his wife, officers behind the house radioed that they had seen someone peeking

through the shades in the back room of the house. Given the circumstances, the officers had probable cause to believe that Lowery was in Valles' home. Because officers had a valid warrant to arrest Lowery and probable cause to believe he was in Valles' residence, the officers could enter Valles' residence to arrest Lowery. The arrest of Lowery in Valles' residence did not violate Lowery's Fourth Amendment rights. Again, we want to be clear that we are concerned only with Lowery and whether his Fourth Amendment rights were violated; we do not address whether the rights of any third party were violated when law enforcement entered Valles' home without a search warrant to arrest Lowery.

*Lowery Did Not Have Standing to Challenge Search of Valles' Locked Room.*

Lowery also argues that because of his status as an overnight guest, he has standing to challenge the alleged invalid search of Valles' residence. In its brief, the State points out that Lowery relies in large part on his testimony at trial to argue that the district court erred in concluding that he was not an overnight guest and did not have standing to challenge the searches under the Fourth Amendment. But, the State notes that Lowery's trial testimony was not available to the district court when it overruled Lowery's motion to suppress, and after Lowery's testimony was adduced at trial, he "did not renew his motion to suppress, ask the court to reconsider its earlier ruling, or otherwise alert the court that there was new evidence regarding whether Lowery was an overnight guest." Brief for appellee at 13.

The State acknowledges the general rule that "'[w]hen a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.'" *Id.* Accord *State v. Tyler*, 291 Neb. 920, 870 N.W.2d 119 (2015). But the State then argues that "it is difficult to see how the court could have erred based on evidence that was

never presented to it for disposition." Brief for appellee at 13. The State submits that if Lowery's testimony were excluded from consideration, "the district court's finding that Lowery was not an overnight guest would not be clearly wrong, which would mean that Lowery did not have standing to challenge the searches and that the court properly overruled his motion to suppress on that ground." Brief for appellee at 14.

We need not decide whether Lowery's trial testimony regarding his overnight status should be excluded from consideration, because the arrest of Lowery in Valles' home did not violate Lowery's Fourth Amendment rights. As will become apparent later in our analysis, even if Lowery did have overnight guest status, he did not have standing to challenge the initial search of Valles' locked room. The search of the locked room led to a search warrant for the rest of the home, at which time the evidence used against Lowery was discovered. The fact that the room was locked and not accessible to Lowery is key to Lowery's inability to challenge the search.

[4] In *State v. Nelson*, 282 Neb. 767, 776, 807 N.W.2d 769, 778 (2011), the Nebraska Supreme Court said:

> Although the right to challenge a search on Fourth Amendment grounds is generally referred to as "standing," the U.S. Supreme Court has clarified that the definition of that right "is more properly placed within the purview of substantive Fourth Amendment law than within that of standing." *Rakas* [*v. Illinois*, 439 U.S. 128, 140, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978)]. See *Minnesota v. Carter*, 525 U.S. 83, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998). We have stated: "A 'standing' analysis in the context of search and seizure is nothing more than an inquiry into whether the disputed search and seizure has infringed an interest of the defendant in violation of the protection afforded by the Fourth Amendment." *State v. Konfrst*, 251 Neb. 214, 224, 556 N.W.2d 250, 259 (1996). As the Court of Appeals for the Fifth Circuit has stated, and we tend to follow: "We [nevertheless] use the term

> 'standing' somewhat imprecisely to refer to this threshold substantive determination." *U.S. v. Sanchez*, 943 F.2d 110, 113 n.1 (1st Cir. 1991).

Like the court in *Nelson, supra*, we will use the term "standing" in our analysis as well.

[5] A "standing" analysis in the context of search and seizure is nothing more than an inquiry into whether the disputed search and seizure has infringed an interest of the defendant in violation of the protection afforded by the Fourth Amendment. *Nelson, supra*. The test used to determine if a defendant has an interest protected by the Fourth Amendment is whether the defendant has a legitimate or justifiable expectation of privacy in the premises. See *id*. Ordinarily, two inquiries are required: First, an individual must have exhibited an actual (subjective) expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable. *Id*.

[6,7] In *State v. Lara*, 258 Neb. 996, 1001, 607 N.W.2d 487, 491 (2000), the Nebraska Supreme Court said:

> The U.S. Supreme Court has held that an individual's status as an overnight guest is enough alone to show that he or she has a legitimate expectation of privacy in the premises which is protected by the Fourth Amendment. *Minnesota v. Olson*, 495 U.S. 91, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990). Likewise, this court has recognized that an overnight guest has an expectation of privacy in his or her host's home, which society is willing to recognize as reasonable, and, therefore, the overnight guest has standing to assert Fourth Amendment violations. *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996); *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995); *State v. Cortis*, 237 Neb. 97, 465 N.W.2d 132 (1991); *State v. Walker*, 236 Neb. 155, 459 N.W.2d 527 (1990).

Importantly, however, an overnight guest's legitimate expectation of privacy does not extend to areas of the host's home which are off limits to the guest or of which the guest has

no knowledge. *U.S. v. Osorio*, 949 F.2d 38 (2d Cir. 1991); *Lara, supra*.

Based on these principles, even if Lowery was an overnight guest at Valles' home, Lowery did not have a legitimate expectation of privacy in Valles' locked bedroom; Valles told the officers that it was his room, he always kept it locked, and nobody ever went in there. Accordingly, Lowery did not have standing to challenge the search of Valles' locked room.

The search of Valles' locked room revealed drug paraphernalia and formed the basis for the search warrant; the search warrant was then used to search the entire home, including the bedroom that Lowery had been in. As we will explain below, any illegal search of Valles' locked room did not violate Lowery's Fourth Amendment rights, and thus, he does not have standing to challenge such search and the fruit of the poisonous tree doctrine does not apply. Accordingly, evidence found in Valles' home, including the bedroom Lowery had been in, was admissible against Lowery.

[8] "[A] defendant . . . can prevail on a 'fruit of the poisonous tree' claim only if he has standing regarding the violation which constitutes the poisonous tree." 6 Wayne R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment § 11.4 at 324-25 (5th ed. 2012). LaFave said:

> A useful illustration is *People v. Henley*, [53 N.Y.2d 403, 425 N.E.2d 816, 442 N.Y.S.2d 428 (1981)], where after his illegal arrest defendant consented to search of an apartment he shared with his brother, resulting in the discovery of the fruits of a burglary. The evidence was suppressed as to the defendant because the consent, though voluntary, was the fruit of his illegal arrest, but the brother did not likewise prevail, as the illegal arrest was not a violation of his constitutional rights.

6 LaFave, *supra*, § 11.4 at 325.

Also instructive is *Alderman v. United States*, 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969). In *Alderman*, the question was the defendants' (there were three separate

defendants involved) standing to object to the government's use of the fruits of illegal surveillance. Each defendant asked for a retrial if any of the evidence used to convict him was the product of unauthorized surveillance, regardless of whose Fourth Amendment rights the surveillance violated. The Supreme Court rejected the defendants' "expansive reading" of the Fourth Amendment and of the exclusionary rule stating: "The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Alderman*, 394 U.S. at 171-72. The *Alderman* Court adhered to "the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Id.*, 394 U.S. at 174. The Court said that "there is a substantial difference for constitutional purposes between preventing the incrimination of a defendant through the very evidence illegally seized from him and suppressing evidence on the motion of a party who cannot claim this predicate for exclusion." *Id.* But see, La. Const. Ann. art. 1, § 5 (2006) (stating in relevant part "[a]ny person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court").

In the instant case, the search warrant and the items found in the subsequent search of the entire house, including the bedroom Lowery had been in, were the fruit of the prior search of Valles' locked bedroom. An argument could be made that the search of that locked room was illegal, because the officers forced Valles to unlock the door and had no probable cause or other reasonable belief that Lowery's brother was in there. In other words, the initial search of Valles' locked room is the "poisonous tree" in this case. Lowery did not have standing to challenge the search of Valles' locked room, because even if Lowery qualified as an overnight guest in Valles' home entitling him to an expectation of privacy in his host's home,

an overnight guest's legitimate expectation of privacy does not extend to areas of the host's home which are off limits to the guest or of which the guest has no knowledge. *State v. Lara*, 258 Neb. 996, 607 N.W.2d 487 (2000). Therefore, the possible illegal search of Valles' locked bedroom did not violate Lowery's constitutional rights. Though the search of Valles' bedroom was arguably unconstitutional as to Valles, Lowery, as a third party, does not have standing to complain about a violation of another party's constitutional rights. See, *Alderman, supra*; *People v. Henley*, 53 N.Y.2d 403, 425 N.E.2d 816, 442 N.Y.S.2d 428 (1981). See, also, *Rakas v. Illinois*, 439 U.S. 128, 134, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978) ("since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment . . . it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections"). Therefore, Lowery cannot prevail on his fruit of the poisonous tree doctrine claim, because he did not have standing regarding the search that constituted the poisonous tree (the initial search of Valles' locked room). Accordingly, evidence found in Valles' home, including the bedroom Lowery had been in, was admissible against Lowery.

## CONCLUSION

For the reasons stated above, the arrest of Lowery in Valles' home did not violate Lowery's Fourth Amendment rights, and even if Lowery did have overnight guest status, he did not have standing to challenge the search of Valles' locked room. Accordingly, we affirm the district court's denial of Lowery's motion to suppress.

Affirmed.

**Nebraska Court of Appeals**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. LaRonn R. Tyson, appellant.

876 N.W.2d 13

Filed February 23, 2016. No. A-15-054.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** 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.
3. **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.
4. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
5. **Impeachment: Testimony: Prior Statements.** One means of attacking the credibility of a witness is by showing inconsistency between his or her testimony at trial and what he or she said on previous occasions.
6. ____: ____: ____. The trial court has considerable discretion in determining whether testimony is inconsistent with prior statements.
7. ____: ____: ____. As a general rule, a witness makes an inconsistent or contradictory statement if he or she refuses to either deny or affirm that he or she did, or if he or she answers that he or she does not remember whether or not he or she made it.
8. **Evidence: Hearsay.** It is elementary that out-of-court statements offered to prove the truth of the matter asserted are hearsay.
9. **Rules of Evidence: Impeachment: Prior Statements.** Prior inconsistent statements are admissible as impeachment evidence, but they

are not admissible as substantive evidence, unless they are otherwise admissible under the Nebraska Evidence Rules.

10. **Trial: Appeal and Error.** Absent an abuse of discretion, a trial court's ruling will be upheld on appeal.
11. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
12. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
13. **Sentences.** When imposing a sentence, the sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the offense. The sentencing court is not limited to any mathematically applied set of factors.
14. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Douglas County: Kimberly Miller Pankonin, Judge. Affirmed.

James J. Regan for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

Irwin, Inbody, and Riedmann, Judges.

Inbody, Judge.

## INTRODUCTION

LaRonn R. Tyson appeals his conviction by a jury of possession of a deadly weapon by a felon and the sentence imposed

by the Douglas County District Court thereon. For the reasons that follow, we affirm Tyson's conviction and sentence.

## STATEMENT OF FACTS

On June 18, 2014, the State filed an information charging Tyson with one count of possession of a deadly weapon by a prohibited person, a Class ID felony, in violation of Neb. Rev. Stat. § 28-1206 (Cum. Supp. 2014), and one count of possession of a stolen firearm, a Class III felony, in violation of Neb. Rev. Stat. § 28-1212.03 (Cum. Supp. 2014).

A jury trial was held on the matter. The parties stipulated to several items: (1) that Tyson's DNA was taken from Tyson's person and from the gun found at the scene and that the DNA results indicated the presence of human DNA but did not result in scientifically reliable proof that it was Tyson's DNA, (2) that Tyson was a "prohibited person" as defined in § 28-1206, and (3) that the parties agreed the items in evidence were properly handled.

The State called Omaha police officer James Holtmeyer to the stand. Holtmeyer, a 6-year veteran of the Omaha Police Department, testified that he is assigned to the uniform patrol bureau. On May 17, 2014, Holtmeyer was assigned to patrol and conduct surveillance when he received a dispatch call, at approximately 4:30 p.m., regarding an alleged trespassing at a residence on Stone Avenue in Omaha, Nebraska. Upon arrival at the residence, Holtmeyer observed two individuals on the front porch of the residence and several other people inside of the residence. Holtmeyer approached the residence and observed that one of the individuals was male and one was female and that the male was wearing "blue jeans, a red jacket, and a black and gray San Antonio Spur[s] baseball cap." Holtmeyer identified Tyson as that individual. Holtmeyer also smelled a strong odor of marijuana. Holtmeyer testified that Tyson appeared nervous and was clutching his waistband with his right hand on top of his jacket. Holtmeyer asked Tyson for his name and indicated to Tyson that he smelled the

odor of marijuana and asked permission to conduct a pat-down search of his person for weapons. Holtmeyer testified that Tyson immediately stood up and jumped over the railing of the front porch.

Holtmeyer testified that he turned and ran down the porch stairs in pursuit of Tyson. Holtmeyer testified that Tyson ran toward the back of the residence between a wooden privacy fence and detached garage. Holtmeyer testified that he did not have visual contact with Tyson as he jumped off the porch, but followed him and could see his back. Holtmeyer also could not see Tyson the entire time he was running through the passageway. Holtmeyer saw Tyson jump over a chain link fence and stumble to his knees. Tyson's black and gray San Antonio Spurs baseball cap fell into the yard. Holtmeyer testified that at that point, he was unable to fit through the passageway and ran east and then southbound around another house. Holtmeyer ran two blocks to Laurel Avenue, where two officers observed Tyson running and apprehended him.

Once Tyson was arrested, Holtmeyer retraced the path that Tyson had taken, because he expected that Tyson had tossed some type of weapon or narcotic. Holtmeyer testified that in his line of work, he has observed that people generally run to delay apprehension and that it is usually weapons or narcotics related. Holtmeyer found the red jacket that Tyson had been wearing, which contained no weapons or narcotics, and along the path, he found Tyson's black and gray San Antonio Spurs baseball cap. Near the wooden fence that separates the yards of two residences on Stone Avenue, Holtmeyer also found a black Heckler & Koch P30 9-mm firearm. Holtmeyer admitted that he did not have Tyson in his field of vision the entire pursuit and that Tyson could have tossed the gun during that time.

Cole Johannsen, an Omaha police officer, testified that he was on patrol on May 17, 2014, when he received a call to assist officers. Johannsen arrived at the specified address

on Stone Avenue, exited his police cruiser, and observed Holtmeyer speaking with two individuals on the front porch. One of those individuals, later identified as Tyson, was male and was wearing a red jacket, and as Johannsen approached the porch, that individual jumped off the porch and ran back toward the garage. Johannsen testified that he ran after Tyson and did not lose sight of him until Tyson ran through the area near the wooden fence. Johannsen continued to the back of the house and through the gate where he observed Tyson running southbound through the yards. Johannsen testified that he lost Tyson when Tyson ran through a thicket. When Johannsen made it through the thicket, he noted a black male walking eastbound on the south side of Laurel Avenue in a blue T-shirt. Johannsen testified that the male walking looked suspicious. Johannsen's attention was directed to the male by two young children who told Johannsen that the male in the blue shirt had taken his red jacket off. At that point, Tyson took off running and Johannsen pursued him again. Timothy Bauman, an Omaha police officer, arrived in his police cruiser and exited with his gun pointed at Tyson. Tyson stopped running, put his hands up, and lay on the ground.

Once Tyson was taken into custody, Johannsen began retracing his steps and located the red jacket in a driveway off of Laurel Avenue near the thicket. Johannsen testified that Tyson appeared to be "running full steam" and did not appear to be holding his waistband. During the pursuit, Johannsen did not see Tyson throw anything.

James Hayley, an Omaha police officer, was also involved in the events on May 17, 2014. Hayley interviewed several female parties who indicated that they were renting the residence and had taken a no trespass notice down from the door. Haley testified that he could smell a strong odor of marijuana coming from the residence. Hayley went into the residence to make contact with the renter when he heard a notice on his police radio of "a party running southbound through the houses." During his investigation, Hayley observed a

San Antonio Spurs baseball cap and a firearm located behind a residence on Stone Avenue.

Bauman testified that he was dispatched to the scene with the other officers on May 17, 2014. Bauman drove his police cruiser to the specified address on Stone Avenue, where Holtmeyer was talking to a black male wearing "a black [baseball] hat with a red and white coat" sitting on the left side of the porch. As Bauman approached the residence, that individual, Tyson, jumped off the porch and ran southbound between the garage and wooden fence. Bauman lost sight of Tyson as he rounded the corner of the garage in between the garage and the fence. Bauman began pursuit of Tyson, but testified that because he would not be able to get through the fence quickly, he turned around and headed to his police cruiser. Bauman did not see Tyson throw anything. Bauman headed southbound and found Tyson running down Laurel Avenue. Bauman testified that Tyson "was [no longer] wearing a coat or a hat." Bauman took Tyson into custody and did not find any weapons or narcotics on his person. Bauman testified that he was speaking with Tyson, who appeared nervous and was looking to see what the officers who began backtracking his path were doing.

Todd Andrews testified that in August 2012, he purchased a Heckler & Koch P30 9-mm firearm from a store in Omaha. Andrews obtained a permit to purchase the firearm, purchased the firearm, and took his receipt and the firearm to the police department to register it. Shortly thereafter, the firearm was stolen from his home. Andrews testified that someone broke into his home and stole several items, including the firearm which had a specific serial number. Andrews reported the firearm missing to the police. In May 2014, Andrews received a call from the police department that a firearm had been recovered. Andrews later discovered that the weapon was his firearm, which matched the description and serial number of his gun. Andrews testified that his firearm would not fit into his pocket, and although unlikely, it might fit in a waistband.

Brandee Foster testified that she has known Tyson since 2010. Foster was at the residence on Stone Avenue helping a family friend move on the day that Tyson was arrested. Foster took a video of the circumstances which was played to the jury. Foster testified that in the video, Tyson is wearing a red jacket, a "black hat," and "some dark colored jeans." Foster observed the police approach the residence and ask for a lease for the individual whom they had just helped move. Foster explained that Tyson "was asleep on the porch" before he ran. Foster testified that she was with Tyson most of the day and that he did not have a gun.

The matter was submitted to the jury, which found Tyson guilty of possession of a deadly weapon by a prohibited person, but not guilty of possession of a stolen firearm. The district court accepted the verdict and adjudged Tyson guilty of possession of a deadly weapon by a prohibited person. A presentence investigation report was ordered and received. Thereafter, the district court sentenced Tyson to 16 to 20 years' imprisonment with 243 days' credit for time served. It is from this order that Tyson has timely appealed.

## ASSIGNMENTS OF ERROR

Tyson assigns that the district court erred by refusing to allow him to present evidence of inconsistent statements in accordance with Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 2008) and by imposing an excessive sentence.

## STANDARD OF REVIEW

[1,2] 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. Valverde*, 286 Neb. 280, 835 N.W.2d 732 (2013); *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.*

[3,4] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Berney*, 288 Neb. 377, 847 N.W.2d 732 (2014). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

## ANALYSIS

*Prior Inconsistent Statements.*

Tyson argues that the district court erred by refusing to allow him to present prior inconsistent statements made by Holtmeyer as substantive evidence despite the fact that Holtmeyer testified at trial and was subject to cross-examination. For the reasons that follow, we reject Tyson's claim that the district court's evidentiary ruling was erroneous, although for reasons different than those of the district court. It is a longstanding rule that if we reach the same conclusion as the district court—here, specifically that the evidence was properly excluded—we will affirm the order of the district court, although for a different reason. See *Boettcher v. Balka*, 252 Neb. 547, 567 N.W.2d 95 (1997) (proper result will not be reversed on appeal merely because it was reached for wrong reasons; when record demonstrates that decision of trial court is correct, although such correctness is based on different ground from that assigned by trial court, appellate court will affirm).

[5-8] One means of attacking the credibility of a witness is by showing inconsistency between his or her testimony at trial and what he or she said on previous occasions. *State v. Marco*, 220 Neb. 96, 368 N.W.2d 470 (1985). The trial court has considerable discretion in determining whether testimony is inconsistent with prior statements. *Id*. As a general rule, a

witness makes an inconsistent or contradictory statement if he or she refuses to either deny or affirm that he or she did, or if he or she answers that he or she does not remember whether or not he or she made it. *Id.* See *State v. Burton*, 282 Neb. 135, 802 N.W.2d 127 (2011). See, also, e.g., *McAlinney v. Marion Merrell Dow, Inc.*, 992 F.2d 839 (8th Cir. 1993); *United States v. Rogers*, 549 F.2d 490 (8th Cir. 1976). It is elementary that out-of-court statements offered to prove the truth of the matter asserted are hearsay. § 27-801(3); *State v. Marco, supra*.

[9,10] Prior inconsistent statements are admissible as impeachment evidence, but they are not admissible as substantive evidence, unless they are otherwise admissible under the Nebraska Evidence Rules. *State v. Ballew*, 291 Neb. 577, 867 N.W.2d 571 (2015). See, *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007); *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986). See, also, Neb. Rev. Stat. § 27-613 (Reissue 2008); § 27-801. Absent an abuse of that discretion, the trial court's ruling will be upheld on appeal. *State v. Ballew, supra*.

Tyson argues that the district court should have admitted the prior inconsistent statements as substantive evidence pursuant to § 27-801(4)(a)(i), which provides:

> (4) A statement is not hearsay if:
>
> (a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . .

At trial, the district court found that the evidence was inadmissible, even though it was not hearsay, because the admission of the evidence required a sponsoring witness. At oral argument, Tyson did not set forth any arguments as to the sponsoring witness requirement. The State commented that there are no Nebraska cases involving a rule for a sponsoring

witness necessary for the admissibility of evidence under § 27-801(4)(a)(i), but, instead directed this court to *United States v. Dennis*, 625 F.2d 782 (8th Cir. 1980), and continued to argue that the district court was correct in its order, albeit for reasons different than those set forth by the district court.

We likewise have found no case law in Nebraska which holds that a sponsoring witness is necessary for the admissibility of prior inconsistent statements as substantive evidence pursuant to § 27-801(4)(a)(i). Our research of case law outside of Nebraska points to the necessity of a sponsoring witness in cases dealing with hearsay and the business records exception, but not in the context of prior inconsistent statements as substantive evidence. See, *U.S. v. Turner*, 189 F.3d 712 (8th. Cir. 1999); *Crane v. Crest Tankers, Inc.*, 47 F.3d 292 (8th. Cir. 1995); *U.S. v. Coohey*, 11 F.3d 97 (8th. Cir. 1993).

In *United States v. Dennis, supra*, one of the pertinent issues involved the defendant's objection to the trial court's admission of prior inconsistent statements. In *Dennis*, one of the witnesses testified before the grand jury that he saw the defendant with a gun, that the defendant had lent him money, and that the defendant had told him not to tell the grand jury; however, on direct examination at trial, the witness denied all of those facts and denied making or claimed not to recall making any of the previous statements. When confronted with the different testimony, the witness admitted to making the statements to the grand jury. The trial court denied the defendant's request to reread some of the prior inconsistent statements to the jury on the grounds that they were cumulative.

The Eighth Circuit found that the trial court properly determined that the witness' statements were inconsistent, but because the witness denied or could not recall those prior inconsistent statements, found that reading them to the jury was the proper method of placing the statements into evidence. The Eighth Circuit found:

> Laying the proper foundation for a prior inconsistent statement requires that the witness must be afforded an

> opportunity to explain or deny the statement and that the opposing party must be afforded an opportunity to interrogate the witness concerning the statement. *Osborne v. United States*, 542 F.2d 1015, 1020 (8th Cir. 1976); *United States v. Martorano*, 457 F.Supp. 803, 811 (D.Mass. 1978) (denial of new trial), *rev'd on other grounds*, 610 F.2d 36 (1st Cir. 1979). Where a witness denies or cannot recall a prior inconsistent statement, that statement may be read to the jury for impeachment. *United States v. Rogers*, . . . 549 F.2d 490 [(8th Cir. 1976)]. But a witness who admits making a prior inconsistent statement is thereby impeached, and no further testimony is necessary. *United States v. Jones*, 578 F.2d 1332, 1340 (10th Cir.), *cert. denied*, 439 U.S. 913, 99 S.Ct. 284, 58 L.Ed.2d 259 (1978).

*United States v. Dennis*, 625 F.2d at 796.

However, the circumstances of the present case are distinguishable, as the defendant in *Dennis* sought to use the prior inconsistent statements as impeachment, not as substantive evidence, which has been established as two different methods of using prior inconsistent statements. Therefore, we decline to follow or substantiate the ruling of the district court that a sponsoring witness was required.

At trial, at the beginning of Tyson's cross-examination of Holtmeyer, the State objected to Tyson's counsel's questioning regarding Holtmeyer's testimony at the preliminary hearing.

> [Tyson's counsel:] So when you testified at your preliminary hearing —
>
> [The State]: I'm going to object as improper impeachment.
>
> [Tyson's counsel:] I'm not sure —
>
> THE COURT: I haven't heard the question yet. Are you —
>
> [Tyson's counsel:] What — I'm going to ask him this: You testified at the preliminary hearing under oath?
>
> [Holtmeyer]: Yes, sir.

[Tyson's counsel:] You didn't talk about losing sight of . . . Tyson on three different occasions then, did you?

[Holtmeyer:] No. You didn't ask me that question.

[Tyson's counsel:] You testified then that you suspect that when he threw the firearm over the fence was when he cut southwest out of your vision; wasn't that your testimony then?

[Holtmeyer:] That was my answer after being asked that specific question, about whether he could have then tossed the firearm when he cut southwest.

[Tyson's counsel:] Do you recall being asked: Do you think . . . Tyson came back at some point and put the gun there, and answering, as I testified earlier from the point where I witnessed him jump over the fence, fall to his knees and a hat fall off his head, he then cut immediately to the southwest of my vision, so that's when I suspect he threw the firearm over the fence?

[The State]: Judge, I would ask — I would renew my objection for improper impeachment.

[Tyson's counsel]: It's classic prior inconsistent statement under oath.

. . . .

THE COURT: Overruled. The answer stands.

The record then indicates that near the conclusion of the trial proceedings, Tyson's counsel announced that his final matter in the case involved reading the alleged prior inconsistent statements made by Holtmeyer, at the preliminary hearing, to the jury as substantive evidence.

[Tyson's counsel]: Your Honor, I'm just going to let the Court know that my — our case — the only remaining part of our case is going to be my intention to read prior inconsistent statements of Officer Holtmeyer, which were given at a preliminary hearing, and I think they're admissible.

They're not hearsay, they're admissible under Rule 27-801(4)(a), as prior statements made in a proceeding that meets the qualifications of that statute.

> I've told [the State] what portions of it I intend to read, and, of course, that allows him to read consistent provisions if he so desires, the way I understand the statute.

The State objected, and after arguments were made by both parties, the district court ordered:

> THE COURT: The opportunity to — the statement is not hearsay and can be admissible under this rule when — with a sponsoring witness. The witness was here, was subject to cross-examination, and that's when the rule would kick in in terms of that information not being hearsay to be — and requires the sponsoring witness.
>
> That testimony does not come in in and of itself just being read in the record, so I guess there's a motion by the State at this time to exclude it?
>
> [The State]: I would I guess formally make an oral motion in limine to exclude the reading of that portion of the preliminary hearing as outlined by [Tyson's counsel].
>
> THE COURT: The Court is going to grant that . . . .

Tyson then made the following offer of proof:

> So as an offer of proof in my request to offer a prior inconsistent statement pursuant to Nebraska Rev Stat [sic] 27-801(4)(A) [sic], I intended to read Officer Holtmeyer's testimony at a preliminary hearing held on June 17, 2014, . . . Page 16, Line 20.
>
> The question being: So at that point then, you're going towards where you see him jump the Cyclone fence, question mark?
>
> Answer: Yes. I was right behind him until I witnessed him leap over the fence and noticed that the space that separated the house and the neighbor's fence was only approximately a foot to a foot and a half wide, and my shoulders are wider than that.
>
> Another prior inconsistent statement would be on Page 17 of that preliminary hearing, Line 14.

> So did you say — do you think Tyson came back at some point and put his gun there, question mark?
>
> Answer: No. As I testified earlier, from the point where I witnessed him jump over the fence, fall to his knees and the hat fall off his head, he then immediately cut to the southwest out of my vision, and so that's where I suspect he threw the firearm threw [sic] the fence.

The State then offered the portion of Holtmeyer's testimony from the preliminary hearing "for the limited purpose of a complete record for the Court of Appeals and Supreme Court . . . I'm not offering it as an exhibit for the jury." Tyson's counsel did not object to the offer. Thereafter, both parties rested their cases.

Upon our review of the record, we find that the statements Tyson wished to offer as substantive evidence did not meet the requirements prescribed by § 27-801(4)(a)(i). Clearly, Holtmeyer was available and testified at trial and was subjected to cross-examination regarding his statements, and the statements that Tyson wished to offer were made under oath at the preliminary hearing; however, the statements were not inconsistent with Holtmeyer's testimony given at the preliminary hearing and, therefore, were not admissible as substantive evidence under § 27-801(4)(a)(i). At the preliminary hearing, Holtmeyer was questioned about the setup of the scene where the incident occurred and was not questioned until trial about the times that he might have lost sight of Tyson. Holtmeyer did not deny that he testified at the preliminary hearing that he lost sight of Tyson after he jumped over the fence and moved southwest; instead, he indicated that he was not questioned at the preliminary hearing, as he was at trial, about any other times Holtmeyer may have lost sight of Tyson. Thus, Holtmeyer's statements at the preliminary hearing were not admissible as substantive evidence because they were not inconsistent statements.

[11,12] Furthermore, even if the district court did abuse its discretion by denying Tyson the opportunity to read to the

jury the statements made by Holtmeyer, which we have found it did not, that error would have been harmless. In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *Id.*

Here, other evidence was presented which supported the jury's verdict. In fact, Holtmeyer's testimony at trial was much more harmful to the State's case at trial than at the preliminary hearing, because Holtmeyer gave detailed testimony at trial about the number of times he actually lost sight of Tyson during the pursuit. As Tyson argues, the evidence presented to the jury was not direct evidence of Tyson's having possession of the gun, but was circumstantial, including the police officer's testimony that Tyson was grasping his waistband and seemed nervous when law enforcement approached and that in law enforcement's experience, when an individual runs from law enforcement, it is generally because he or she is in possession of weapons or narcotics.

In conclusion, we therefore reject Tyson's claim that the evidentiary ruling was erroneous, although for reasons different than the district court. See *Boettcher v. Balka*, 252 Neb. 547, 567 N.W.2d 95 (1997). This assignment of error is without merit.

*Excessive Sentence.*

Tyson argues that the district court abused his discretion in imposing an excessive sentence by failing to weigh the appropriate factors.

[13,14] When imposing a sentence, the sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the offense. *State v. Stevens*, 290 Neb. 460, 860 N.W.2d 717 (2015). The sentencing court is not limited to any mathematically applied set of factors. *Id*. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id*.

The district court received and reviewed the presentence investigation report and considered all of the appropriate factors. The presentence investigation report indicates that at the time of sentencing, Tyson was 21 years old, had graduated high school, and had one dependent. Tyson's criminal history includes adjudications for theft by unlawful taking and possession of marijuana—1 ounce or less. As an adult, Tyson has been convicted of theft by receiving stolen property—$200 to $500, obstructing the administration of law, possession of a controlled substance, possession of marijuana—1 ounce or less, reckless driving, and attempted burglary. The presentence investigation report indicates that Tyson scored overall in the very high risk range on an LS/CMI assessment.

Tyson was convicted of possession of a deadly weapon by a felon, a Class ID felony, punishable by 3 to 50 years' imprisonment. See, § 28-1206(3)(b); Neb. Rev. Stat. § 28-105(1)(a) (Cum. Supp. 2014). The district court sentenced Tyson to 16 to 20 years' imprisonment, which is well within the statutory sentencing range. However, as set forth above, Tyson argues that the court failed to take into account the appropriate factors that he was only 19 years old at the time of the arrest, that no one actually saw him with a firearm, that there was no

evidence of violence, and that he was a high school graduate with a newborn son and a supportive family.

Our review of the record indicates that not only was Tyson's sentence within the statutory sentencing range, but that the district court considered all of the appropriate factors. Those factors include the seriousness of Tyson's offense and his criminal history, which included three felony convictions as an adult in only a short amount of time. Based upon the record, we cannot say that the district court abused its discretion by imposing a sentence within the statutory sentencing range. This assignment of error is without merit.

## CONCLUSION

In sum, we find that the district court did not abuse its discretion by sustaining the State's objection to Tyson's counsel's reading preliminary hearing testimony of Holtmeyer to the jury as substantive evidence and by imposing a sentence within the statutory sentencing range. Therefore, we affirm Tyson's conviction and sentence.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v.
Travis T. Mitchell, appellant.
876 N.W.2d 1

Filed February 23, 2016. No. A-15-086.

1. **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.
2. **Criminal Law: Evidence.** In reviewing a sufficiency of the evidence claim, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
4. **Drunk Driving: Words and Phrases.** As used in Neb. Rev. Stat. § 60-6,196 (Reissue 2008), the phrase "under the influence of alcoholic liquor or of any drug" requires the ingestion of alcohol or drugs in an amount sufficient to impair to any appreciable degree the driver's ability to operate a motor vehicle in a prudent and cautious manner.
5. **Police Officers and Sheriffs: Drunk Driving: Witnesses.** After sufficient foundation is laid, a law enforcement officer may testify that in his or her opinion, a defendant was driving under the influence.
6. **Convictions: Drunk Driving: Evidence.** Either a law enforcement officer's observations of a defendant's intoxicated behavior or the defendant's poor performance on field sobriety tests constitutes sufficient evidence to sustain a conviction of driving while under the influence of alcoholic liquor.
7. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the

course of a trial that is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.

8. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial will not be disturbed on appeal in the absence of an abuse of discretion.
9. **Motions for Mistrial: Motions to Strike: Proof: Appeal and Error.** Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material. The defendant must prove that the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice.
10. **Miranda Rights: Appeal and Error.** Where the record does not indicate that a defendant received any *Miranda* warnings before remaining silent, an appellate court will treat the silence as occurring pre-*Miranda*.
11. **Miranda Rights: Impeachment.** The reading of *Miranda* rights is the key factor in determining whether the government can use a defendant's silence against him or her.
12. **Miranda Rights: Impeachment: Due Process.** Impeaching a defendant's version of the crime at trial by utilizing his or her postarrest, post-*Miranda* silence violates due process. In such a case, the implicit assurance that silence will carry no penalty renders it unfair to use the defendant's silence against him or her.
13. **Miranda Rights: Impeachment.** The prosecution may impeach the defendant on the stand by utilizing his or her silence occurring after arrest where the record does not reflect that he or she had been given *Miranda* warnings at the time.
14. **Miranda Rights: Impeachment: Mental Competency.** A defendant's postarrest, post-*Miranda* silence cannot be used as substantive evidence to refute the defendant's insanity defense.
15. **Miranda Rights: Impeachment.** The State may utilize a defendant's postarrest, pre-*Miranda* silence as substantive evidence of his or her guilt; the giving of *Miranda* is the key inquiry in determining when the State can utilize a defendant's silence.
16. **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, and motivation for the offense, as well as the nature of the offense and the violence involved in the commission of the crime.
17. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in

considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Affirmed.

Joseph D. Nigro, Lancaster County Public Defender, Christopher Eickholt, and Nathan Sohriakoff for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Moore, Chief Judge, and Irwin and Inbody, Judges.

Irwin, Judge.

## I. INTRODUCTION

Travis T. Mitchell appeals his conviction and sentence for driving under the influence (DUI), fourth offense, with refusal to submit to a chemical test, and for driving during revocation. On appeal, Mitchell argues that there was insufficient evidence to support his convictions for DUI with refusal to submit to a chemical test and for driving during revocation, that the district court erred in overruling his motion for mistrial based on the prosecutor's comment during closing arguments, and that he received excessive sentences. We find no merit to Mitchell's assertions on appeal and affirm.

## II. BACKGROUND

The events giving rise to this case occurred on June 6, 2014. That morning, Mitchell and his mother, Lucille Mitchell, went to a home improvement store in Lincoln, Nebraska, to purchase supplies to build a dog house. Lucille drove the pair in a beige sport utility vehicle (SUV). On the way to the home improvement store, Mitchell asked Lucille to stop at a nearby liquor store. Lucille stopped at the store, and Mitchell purchased beer and a bottle of liquor. Mitchell drank a "sip of each" before he and Lucille went into the home improvement store.

At the home improvement store, Lucille and Mitchell purchased lumber and other building materials. In the parking lot, a store employee began tying the lumber on top of the vehicle, but Mitchell became impatient and drove off in the SUV, leaving Lucille behind in the parking lot. Lucille was worried that Mitchell might hurt himself or another driver, so she notified the police that Mitchell had driven off in the SUV.

After Lucille called the police, the police dispatcher notified officers patrolling the area that Mitchell had been reported driving a beige SUV dangerously. Officer James Quandt of the Lincoln Police Department was stopped at a red light when he observed a man he believed to be Mitchell driving a vehicle matching the description of the beige SUV. Officer Quandt was able to confirm the driver was Mitchell after matching his appearance to a photograph on his in-car computer system. Officer Quandt also determined that Mitchell's driver's license was revoked. Officer Quandt followed Mitchell from a distance. Officer Quandt observed Mitchell accelerate, change lanes a few times, and run a red light. Officer Quandt eventually lost sight of Mitchell's vehicle.

Shortly after Officer Quandt observed Mitchell driving, Officer Sarah Williams of the Lincoln Police Department spotted a vehicle matching the SUV's description. The driver resembled a photograph of Mitchell that Officer Williams was able to view on her in-car computer system. Officer Williams followed Mitchell and observed him driving erratically, including speeding more than 15 miles per hour over the speed limit and passing other cars in the center turn lane. Like Officer Quandt, Officer Williams lost sight of the SUV.

After Officer Quandt had lost sight of Mitchell's vehicle, he had radioed other officers to notify them that Mitchell might be driving to a nearby address where Mitchell and Lucille lived. Officer Joseph Keiser of the Lincoln Police Department was near the area and arrived at Mitchell's house before Mitchell did. Officer Keiser positioned himself in a nearby alleyway and then observed Mitchell pull into the driveway of the house

at a high rate of speed. When Mitchell pulled into the driveway, he drove over the grass, leaving tire marks.

After Mitchell had parked in the driveway, Officer Keiser approached the SUV and instructed Mitchell several times to exit the vehicle. Mitchell did not comply with the instructions. Eventually, Officer Keiser physically removed Mitchell from the SUV and handcuffed him.

After Mitchell was removed from the SUV, officers located an alcohol container in its center console and a paper bag containing alcohol on its passenger's side floor. In total, officers located one partially empty container of hard liquor without a lid and five beer cans, at least one of which was open.

Officer Quandt, the officer who had previously observed Mitchell run a red light, arrived at Mitchell's house and transported Mitchell to the Lancaster County jail. At the jail, Mitchell became aggressive and refused to submit to a breath test. Mitchell was charged both with DUI with refusal to submit to a chemical test and with driving during revocation.

The case proceeded to trial on December 1, 2014. At the trial, Lucille testified that Mitchell suffers from mental health problems. According to Lucille, the symptoms of Mitchell's mental health issues resemble the behaviors he displays when he is intoxicated. Lucille testified that on the morning of June 6, Mitchell was displaying behaviors that could have been consistent with him being intoxicated, including being agitated, making poor choices, and being impatient. Lucille also testified that she smelled alcohol on Mitchell's clothes.

The police officers involved in following and arresting Mitchell also testified at the trial. Officer Williams testified that she was trained in DUI investigations. Officer Williams further testified that she observed Mitchell driving erratically and that in her opinion, Mitchell's driving was unsafe and consistent with the behavior of a person who was under the influence. Officer Keiser testified that the manner in which Mitchell drove into the driveway was unsafe. Officer Keiser further testified that Mitchell smelled of alcohol and was generally

confused. Officer Keiser stated that he had experience dealing with drunk individuals and that in his opinion, Mitchell was under the influence of alcohol.

The State also called Officer Quandt to the stand. Officer Quandt testified that he had extensive DUI training. Officer Quandt opined that Mitchell was under the influence of alcohol and unable to safely operate a vehicle on the day in question. In support of his opinion that Mitchell was intoxicated, Officer Quandt noted that Mitchell had a hard time balancing, staggered, could not walk in a straight line, smelled of alcohol, slurred his speech, and had bloodshot eyes.

The jury found Mitchell guilty of DUI with refusal to submit to a chemical test and of driving during revocation. After the verdicts, the court held an enhancement hearing and determined that the State had proven Mitchell had three prior DUI convictions. Consequently, the court sentenced Mitchell to 5 to 10 years' imprisonment for fourth-offense DUI with refusal to submit to a chemical test and revoked his driving privileges and driver's license for 15 years. The court also sentenced Mitchell to 1 to 2 years' imprisonment and revoked his driving privileges and driver's license for 15 years for driving during revocation. The court ordered that the sentences be served concurrently to one another and consecutively to any other sentences previously imposed. Mitchell appeals from his convictions and sentences. Additional facts will be discussed, as necessary, in the analysis section of this opinion.

## III. ASSIGNMENTS OF ERROR

On appeal, Mitchell assigns three errors. First, Mitchell asserts there was insufficient evidence to support his convictions for DUI with refusal to submit to a chemical test and for driving during revocation. Second, Mitchell claims the district court erred when it overruled his motion for mistrial based on the prosecutor's comment during closing argument that Mitchell did not deny being intoxicated. Third, Mitchell asserts that he received excessive sentences.

## IV. ANALYSIS

### 1. Sufficiency of Evidence

Mitchell argues that there was insufficient evidence to support his convictions for DUI with refusal to submit to a chemical test and for driving during revocation. Mitchell asserts that the only evidence regarding his intoxication "was simply anecdotal evidence from an officer or two as to the officer's opinion." Brief for appellant at 15. We find no merit to this assignment of error.

[1,2] 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. Hale*, 290 Neb. 70, 858 N.W.2d 543 (2015). The relevant question 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. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

[3] First, we note that Mitchell assigns as error the sufficiency of the evidence to support both his DUI and his driving during revocation convictions. However, Mitchell makes no argument with respect to sufficiency of the evidence for driving during revocation. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court. *State v. Cook*, 290 Neb. 381, 860 N.W.2d 408 (2015). Because Mitchell fails to specifically argue the sufficiency of the evidence to support his conviction for driving during revocation, we do not address that assignment of error.

[4-6] Next, we turn to Mitchell's assertion that the evidence was insufficient to convict him of DUI with refusal to submit to a chemical test. As used in Neb. Rev. Stat. § 60-6,196 (Reissue 2008), the phrase "under the influence of alcoholic liquor or

of any drug" requires the ingestion of alcohol or drugs in an amount sufficient to impair to any appreciable degree the driver's ability to operate a motor vehicle in a prudent and cautious manner. *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009). After sufficient foundation is laid, a law enforcement officer may testify that in his or her opinion, a defendant was driving under the influence. *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000). Either a law enforcement officer's observations of a defendant's intoxicated behavior or the defendant's poor performance on field sobriety tests constitutes sufficient evidence to sustain a conviction of driving while under the influence of alcoholic liquor. *State v. Falcon*, 260 Neb. 119, 615 N.W.2d 436 (2000).

In the case at hand, the State laid foundation for various police officers to testify regarding their opinion that Mitchell was under the influence. See *Baue, supra*. Officer Williams testified that she was trained in DUI investigations and that she had observed Mitchell driving erratically. Officer Williams provided her opinion that Mitchell's unsafe driving was consistent with the behavior of a person driving under the influence. Similarly, Officer Keiser testified that he had experience in dealing with intoxicated individuals and that, in his opinion, Mitchell was under the influence of alcohol. Officer Quandt also testified that he had extensive DUI training. Officer Quandt testified that Mitchell had difficulty balancing, smelled of alcohol, slurred his speech, and had bloodshot eyes. Officer Quandt opined that due to Mitchell's having ingested alcohol, "I don't feel he was safe to operate a motor vehicle at that time." Lastly, Officer Quandt testified that Mitchell refused to submit to a chemical test after he was transported to the jail. This evidence, viewed in the light most favorable to the State, was sufficient for a rational jury to find Mitchell guilty beyond a reasonable doubt of DUI with refusal to submit to a chemical test. There is no merit to Mitchell's assignment of error.

### 2. Motion for Mistrial

Mitchell argues that the trial court erred when it did not grant a mistrial based on the prosecutor's stating in closing argument that Mitchell never denied being intoxicated. Mitchell argues the comment "is a violation of [Mitchell's] right[] to remain silent, his right to a fair trial, and is inconsistent with the requirement that the [S]tate has the burden of proof." Brief for appellant at 16. We find this assignment of error to be without merit.

[7,8] A mistrial is properly granted in a criminal case where an event occurs during the course of a trial that is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial. *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011). The decision whether to grant a motion for mistrial will not be disturbed on appeal in the absence of an abuse of discretion. *Daly, supra*.

[9] Additionally, error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). The defendant must prove that the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice. *Id.*

At the trial, Officer Quandt testified that he transported Mitchell to the jail after Mitchell was apprehended in his driveway. According to Officer Quandt, Mitchell was under arrest at the time he was transported. Officer Quandt testified that Mitchell made voluntary statements regarding his arrest during the ride to the jail. The State played for the jury an audio recording of the trip to the jail. In the recording, Mitchell repeatedly argues that he should not be under arrest because police did not catch him driving.

During closing arguments, the prosecutor made the following statement regarding the audio recording of Mitchell and Officer Quandt in the squad car:

> Now, interesting, if you recall the audio, and that will go back with you and if you want to listen to it, you can listen to it again. He never says, . . . Mitchell never says, I'm not drunk. I wasn't drinking. Why are you arresting me for [DUI], I'm not drunk. What he says is, "You didn't catch me driving. You didn't arrest me in my truck." And later, "You didn't breathalyze me in my car." Never once does he say he's not drunk. It's all about where you got me. He never denied that he's drunk, he never denied that he —

At that point in the closing argument, Mitchell objected. In a sidebar conference, Mitchell's attorney explained that his objection was based on the fact that "Mitchell does not have to deny anything. He does not have to prove anything." Mitchell argued the prosecutor's statement referred to facts not in evidence and that it implied that "[Mitchell's] got some sort of burden because he failed to deny that he was intoxicated." Mitchell asked for a mistrial or, in the alternative, that the jury be ordered to disregard the prosecutor's comment.

In response to Mitchell's objection, the court stated that "there is some case law that talks about pre-arrest silence, which is in essence what you're arguing, his silence, that is, he didn't deny it, he didn't say this, he didn't say that." The court went on to note that Mitchell's silence occurred after he had been arrested. Mitchell's attorney again moved for a mistrial, arguing the comment was "unfair and prejudicial and improper." The court overruled the motion for mistrial, but granted the alternative motion to strike the comment and instruct the jury. The court told the jury, "I am going to instruct the jury to disregard [the prosecutor's] comments about what . . . Mitchell may or may not have denied. So you are instructed to disregard those comments and not consider them."

After the parties' closing arguments, the court read the jury instructions aloud and submitted a copy to the jury for their reference. The jury instructions stated, in relevant part, "The burden of proof is always on the State to prove beyond a

reasonable doubt the material elements of the crime charged and this burden never shifts."

As a preliminary matter, we note that the State argues Mitchell failed to preserve error on this issue because he did not object to a violation of his right to remain silent at the trial. During the closing argument, Mitchell objected that he "d[id] not have to deny anything." The trial court understood Mitchell's objection to be based on the right to remain silent as indicated by its statement that "there is some case law that talks about pre-arrest silence, which is in essence what you're arguing, his silence, . . . he didn't deny it." After this comment by the court, Mitchell again moved for a mistrial, arguing that the prosecutor's comment was "unfair and prejudicial and improper." We find this record demonstrates Mitchell's objection implicated the right to remain silent and preserved the issue for appeal.

[10] Next, the parties state that Mitchell had not been read his *Miranda* rights at the time the silence in question occurred. See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). However, the parties do not provide us a citation to the record for this factual assertion, nor could we locate evidence in the bill of exceptions reflecting when Mitchell was read his *Miranda* rights. The situation is similar to that in *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011). In *Huff*, the defendant argued that officers had improperly commented on his invocation of the right to remain silent. It was not apparent from the record, however, whether the defendant was advised of his *Miranda* rights at the time. The court "treated the defendant's silence as pre-*Miranda* [because] the record did not indicate that he had received any *Miranda* warnings." *Huff*, 282 Neb. at 112, 802 N.W.2d at 104. In the present case, the record does not reflect when Mitchell received *Miranda* warnings and we will therefore treat Mitchell's silence as occurring pre-*Miranda*.

[11,12] In a series of cases, the U.S. Supreme Court has repeatedly indicated that reading a defendant his or her

*Miranda* rights is the key factor in determining whether the government can use a defendant's silence. In *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), the Court held that it violated due process to allow the government to impeach a defendant's version of the crime given at trial by utilizing his or her postarrest, post-*Miranda* silence. The Court stated:

> [W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

*Doyle*, 426 U.S. at 618.

[13,14] Employing similar reasoning, the U.S. Supreme Court in *Fletcher v. Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982), again treated the giving of *Miranda* warnings as the point after which the government could not use a defendant's silence against him. The *Fletcher* Court held that the government was permitted to impeach the defendant on the stand by utilizing his silence after arrest because the record did not reflect that he been read his *Miranda* warnings at the time. Lastly, in *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986), the Supreme Court held that the government could not use a defendant's postarrest silence as substantive evidence to refute the defendant's insanity defense because the silence had occurred post-*Miranda*.

The Nebraska Supreme Court followed the *Doyle* line of cases, starting in *State v. Lofquest*, 223 Neb. 87, 388 N.W.2d 115 (1986). In *Lofquest*, the court remanded the postconviction action for an evidentiary hearing to determine whether the prosecutor's cross-examination of the defendant by means of his refusal to speak referred to pre- or post-*Miranda* silence. The court noted that per *Doyle* and *Fletcher*, the giving of *Miranda* warnings is the point in time after which

impeachment use of a defendant's silence violates due process. *Lofquest, supra*.

Next, in *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002), the court addressed the defendant's contention that the State should not be permitted to use his silence as substantive evidence of sanity in order to refute his insanity defense. The case differed from *Lofquest* because the defendant in *Harms* did not testify at the trial and so the State did not desire to use his silence to impeach him, but, rather, to prove his sanity. The *Harms* court relied on the reasoning of *Doyle* to conclude that the silence of the defendant, after being arrested and receiving *Miranda* warnings, could not be used against him to refute his claim of insanity. However, the court concluded that the State could utilize the silence of the defendant in *Harms* before being arrested and read his *Miranda* rights. As in *Lofquest*, the *Harms* court relied on the line of cases stemming from *Doyle*, which treated the giving of *Miranda* warnings as the key point in time after which the government was not permitted to utilize the defendant's silence. See, also, *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015) (determining that prosecutor's comment on defendant's prearrest, pre-*Miranda* silence was permissible because prior cases have viewed giving *Miranda* warnings as triggering event that prevents State from using defendant's silence).

However, these cases do not directly govern the issue presented in Mitchell's case. In *Lofquest, supra*, the silence was used to impeach the defendant; in the present case, the prosecutor's comment utilized Mitchell's silence as evidence of his guilt. Likewise, in *Harms, supra*, the silence in question occurred before the defendant was arrested and before he had been read his *Miranda* rights, whereas in the case at hand, Mitchell had not yet been read his *Miranda* rights at the time of his silence even though he was under arrest. The question of whether a defendant's postarrest but pre-*Miranda* silence can be used as substantive evidence of his or her guilt has not been addressed by any of the previously discussed cases.

The Eighth Circuit Court of Appeals, however, has analyzed the issue of postarrest, pre-*Miranda* silence used as substantive evidence. In *U.S. v. Frazier*, 408 F.3d 1102 (8th Cir. 2005), the government utilized the defendant's postarrest, pre-*Miranda* silence as substantive evidence of guilt in its case in chief. The Eighth Circuit stated that "[a]lthough [the defendant] was under arrest, there was no governmental action at that point inducing his silence," since he had not yet been read his *Miranda* rights. *Frazier*, 408 F.3d at 1111. The *Frazier* court therefore concluded that the government could utilize the defendant's postarrest, pre-*Miranda* silence as substantive evidence of his guilt.

We agree with the reasoning of the Eighth Circuit. The Nebraska Supreme Court made it clear in *Lofquest* and *Harms* that the giving of *Miranda* warnings—not the fact of being under arrest—is the key inquiry in determining when the State can utilize a defendant's silence. See, *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002); *State v. Lofquest*, 223 Neb. 87, 388 N.W.2d 115 (1986). Before the giving of *Miranda* warnings, there is no state action inducing the defendant to remain silent. See *Frazier, supra*. This logic applies equally to impeachment use of silence as to the use of silence as substantive evidence of a defendant's guilt.

[15] In the present case, we presume Mitchell had not yet been given his *Miranda* warnings at the time he remained silent. See *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011). Because his silence occurred pre-*Miranda*, the prosecutor's comment utilizing Mitchell's silence as evidence of his guilt was not improper.

Mitchell also argues the prosecutor's comment improperly implied that Mitchell had a burden to disprove the charges against him. However, the trial court instructed the jury to disregard the prosecutor's comment about what Mitchell did not deny. Furthermore, the jury instructions correctly stated that the burden to prove the alleged crimes beyond a reasonable doubt rested on the State. In light of the court's admonishing

the jury to disregard the comment and properly instructing the jury, Mitchell has not demonstrated that he suffered actual prejudice as a result of the trial court's denial of his motion for mistrial. See *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

We conclude the trial court did not abuse its discretion in refusing to grant a mistrial.

### 3. Excessive Sentences

Mitchell argues that the sentences he received were excessive. Mitchell asserts that the trial court did not give proper weight to his mental health issues and instead focused solely on his criminal history. We disagree.

[16,17] When imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education and experience, social and cultural background, past criminal record, 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. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011). Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

Mitchell was sentenced to 5 to 10 years' imprisonment, and his driving privileges and driver's license were revoked for 15 years for fourth-offense DUI, a Class III felony. See Neb. Rev. Stat. § 60-6,197.03(8) (Cum. Supp. 2014). Mitchell's sentence is within the statutory range. See, *id.* (stating that person convicted of fourth-offense DUI shall have his or her license revoked for 15 years); Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014) (providing sentencing range for Class III felonies of 1 to 20 years' imprisonment). Mitchell was sentenced to 1 to 2 years' imprisonment, and his driving privileges and driver's

license were revoked for 15 years for driving during revocation. Mitchell's sentence for driving during revocation is also within the statutory limits. See, Neb. Rev. Stat. § 60-6,197.06 (Reissue 2010) (stating that driving during revocation is Class IV felony and that person convicted of driving during revocation shall have his or her license revoked for 15 years); § 28-105 (stating that sentencing range for Class IV felony is 0 to 5 years' imprisonment).

In the present case, the court stated at the sentencing hearing that it was taking into account "the nature and circumstances of the crimes, and history, character and condition of [Mitchell]." The court indicated that it had considered a letter from Mitchell's attorney that stated Mitchell suffered from schizophrenia, depression, and anxiety. The court stated, however, that it could not "ignore the serious nature of this crime and all of the surrounding facts and circumstances." The court noted Mitchell's extensive criminal history and the need to protect the public. The court concluded that "imprisonment [was] necessary for the protection of the public, because the risk [was] substantial that during any period of probation, [Mitchell] would engage in additional criminal conduct, and because a lesser sentence would depreciate the seriousness of the . . . crimes." We cannot find an abuse of discretion in the sentences imposed in this case.

## V. CONCLUSION

We find no merit to Mitchell's assertions of error on appeal. We affirm.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Justin S. Furstenfeld, appellant, v. Lisa B. Pepin, appellee.

875 N.W.2d 468

Filed March 1, 2016. No. A-14-976.

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. **Modification of Decree: Attorney Fees: Appeal and Error.** In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
4. **Courts: Jurisdiction: Appeal and Error.** Once an appeal is perfected to an appellate court, the trial court is divested of jurisdiction to hear a case involving the same matter between the same parties.
5. **Jurisdiction: Appeal and Error.** Generally, once an appeal has been perfected, the trial court no longer has jurisdiction, although the district court retains jurisdiction under Neb. Rev. Stat. § 42-351(2) (Reissue 2008) for certain matters.
6. **Statutes: Words and Phrases.** The word "support" in Neb. Rev. Stat. § 42-351 (Reissue 2008) is not limited to child support and, in fact, applies to spousal support.
7. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
8. **Jurisdiction: Appeal and Error.** Neb. Rev. Stat. § 42-351(2) (Reissue 2008) does not grant authority to hear and determine anew the very issues then pending on appeal and to enter permanent orders addressing these issues during the appeal process.

9. **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.
10. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), 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.
11. **Final Orders: Words and Phrases.** A substantial right under Neb. Rev. Stat. § 25-1902 (Reissue 2008) is an essential legal right.
12. **Final Orders: Appeal and Error.** A substantial right is involved if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.
13. **Final Orders.** Substantial rights under Neb. Rev. Stat. § 25-1902 (Reissue 2008) include those legal rights that a party is entitled to enforce or defend.
14. **Judgments.** An order on summary application in an action after judgment under Neb. Rev. Stat. § 25-1902 (Reissue 2008) is an order ruling on a postjudgment motion in an action.
15. **Courts: Judgments.** A district court has the inherent power to determine the status of its judgments.
16. ____: ____. The district court may, on motion and satisfactory proof that a judgment has been paid and satisfied in whole or in part by the act of the parties thereto, order it discharged and canceled of record, to the extent of the payment or satisfaction.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Affirmed in part, and in part dismissed.

Matt Catlett, of Law Office of Matt Catlett, for appellant.

Terrance A. Poppe and Andrew K. Joyce, of Morrow, Poppe, Watermeier & Lonowski, P.C., L.L.O., for appellee.

Moore, Chief Judge, and Inbody and Bishop, Judges.

Moore, Chief Judge.

## I. INTRODUCTION

Justin S. Furstenfeld appeals from orders entered by the district court for Lancaster County in the course of this modification action. Justin challenges the court's award to Lisa B. Pepin of $5,000 in temporary attorney fees. Furstenfeld also challenges the court's order acknowledging that Pepin had made payments to him under a contempt purge plan, discharging her from the contempt judgment, and awarding her $120 in attorney fees in connection with that order. Because the order awarding temporary attorney fees is not a final, appealable order, we dismiss the appeal as it relates to that order. We affirm the order discharging Pepin from the contempt judgment and awarding Pepin fees in connection with obtaining this order.

## II. BACKGROUND

### 1. Decree of Dissolution

The parties were initially divorced in December 2010, and an amended decree was entered in January 2011. See *Furstenfeld v. Pepin*, 23 Neb. App. 155, 869 N.W.2d 353 (2015). The initial decree approved the parties' property settlement agreement, custody agreement, and support agreement, while the amended decree corrected errors in certain provisions. See *id.*

### 2. Complaints to Modify and Appeal in Case No. A-14-814

On August 30, 2011, Pepin filed an amended complaint to modify the parties' dissolution decree, seeking to modify Furstenfeld's parenting time and child support obligation. On September 18, Furstenfeld filed an answer and counterclaim, seeking custody of the parties' minor child. On December 2, he filed a voluntary dismissal of his counterclaim. We note that resolution of Pepin's modification action was delayed for some time because she experienced difficulty in obtaining Furstenfeld's medical records and she had to obtain a

court order requiring him to provide certain medical records. Furstenfeld filed an appeal from the order, which appeal was dismissed by the Nebraska Supreme Court because the appeal was not from a final, appealable order. See *Furstenfeld v. Pepin*, 287 Neb. 12, 840 N.W.2d 862 (2013).

On June 18, 2012, Pepin filed a motion seeking to enforce a settlement agreement reached by the parties in May after prolonged negotiations, which Furstenfeld subsequently refused to sign.

On June 10, 2014, while resolution of Pepin's motion to enforce the settlement agreement was pending, Furstenfeld filed a motion seeking leave to file an amended or supplemental answer to Pepin's operative complaint for modification. The record on appeal does not contain a ruling by the district court on Justin's motion, but the parties both assert in their briefs that the court denied his request. On July 7, he filed his own complaint to modify the decree in which he asked for custody and child support.

On July 14, 2014, the district court entered an order finding Pepin in contempt for failing to make the parties' child available for a previously planned trip with Furstenfeld, and the court entered a purge order assessing Pepin with travel costs incurred by Furstenfeld and the minor child, as well as attorney fees.

On July 31, 2014, the district court entered an order granting Pepin's motion to enforce the parties' settlement agreement. The court noted that the issues under consideration were parenting time and child support and found that the settlement agreement was valid. On August 29, the court modified the decree to incorporate the terms of the settlement agreement. We note that this modification order does not mention Furstenfeld's July 7 complaint to modify. He appealed from the August 29 order, and in case No. A-14-814, this court affirmed the order of the district court enforcing the parties' settlement agreement. See *Furstenfeld v. Pepin*, 23 Neb. App. 155, 869 N.W.2d 353 (2015).

3. Proceedings During Pendency of Appeal in Case No. A-14-814

The present appeal involves orders entered by the district court on motions filed by the parties while Furstenfeld's appeal in case No. A-14-814 was pending.

On August 26, 2014, Furstenfeld filed a motion for the appointment of an expert and for production of the child for examination. On September 15, Pepin filed a motion for temporary attorney fees "with respect to [Furstenfeld's] Complaint for Modification of Decree." The district court heard these motions on September 23. The bill of exceptions on appeal does not include a transcription of the hearing, but it does reflect that the court received exhibit 86, an affidavit from Pepin in support of her motion for temporary attorney fees.

On September 29, 2014, the district court ordered the parties to submit to a custody evaluation and ordered Furstenfeld to pay temporary attorney fees to Pepin of $5,000.

On September 30, 2014, Pepin filed a "Motion Regarding Receipts," in which she asked for an order compelling Furstenfeld and his counsel to provide receipts for sums she had paid for travel expenses and attorney fees pursuant to the July 14 purge order. In addition, Pepin asked for the award of a reasonable attorney fee. On October 1, Furstenfeld filed a motion asking the district court to clarify and reconsider its September 29 order.

On October 14, 2014, the district court entered an order ruling on Furstenfeld's motion to clarify and reconsider and Pepin's motion for receipts. The court clarified its September 29 order with regard to the performance of the custody evaluation and a requirement that the minor child be made available for examination. The court denied his request to reconsider the award of temporary attorney fees, finding it had authority to award temporary attorney fees in a complaint to modify custody proceeding. With regard to Pepin's motion regarding receipts, the court noted that she had made payments

in accordance with the court's July 14 purge order but that Furstenfeld's attorney refused to provide her with receipts for her payments, arguing that he and his client have a "First Amendment Right not to be compelled to sign a receipt." The court found that the July 14 judgment had been fully paid and satisfied. The court ordered the July 14 judgment for travel expenses and attorney fees discharged and canceled of record. The court awarded Pepin $120 in attorney fees in connection with her motion for receipts.

Furstenfeld subsequently perfected the present appeal from the district court's orders of September 29 and October 14, 2014.

## III. ASSIGNMENTS OF ERROR

Furstenfeld asserts that (1) the district court erred in ordering him to pay Pepin $5,000 in temporary attorney fees, (2) the court had no authority to rule on her motion for receipts, and (3) the court erred in ordering him to pay her $120 in attorney fees in connection with her motion for receipts.

## IV. 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. *In re Interest of Jassenia H.*, 291 Neb. 107, 864 N.W.2d 242 (2015).

[2] In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014).

## V. ANALYSIS

### 1. Jurisdiction

[3] This case presents several jurisdictional issues. Before reaching the legal issues presented for review, it is the duty

of an appellate court to settle jurisdictional issues presented by a case. *Hofferber v. Hastings Utilities*, 282 Neb. 215, 803 N.W.2d 1 (2011). First, we must consider the district court's authority to enter the September 29 and October 14, 2014, orders following Furstenfeld's action in perfecting his appeal in case No. A-14-814. If the court was not divested of jurisdiction by virtue of the appeal in case No. A-14-814, then we must also consider whether the orders he has appealed from in the present case were final, appealable orders.

(a) Did Appeal in Case No. A-14-814 Divest District Court of Jurisdiction?

[4,5] Once an appeal is perfected to an appellate court, the trial court is divested of jurisdiction to hear a case involving the same matter between the same parties. *In re Interest of Jedidiah P.*, 267 Neb. 258, 673 N.W.2d 553 (2004). Generally, once an appeal has been perfected, the trial court no longer has jurisdiction, although the district court retains jurisdiction under Neb. Rev. Stat. § 42-351(2) (Reissue 2008) for certain matters. See, e.g., *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012).

On appeal, Furstenfeld relies upon § 42-351(2) in support of his argument that the district court retained jurisdiction following the appeal in case No. A-14-814 to enter the orders of September 29 and October 14, 2014. Section 42-351(2) provides:

> When final orders relating to proceedings governed by sections 42-347 to 42-381 are on appeal and such appeal is pending, the court that issued such orders shall retain jurisdiction to provide for such orders regarding support, custody, parenting time, visitation, or other access, orders shown to be necessary to allow the use of property or to prevent the irreparable harm to or loss of property during the pendency of such appeal, or other appropriate orders in aid of the appeal process. Such

orders shall not be construed to prejudice any party on appeal.

[6] In *Spady v. Spady, supra*, the husband appealed from a decree of dissolution. During the pendency of the appeal, the district court entered an order awarding the wife temporary alimony. Thereafter, the wife pursued a contempt action, based in part upon the husband's failure to pay the temporary alimony. The district court found the husband to be in contempt on this basis. On appeal, the husband argued that the district court did not have authority to issue the temporary alimony order and that thus, his failure to pay it could not form the basis for a contempt finding. The Supreme Court rejected this argument and affirmed the finding of contempt for failure to pay the temporary alimony. The court ultimately rejected the husband's argument that alimony was not one of the matters in § 42-351(2) for which the trial court retains jurisdiction during the pendency of an appeal. The court determined that the word "support" in the statute is not limited to child support and, in fact, applies to spousal support.

[7] As recognized by the Supreme Court in *Spady v. Spady, supra*, statutory language is to be given its plain and ordinary meaning. In looking at § 42-351(2), there is no mention of attorney fees as a matter over which the district court retains jurisdiction once an appeal is pending. However, the September 29, 2014, award to Pepin of $5,000 in temporary attorney fees was not entered in connection with the proceeding which was on appeal in case No. A-14-814 (her motion to enforce a settlement agreement). Rather, the September 29 order appealed from in the instant case was entered in a separate proceeding (Furstenfeld's complaint to modify custody). Likewise, the October 14 award to Pepin of $120 in attorney fees was entered in a separate proceeding (her motion for receipts in connection with her payments under the July 14 purge order). The October 14 order also ruled on Furstenfeld's motion to reconsider the September 29 award of attorney

fees in his modification proceeding. Accordingly, the question becomes whether these additional proceedings involve the same matter between the same parties as the appeal in case No. A-14-814.

In *Bayliss v. Bayliss*, 8 Neb. App. 269, 592 N.W.2d 165 (1999), this court considered the question of whether § 42-351(2) (Reissue 1998) allows a court to modify a decree while a previous order modifying the decree on the same issue is on appeal. In that case, the former husband filed a motion to modify child support and also asked that the former wife be responsible for visitation transportation costs as well as half of the unreimbursed medical, dental, and daycare expenses. The district court modified the decree and ordered that the former wife pay child support of $50 per month, be responsible for half of the transportation expenses, and be responsible for 38 percent of daycare and unreimbursed medical expenses. The former wife appealed, and while this initial appeal was pending, the former husband filed another motion to modify child support and requested that the former wife pay visitation transportation costs and contribute to daycare and unreimbursed medical expenses. The district court found that § 42-351 allowed it to retain jurisdiction while the initial appeal was pending and modified the decree, ordering the former wife to pay child support of $50 per month; ordered each party to be responsible for visitation transportation expenses; and made the child support retroactive to the first of the month in which the former husband filed the second motion to modify. This second modification order was entered while the initial appeal was still pending.

[8] The former husband appealed from the second modification order in *Bayliss v. Bayliss, supra*, and on appeal, this court determined that the district court did not have jurisdiction to enter the second modification order which modified the decree on issues that were the subject of the then-pending initial appeal. This court stated that § 42-351(2)

does not grant authority to hear and determine anew the very issues then pending on appeal and to enter permanent orders addressing these issues during the appeal process. *Bayliss v. Bayliss, supra*. Accordingly, we vacated the order and dismissed the appeal for lack of jurisdiction.

The present appeal was filed by Furstenfeld while the appeal in case No. A-14-814 was pending. Certainly, we have the same parties in the present appeal as in case No. A-14-814, but we are not presented with a situation involving two permanent orders in effect at the same time, in the same case, on the same issue. The underlying action in case No. A-14-814 was initiated by Pepin when she filed a complaint to modify the decree, seeking to reduce or suspend Furstenfeld's parenting time and to increase his child support. The parties reached an oral agreement, and the district court sustained Pepin's motion to enforce the agreement. The court ordered that Furstenfeld's child support obligation be increased, awarded Pepin attorney fees, and made certain modifications to the decree (which did not include any modification of custody or parenting time).

In July 2014, Furstenfeld filed his complaint to modify, seeking custody and child support. In September, the district court, upon Pepin's motion, ordered Furstenfeld to pay her temporary attorney fees of $5,000, which order the district court refused to reconsider in its October order. In this appeal, Furstenfeld challenges the district court's authority to award temporary attorney fees in a modification proceeding.

Furstenfeld also challenges in this appeal the portion of the October 2014 order which found that Pepin had fully paid and satisfied the July 2014 contempt order and purge plan, discharged the contempt judgment, and awarded her $120 in attorney fees incurred in connection with obtaining the order. Specifically, he challenges the district court's authority to rule on her motion for receipts and to award attorney fees in that proceeding.

Neither the September 2014 nor the October 2014 order appealed from, when compared with the orders appealed from in case No. A-14-814, presents us with a situation of having two permanent orders in effect at the same time, in the same case, on the same issue. We conclude that the appeal in case No. A-14-814 did not divest the district court of jurisdiction to rule on Pepin's motion for temporary attorney fees in Furstenfeld's modification action, his motion to reconsider the award of temporary attorney fees, or her motion for receipts in connection with the prior contempt proceeding. However, we must still consider whether the orders appealed from were final, appealable orders.

(b) Were Orders Appealed From Final, Appealable Orders?

[9-13] 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. *Kelliher v. Soundy*, 288 Neb. 898, 852 N.W.2d 718 (2014). Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), 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. *In re Estate of Gsantner*, 288 Neb. 222, 846 N.W.2d 646 (2014). A substantial right under § 25-1902 is an essential legal right. *In re Estate of Gsantner, supra*. A substantial right is involved if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken. *Id.* Substantial rights under § 25-1902 include those legal rights that a party is entitled to enforce or defend. *In re Estate of Gsantner, supra*.

*(i) Award of Temporary Attorney Fees*

Furstenfeld argues that the September 29, 2014, order requiring him to pay Pepin $5,000 in temporary attorney fees and the portion of the court's October 14 order denying his motion to reconsider the award of temporary attorney fees were final, appealable orders because they deprived him of a substantial property right, i.e., $5,000, thus affecting a substantial right of his under § 25-1902.

It is clear that temporary orders of alimony and child support are not appealable until the appeal from the final order in the case. See, e.g., *Jessen v. Jessen*, 259 Neb. 644, 611 N.W.2d 834 (2000) (challenge to award of temporary alimony pending appeal is to be brought at same time as appeal of decree of dissolution); *Kosiske v. Kosiske*, 8 Neb. App. 694, 600 N.W.2d 840 (1999) (temporary child support and alimony obligations are not final and appealable at time entered, but become final upon entry of decree dissolving parties' marriage); *Kricsfeld v. Kricsfeld*, 8 Neb. App. 1, 588 N.W.2d 210 (1999) (addressing adequacy of temporary alimony order at time of appeal from decree of dissolution). We have not found a case explicitly holding that temporary attorney fees are not appealable, but an award of temporary attorney fees was discussed in the course of an appeal from the final decree in *Olson v. Olson*, 13 Neb. App. 365, 693 N.W.2d 572 (2005), implying that the award was not appealable at the time it was entered.

We conclude that an award of temporary attorney fees is not an appealable order, but, rather, it may be addressed in any appeal from the final order in the modification proceeding. Because the award of $5,000 in temporary attorney fees was not a final, appealable order, we are without jurisdiction to address Furstenfeld's assignments of error in connection with the award of temporary attorney fees.

*(ii) Order Ruling on Motion for Receipts*

[14] In its October 14, 2014, order, the district court also ruled on Pepin's motion for receipts and awarded her $120 in attorney fees in connection with that motion. With respect to the portion of the court's October 14 order requiring Furstenfeld to pay Pepin's attorney fees of $120, he argues that the order appears to be one made upon a summary application in an action after judgment, the "judgment" being the order filed by the court on July 14, holding her in contempt and requiring her to take certain action in order to purge herself of contempt, and the "summary application" being her motion requiring him to execute receipts. An order on "'summary application in an action after judgment'" under § 25-1902 is an order ruling on a postjudgment motion in an action. *Heathman v. Kenney*, 263 Neb. 966, 968, 644 N.W.2d 558, 561 (2002).

We agree with Furstenfeld and conclude that Pepin's motion for receipts was a summary application in an action after judgment under § 25-1902(3) and was therefore a final, appealable order. Accordingly, we have jurisdiction of the portion of his appeal challenging the award of $120 in attorney fees.

2. Award of $120 in Attorney Fees

Furstenfeld asserts that the district court had no authority to rule on Pepin's motion for receipts and that it erred in ordering him to pay her $120 in attorney fees in connection with her motion for receipts.

[15,16] Neb. Rev. Stat. § 25-2210 (Reissue 2008) provides in part that "[w]henever any judgment is paid and discharged, the clerk shall enter such fact upon the judgment record in a column provided for that purpose." A district court has the inherent power to determine the status of its judgments. *Jensen v. Jensen*, 275 Neb. 921, 750 N.W.2d 335 (2008). The district court may, on motion and satisfactory proof that a judgment has been paid and satisfied in whole or in part by the act of

the parties thereto, order it discharged and canceled of record, to the extent of the payment or satisfaction. *Id.*

Although framed in terms of a request for receipts acknowledging her payment of the sums ordered under the July 2014 purge order, Pepin was essentially asking the court to determine the status of that judgment and find that her obligation under the purge order had been fulfilled. This is what the court did in its October order. The court found the evidence proved that the judgments for travel expenses and attorney fees ordered in the July order had been fully paid and satisfied and ordered the judgment for those expenses and fees discharged and canceled of record. The court had authority to do so and did not err in this regard.

Further, we find no abuse of discretion in the award of $120 in attorney fees incurred by Pepin in obtaining the order discharging the contempt judgments against her in light of Furstenfeld's refusal to acknowledge receipt of the payments.

## VI. CONCLUSION

Because the order awarding temporary attorney fees is not a final, appealable order, we dismiss the appeal as it relates to that order. We affirm the order discharging Pepin from the contempt judgment and awarding her fees in connection with obtaining this order.

Affirmed in part, and in part dismissed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Candice M. McMillion, appellant.

875 N.W.2d 877

Filed March 1, 2016. No. A-14-1166.

1. **Witnesses: Testimony: Evidence.** If a witness uses a writing to refresh his or her memory for the purpose of testifying, either before or while testifying, an adverse party is entitled to have it produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce into evidence those portions which relate to the testimony of the witness.
2. **Criminal Law: Mental Health: Minors.** No professional counselor-patient privilege exists in criminal prosecutions for injuries to children.
3. ____: ____: ____. The statutory privilege between patient and professional counselor is not available in a prosecution for child abuse.
4. **Appeal and Error.** An error is harmless when no substantial miscarriage of justice occurred as a result of the error.
5. **Criminal Law: Trial: Courts: Appeal and Error: Words and Phrases.** Harmless error exists in a bench trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the court in a judgment adverse to a substantial right of the defendant.
6. **Constitutional Law: Pretrial Procedure.** Confrontation Clause rights are trial rights that do not extend to pretrial hearings in state proceedings.
7. **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.
8. **Constitutional Law: Search and Seizure: Standing.** A "standing" analysis in the context of search and seizure is nothing more than an

inquiry into whether the disputed search and seizure has infringed an interest of the defendant in violation of the protection afforded by the Fourth Amendment.

9. **Constitutional Law: Search and Seizure.** The test used to determine if a defendant has an interest protected by the Fourth Amendment is whether the defendant has a legitimate or justifiable expectation of privacy in the premises.
10. ____: ____. Two inquiries are required to determine if a defendant has a legitimate expectation of privacy in the premises. First, an individual must have exhibited an actual (subjective) expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable.
11. ____: ____. In the context of search and seizure, with regard to the content of cell phones, an accused must first establish that he personally has a legitimate expectation of privacy in the object that was searched.
12. **Constitutional Law: Search and Seizure: Proof.** An individual may demonstrate infringement of his or her own legitimate expectation of privacy by showing that he owned the premises or that he occupied them and had dominion and control over them based on permission from the owner.
13. **Constitutional Law: Search and Seizure: Words and Phrases.** Factors relevant to the determination of standing in the context of search and seizure include historical use of the property or item, ability to regulate access, the totality of the circumstances surrounding the search, the existence or nonexistence of a subjective anticipation of privacy, and the objective reasonableness of the expectation of privacy considering the specific facts of the case.
14. **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.
15. **Criminal Law: Public Officers and Employees: Attorney and Client.** A public defender's duty is to represent all indigent felony defendants.
16. **Constitutional Law: Criminal Law: Right to Counsel.** An indigent criminal defendant's Sixth Amendment right to counsel does not include the right to counsel of the indigent defendant's own choice.
17. **Constitutional Law: Right to Counsel: Conflict of Interest.** A Sixth Amendment right to effective assistance of counsel includes representation free of conflicts of interest which adversely affect the lawyer's performance.
18. **Right to Counsel: Conflict of Interest: Appeal and Error.** Whether a defendant's lawyer's representation violates a defendant's right to representation free from conflicts of interest is a mixed question of

law and fact that an appellate court reviews independently of the lower court's decision.

19. **Attorney and Client: Conflict of Interest.** The fact that an attorney has other clients, including one who would be a State witness and testify at trial, is not sufficient in and of itself to constitute a conflict of interest.
20. **Effectiveness of Counsel: Conflict of Interest: Words and Phrases.** The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard for another or where a lawyer's representation of one client is rendered less effective by reason of his or her representation of another client.
21. **Effectiveness of Counsel: Conflict of Interest: Proof.** A defendant who shows that a conflict of interest actually affected the adequacy of his or her representation need not demonstrate prejudice, but such conflict of interest must be shown to have resulted in conduct by counsel that was detrimental to the defense.
22. **Attorney and Client: Conflict of Interest.** Where no direct or concurrent representation is involved, there is no actual conflict of interest.
23. **Attorney and Client: Conflict of Interest: Informed Consent.** A lawyer who formerly represented a client in a matter is prohibited from thereafter representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
24. **Juries.** A jury must be sequestered when a case is finally submitted to the jury.
25. **Criminal Law: Trial: Juries: Appeal and Error.** Whether a jury is to be kept together before submission of the cause in a criminal trial is left to the discretion of the trial court.
26. ____: ____: ____: ____. To warrant reversal, denial of a motion to sequester the jury before submission of the cause must be shown to have prejudiced the defendant.
27. **Motions for Mistrial: Appeal and Error.** Whether to grant a mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.
28. **Prosecuting Attorneys: Trial.** Prosecutors are charged with the duty of conducting criminal trials in such a manner that an accused may have a fair trial.
29. **Constitutional Law: Prosecuting Attorneys: Trial.** A prosecutor's comment on a defendant's silence in the defendant's trial is a violation of an accused's right to remain silent under the 5th and 14th Amendments to the U.S. Constitution and under article I, § 12, of the Nebraska Constitution.

30. ____: ____: ____. The prohibition against a prosecutor's comment on a defendant's right to remain silent applies throughout a trial, including the opening statement and closing argument during the defendant's trial.
31. ____: ____: ____. In an opening statement for a jury trial, a prosecutor's comment concerning the necessity of the defendant's testimony or an expression concerning the plausibility or credibility of anticipated testimony from a defendant violates an accused's right to remain silent at trial.
32. **Motions for Mistrial: Prosecuting Attorneys: Proof.** Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.
33. **Trial: Parties.** A party is allowed considerable latitude in making an opening statement.
34. **Trial: Prejudicial Statements.** The impact of any comment made at trial depends on the atmosphere at trial.
35. **Motions for Mistrial: Prejudicial Statements: Appeal and Error.** In ruling on a motion for mistrial, the trial judge is in a better position to measure the impact a comment has on a jury, and his or her decision will not be overturned unless clearly erroneous.
36. **Trial: Evidence.** In an opening statement, it is permissible for the State to discuss what the evidence may show.
37. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
38. **Trial: Jurors.** Both when determining whether a venireperson should be removed for cause and when determining whether a juror should be retained after the commencement of trial, the retention or rejection of a juror is a matter of discretion for the trial court.
39. **Criminal Law: Jury Misconduct: Proof.** In a criminal case, jury misconduct must be demonstrated by clear and convincing evidence.
40. ____: ____: ____. Where the jury misconduct in a criminal case involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct.
41. **Trial: Evidence: Appeal and Error.** On appeal, the defendant may not assert a different ground for his or her objection to the admission of evidence than was offered to the trier of fact.
42. **Trial: Expert Witnesses: Appeal and Error.** An objection on the basis of insufficient foundation is a general objection and fails to preserve a challenge on appeal to admissibility of expert testimony.
43. **Trial: Evidence.** Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined on a case-by-case basis.

44. **Trial: Evidence: Appeal and Error.** A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion.
45. **Trial: Evidence: Photographs.** Photographic evidence is admissible when it is shown that it is a correct reproduction of what it purports to show, and such showing may be made by any evidence that bears on whether the photographic evidence correctly depicts what it purports to represent.
46. **Trial: Evidence: Photographs: Witnesses.** Under the illustrative model of authenticating photographic evidence, a photograph, motion picture, videotape, or other recording is viewed merely as a graphic portrayal of oral testimony and is admissible only when a witness testifies that it is a correct and accurate representation of facts that the witness personally observed.
47. **Criminal Law: Pretrial Procedure: Appeal and Error.** Unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion.
48. **Constitutional Law: Criminal Law: Parties.** The federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.
49. **Parties: Testimony: Rules of Evidence.** A defendant does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.
50. **Criminal Law: Evidence.** The defendant's right to compulsory process is itself designed to vindicate the principle that the ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.
51. **Evidence: Testimony.** Discovery, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony.
52. **Evidence.** The State's interest in protecting itself against an 11th-hour defense is merely one component of the broader public interest in a full and truthful disclosure of critical facts.
53. **Pretrial Procedure: Appeal and Error.** Trial courts have broad discretion with respect to sanctions involving discovery procedures.
54. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
55. **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.

56. **Jury Instructions: Appeal and Error.** In reviewing a claim of prejudice from jury instructions given or refused, an appellate court must read the instructions 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 evidence, there is no prejudicial error.
57. **Jury Instructions.** A trial court is not required to give a proffered instruction which unduly emphasizes a part of the evidence in the case.
58. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
59. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction for 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.
60. **Criminal Law: Evidence: Appeal and Error.** The relevant question when an appellate court reviews a sufficiency of the evidence claim 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.
61. **Sexual Assault: Words and Phrases.** A person commits first degree sexual assault of a child when he or she subjects another person under 12 years of age to sexual penetration and the actor is at least 19 years of age or older.
62. **Sexual Misconduct: Words and Phrases.** Any person who knowingly engages in sexual penetration with his or her child commits incest.
63. **Judicial Notice: Records: Rules of Evidence.** As a subject for judicial notice, existence of court records and certain judicial action reflected in a court's record are, in accordance with Neb. Rev. Stat. § 27-201(2)(b) (Reissue 2008), facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.
64. **Judicial Notice: Records: Collateral Estoppel: Res Judicata.** A court may judicially notice existence of its records and the records of another court, but judicial notice of facts reflected in a court's records is subject to the doctrine of collateral estoppel or of res judicata.
65. **Judicial Notice.** Judicial notice may be taken at any stage of the proceeding.

66. **Judicial Notice: Rules of Evidence: Words and Phrases.** A proceeding under Neb. Rev. Stat. § 27-201(6) (Reissue 2008) includes judicial activity which occurs after commencement of an action and includes judicial action in an appeal.
67. **Parental Rights.** A natural parent who relinquishes his or her rights to a child by a valid written instrument gives up all rights to the child at the time of the relinquishment.
68. **Parental Rights: Adoption.** After a decree of adoption has been entered, the natural parents of an adopted child shall be relieved of all parental duties and responsibilities for the child and shall have no rights over the child.
69. **Moot Question: Words and Phrases.** An issue is moot when it seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
70. **Sentences.** Generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively.
71. ____. A court is required to order consecutive sentences only for those specific crimes that require a mandatory minimum sentence to be served consecutively to other sentences imposed.
72. **Convictions: Sentences.** If the conviction requires only a mandatory minimum sentence but the statute does not mandate that the minimum sentence run consecutively to other sentences, the decision as to whether to run the sentences consecutively or concurrently is left to the sentencing court.
73. **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.
74. **Sentences.** The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction or the same chain of events, is whether the offense charged in one count involves any different elements than an offense charged in another count and whether some additional evidence is required to prove one of the other offenses.

Appeal from the District Court for Sarpy County: David K. Arterburn, Judge. Affirmed.

Thomas P. Strigenz, Sarpy County Public Defender, and Colleen Hassett for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

Pirtle, Riedmann, and Bishop, Judges.

Riedmann, Judge.

## I. INTRODUCTION

Candice M. McMillion was convicted in the Sarpy County District Court of first degree sexual assault of a child under 12, incest, two counts of visual depiction of sexually explicit conduct, and child abuse. She appeals, assigning numerous errors with respect to her convictions and sentences. We affirm.

## II. BACKGROUND

### 1. Events Surrounding Charges

McMillion has been married to her husband, Caleb McMillion (Caleb), since March 2007. Their son, S.M., was born in August 2007. In late September 2012, after getting into an argument with Caleb, McMillion told her father-in-law that she had "put her mouth on [S.M.] a couple of times" and that she did so, in order to save her marriage, because Caleb "was into that." McMillion told him that Caleb had done similar acts to S.M. Shortly after their conversation ended, McMillion sent a text message to her mother-in-law and recanted. She said that she had lied and made up what she said to hurt Caleb. S.M. underwent a forensic interview at the time but did not disclose any abuse. He was removed from McMillion and Caleb's home in early October, however, due to domestic violence issues, and was placed with his paternal grandparents.

Because S.M. was acting out and displaying inappropriate behaviors, in January 2013, he began attending weekly therapy sessions with Amanda Gurock, a licensed independent mental health practitioner. After the first session, Gurock diagnosed S.M. with adjustment disorder with a disturbance of mixed emotions and conduct and anxiety disorder, not otherwise specified. Gurock also diagnosed S.M. with anxiety disorder because he was fidgety, had a lot of nervousness, had fears of different situations, and had bad dreams.

On February 18, 2013, S.M. disclosed to Gurock that he had been sexually abused by McMillion and Caleb numerous

times between the ages of 3 and 5. He specifically described the abuse, including that McMillion performed oral sex on him and forced him to do the same to her. S.M. underwent a forensic interview at Project Harmony, a child advocacy center, on February 20. Based on the information S.M. provided to Gurock and the forensic interviewer, McMillion was arrested and ultimately charged with count I, first degree sexual assault of a child under 12; count II, incest; counts III and IV, visual depiction of sexually explicit conduct; and count V, child abuse. Caleb was also arrested and charged with similar offenses.

### 2. Pretrial Motions

#### (a) Motion in Limine

Prior to trial, McMillion filed a motion in limine to prohibit the State from eliciting testimony of the statements S.M. made to Gurock and the Project Harmony interviewer. At a hearing on the motion, Gurock testified that she takes notes during her sessions with S.M. to remind herself what they talked about. The notes that are kept in the official file are general due to concerns about confidentiality, and they generally indicate what occurred at each session. However, Gurock also takes handwritten notes in a notebook where she writes down "a couple of words," and those notes are not kept in the official file. Gurock indicated that she reviewed her handwritten notes in preparation of giving testimony at the hearing.

Based on Gurock's admission that she refreshed her recollection with her handwritten notes prior to testifying, McMillion requested during the hearing that the court order Gurock to turn over her notes. The court observed that there had been no refreshing of recollection in the courtroom, and the notes had not been utilized during testimony. Thus, the court declined to order Gurock to produce her notes.

In a later written order, the district court ruled on McMillion's motion in limine, finding that the statements S.M. made during therapy sessions fall under an exception to the hearsay rule and

are therefore admissible. The court also found that the statements S.M. made during the Project Harmony interview would be admissible only if S.M. testified at trial.

(b) Motion to Suppress

At the time Caleb was arrested, police seized the cell phone he had with him, which contained a memory card. Police applied for and received a search warrant for the phone and its memory card and ultimately searched them.

McMillion filed a motion to suppress the search of the cell phone and memory card. At the suppression hearing, Det. Roy Howell testified that after receiving the search warrant, he made a bit-by-bit physical copy of the memory card contained in the phone. He explained that the file structure of the type of memory card in Caleb's phone is specific to the phone. On the memory card taken out of Caleb's phone, Howell found a "Mobo folder," which is associated with an application that was downloaded onto the phone. The Mobo folder is specific to Caleb's phone. Inside the Mobo folder, Howell discovered two photographs of McMillion performing oral sex on S.M. The photographs are still shots derived from two videos, but the videos were never recovered.

Caleb testified at the suppression hearing that he and McMillion separated in September 2012 but maintained frequent contact during their separation. They jointly owned approximately five similar memory cards, but from the time they separated until their arrests, Caleb had no access to the memory card in McMillion's cell phone and she had no access to his phone's memory card. He considered the memory card found in his phone at the time of arrest, from which the photographs were recovered, to be his memory card. That particular memory card contained data associated with Caleb's e-mail account and other personal folders and applications that he manually installed on his phone. McMillion and Caleb shared a joint cell phone account, and both paid the bill. Before they separated, McMillion knew the passcode to Caleb's phone "for the most part," but after separation,

Caleb changed his passcode often because he did not want McMillion to know it.

McMillion also testified at the suppression hearing and said that even after she and Caleb separated, she still had the opportunity to use his cell phone. She also acknowledged telling her grandmother that she did not know what was on Caleb's phone because he always had it locked and hid it from her. However, she testified that even if she did not know Caleb's passcode, she was able to bypass it and access his phone by inputting his e-mail address and changing his passcode.

In its subsequent order, the district court observed that the search warrant authorized the search of the cell phone and its memory card. The phone and memory card are specifically described in the warrant as belonging to Caleb, from whom they were seized at the time of his arrest. The memory card contained items specifically belonging to Caleb but no items belonging to McMillion. The court therefore determined that McMillion lacked standing to challenge the search of Caleb's phone and memory card, because she did not have a legitimate expectation of privacy in Caleb's phone or memory card. The motion to suppress was therefore denied.

(c) Motion to Withdraw

Before trial commenced, the State filed a motion to endorse additional witnesses, including two individuals that had been represented by McMillion's trial counsel's office. McMillion's trial counsel then filed a motion to withdraw based on a potential conflict of interest. At a hearing on the motion, he indicated that he believed he had a conflict of interest. The court received into evidence affidavits from both potential witnesses waiving attorney-client privilege and waiving any conflict of interest. McMillion and the State also stipulated that there was no relationship between the witnesses' cases and McMillion's case.

The district court found that there was no evidence McMillion's counsel would have divided loyalties which would prevent him from providing effective representation

to McMillion and that there was nothing about the witnesses which would detract from his ability to zealously represent McMillion. Therefore, the motion to withdraw was denied.

(d) Motion to Sequester Jury

After the jury had been selected but before opening statements or presentation of any evidence, McMillion moved to sequester the jury during the pendency of trial. The court denied the motion.

(e) Motion for Mistrial

During opening statements, the State highlighted McMillion's explanations and how her story changed over time. It explained that McMillion initially denied sexually assaulting S.M., but that once the photographs were found on Caleb's cell phone, she could not deny it happened, and her story changed. The prosecutor then said:

> It could no longer be it never happened. I was making it all up. It then became other stories and other reasons why this may have happened. She may take the stand and she may try and tell you those stories, those many stories that began after the evidence was found.

At the conclusion of the State's opening statement, McMillion moved for mistrial on the ground that the State improperly referenced McMillion's taking the stand, which violated her constitutional right to remain silent. The motion was denied.

(f) Motion to Remove Juror

After opening statements but prior to the presentation of evidence, the mother of a juror e-mailed a member of the county attorney's office. The mother indicated that her daughter had informed her that the daughter had been selected for a jury, and the mother asked about the daughter's employer's responsibility to pay her while she was serving on the jury. The member of the county attorney's office explained to the judge that the mother was an acquaintance of hers and that she did not respond to the e-mail.

Based on the correspondence, McMillion asked that the juror be removed from the panel and replaced with an alternate. The district court observed that the concern seemed to be that of the mother and that there was no indication in the e-mail that there was any concern expressed by the juror as to the impact of jury service on her employment. The court noted that it had admonished the jurors that they could disclose that they were on a jury but could not talk about the case, and there was no indication in the e-mail that that responsibility was breached. The court also noted that the parties discussed during voir dire this juror's employment and acquaintance with the county attorney, and no motion to strike was made. Therefore, the court denied the request to remove the juror.

### 3. Trial

Witnesses at trial testified regarding the events leading up to McMillion's arrest. Caleb testified that he had entered into a plea agreement for his charges and volunteered to testify against McMillion to prevent S.M. from being called to testify. He described an incident in June 2012 where he witnessed McMillion performing oral sex on S.M. and recorded a video of it on his cell phone. Caleb also described other pornographic videos he made with McMillion and said that she voluntarily participated in them.

S.M.'s paternal grandparents testified about S.M.'s behavior when he first came to live with them in October 2012. S.M. was exhibiting inappropriate sexual behaviors at preschool and was also violent. S.M. was afraid of McMillion and frequently expressed fear that she would come to hurt his grandparents and "get him."

Gurock testified regarding her role as S.M.'s counselor. She outlined her original diagnoses for him and explained that after he disclosed the sexual abuse to her, she changed his diagnoses to posttraumatic stress disorder, mood disorder not otherwise specified, and attention deficit hyperactivity

disorder. She also explained that it is normal for children to delay reporting sexual abuse, in part because they wait until they are comfortable with someone and trust him or her enough to say something.

In S.M.'s fifth session with Gurock, he disclosed the sexual abuse, describing the events in detail. S.M. said the sexual abuse occurred when he was between the ages of 3 and 5, when he lived with McMillion and Caleb. He said the abuse happened many times in their bedroom. S.M. reported that Caleb told him not to talk about "inappropriate things," so he was not supposed to tell anyone or he would get soap in his mouth.

McMillion testified in her own defense. She said that she and Caleb had been together since she was 18 years old and that he was physically and verbally abusive during their relationship. Much of the abuse centered on sexual activity which included other partners and participation in "fetish videos." McMillion testified that she acquiesced because Caleb threatened to find someone else if she refused and she wanted to make him happy. McMillion felt that she was controlled by Caleb and that she could not say no or stand up for herself.

McMillion admitted that the photographs on Caleb's cell phone accurately depicted what occurred, but said she did not remember doing what was depicted. She also admitted telling her father-in-law that she and Caleb had sexually assaulted S.M. and that she had done so to save her marriage, and she admitted to immediately recanting her claims. McMillion acknowledged writing letters to friends and family from jail indicating that she has no memory of the assaults and telling them that she had been drugged.

A psychiatrist who evaluated McMillion in November 2013 concluded that she was a victim of "spousal abuse, sexual" based upon Caleb's manipulating her through verbal and physical abuse to perform sexual acts she did not want to do. The psychiatrist opined McMillion had basically abdicated control to Caleb, knew that she could be physically and verbally

abused, and knew that things could get worse for her if she did not do what she was told. The psychiatrist concluded that McMillion was afraid not to do what she was told and that a large number of her actions, in his opinion, were therefore involuntary.

The jury also heard testimony from a licensed clinical psychologist who evaluated McMillion. He diagnosed her with posttraumatic stress disorder with dissociative features. He believed that she has had that diagnosis since her late teens or early 20's. In his opinion, she had significant and notable behavioral health problems throughout the entirety of her relationship with Caleb and subjugated herself to him and his coercion and manipulation.

On rebuttal, the State presented the testimony of a forensic psychiatrist who evaluated McMillion to determine whether she suffered from any type of dissociation. He explained that dissociation generally deals with being in a different personality, like a multiple personality, assuming a different identity sometimes. McMillion never mentioned any dissociative experiences to the forensic psychiatrist, and he never saw any signs of dissociation in her. Thus, he did not believe she suffered from any type of dissociation.

The State also presented rebuttal testimony from two witnesses who had been incarcerated with McMillion in April 2014. Both witnesses testified that McMillion told them she engaged in the activity for which she was charged to please Caleb, but that her defense was that she had been drugged. One of the witnesses testified McMillion said that Caleb was supposed to have thrown his cell phone in the river and that if he had, there would be no evidence and she would not be in the situation she was in.

### 4. Jury Instructions

At the jury instruction conference, McMillion tendered three proposed jury instructions. The court declined to give her instructions as proposed.

### 5. Verdict and Sentencing

The jury ultimately convicted McMillion of all five counts. At sentencing, the parties and district court discussed whether the law required that the court order consecutive sentences. The district court found that regardless of the requirements, the nature of the offenses in the present case merited consecutive sentences. McMillion was then sentenced to imprisonment as follows: on count I, 30 to 50 years; on count II, 1 to 5 years; on count III, 3 to 5 years; on count IV, 3 to 5 years; and on count V, 2 to 5 years. The district court orally stated that S.M. was not required to have any contact with McMillion while she is serving her sentence, but the written sentencing order prohibited McMillion from having contact with S.M. McMillion timely appeals to this court.

Further factual details will be set forth below, as relevant to McMillion's specific assignments of error.

## III. ASSIGNMENTS OF ERROR

McMillion alleges, consolidated and restated, that the district court erred in (1) failing to order Gurock to turn over her office notes; (2) denying her motion to suppress; (3) denying her trial counsel's motion to withdraw; (4) denying her motion to sequester the jury; (5) denying her motion for mistrial during opening statements; (6) denying her request to remove the juror; (7) allowing Howell to give an expert opinion; (8) receiving the photographs into evidence over her objection; (9) granting the State's motion in limine as to McMillion's treating physician, Dr. Ashley Falk; (10) failing to give her proposed jury instructions; (11) finding sufficient evidence to sustain the convictions; and (12) sentencing her improperly and excessively.

## IV. ANALYSIS

### 1. Gurock's Office Notes

McMillion first argues that the district court erred in failing to require Gurock to produce her office notes when she testified that she reviewed them prior to testifying and they

refreshed her recollection as to some of the disclosures S.M. made to her. We agree, but find the error was harmless and therefore does not constitute reversible error.

[1] If a witness uses a writing to refresh his or her memory for the purpose of testifying, either before or while testifying, an adverse party is entitled to have it produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce into evidence those portions which relate to the testimony of the witness. Neb. Rev. Stat. § 27-612 (Reissue 2008). Section 27-612 requires production of not only documents used to refresh recollection in the courtroom while the witness is testifying, but also those writings the witness reviewed prior to giving testimony. Thus, the district court erred in the basis upon which it denied McMillion's request for access to Gurock's notes.

[2,3] On appeal, the State argues that the notes were privileged under Neb. Rev. Stat. § 27-504 (Reissue 2008), and therefore not subject to disclosure. Section 27-504 provides a privilege for professional counselor-patient communications. However, McMillion was being prosecuted for, in part, first degree sexual assault of a child and child abuse. Under § 27-504(4)(d), no privilege exists in criminal prosecutions for injuries to children. Neb. Rev. Stat. § 28-707(2) (Reissue 2008) specifically states that the statutory privilege between patient and professional counselor is not available in a prosecution for child abuse. Therefore, these records were not privileged and the court erred in refusing to order that they be produced.

[4,5] But rejection of McMillion's request for access to Gurock's notes was harmless error inasmuch as no "'substantial miscarriage of justice'" occurred as a result of the error. See *State v. Schroder*, 232 Neb. 65, 71, 439 N.W.2d 489, 493 (1989). Accord Neb. Rev. Stat. § 29-2308 (Reissue 2008). Harmless error exists in a bench trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence

the court in a judgment adverse to a substantial right of the defendant. *State v. Schroder, supra*. The erroneous ruling in the present case occurred during a pretrial hearing, which, like a bench trial, is presided over by the court only with no jury present.

Here, the issue arose during a hearing on McMillion's motion in limine, which requested that the court prohibit the State from introducing into evidence at trial S.M.'s statements to Gurock. McMillion argues on appeal, "At a minimum, [McMillion] was placed at a disadvantage in not being able to review those notes and at worst, there has been a violation of [her] 6th Amendment right to confrontation." Brief for appellant at 21.

We disagree because the court's focus in denying the motion in limine was not on the substance of S.M.'s statements, which was the focus of Gurock's notes, but, rather, on the context in which the statements were made. In other words, the district court refused to exclude S.M.'s statements because it found they fell under the hearsay exception which allows into evidence statements made for the purpose of medical diagnosis or treatment. Thus, the content of Gurock's notes would not have materially influenced the court's ruling on the motion in limine.

[6] We also reject McMillion's argument that failure to provide the notes violated her constitutional right to confrontation. Confrontation Clause rights are trial rights that do not extend to pretrial hearings in state proceedings. *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009). And in any event, McMillion was allowed to fully cross-examine Gurock at the hearing regarding the context of the statements and her notes without limitation or interference from the court. See *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008) (Confrontation Clause guarantees opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense might wish). Accordingly, we find no reversible error.

2. Denial of Motion to Suppress

McMillion argues that the district court erred in denying her motion to suppress for three reasons. First, she claims the court erroneously concluded that she lacked standing to challenge the search of Caleb's cell phone and memory card.

[7] 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. Tyler*, 291 Neb. 920, 870 N.W.2d 119 (2015).

[8-10] A "standing" analysis in the context of search and seizure is nothing more than an inquiry into whether the disputed search and seizure has infringed an interest of the defendant in violation of the protection afforded by the Fourth Amendment. *State v. Nelson*, 282 Neb. 767, 807 N.W.2d 769 (2011). The test used to determine if a defendant has an interest protected by the Fourth Amendment is whether the defendant has a legitimate or justifiable expectation of privacy in the premises. See *id*. Ordinarily, two inquiries are required. First, an individual must have exhibited an actual (subjective) expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable. *Id*.

[11-13] With regard to the content of cell phones, an accused must first establish that he personally has a legitimate expectation of privacy in the object that was searched. *U.S. v. Turner*, 781 F.3d 374 (8th Cir. 2015). An individual may demonstrate infringement of his or her own legitimate expectation of privacy by showing that he owned the premises or that he occupied them and had dominion and control over them based on permission from the owner. *State v. Nelson, supra*. Other factors relevant to the determination of standing include historical use of the property or item, ability to regulate access, the

totality of the circumstances surrounding the search, the existence or nonexistence of a subjective anticipation of privacy, and the objective reasonableness of the expectation of privacy considering the specific facts of the case. See *U.S. v. Gomez*, 16 F.3d 254 (8th Cir. 1994).

As noted above, we review the trial court's factual findings for clear error. The factual findings made by the district court in the present case were largely undisputed. McMillion and Caleb each had their own cell phones, which they used to communicate with each other. They had been separated and living apart for approximately 5 months prior to the seizure of Caleb's phone. The phone was seized from Caleb's person at the time of his arrest. McMillion could not say with certainty that she ever used the particular memory card in Caleb's phone at any time, and the memory card contained data specific to Caleb such as his e-mail account and applications he installed on his phone.

In addition, the district court found that Caleb sought to exclude McMillion from having access to his cell phone by changing the passcode. McMillion admitted that although she was able to access Caleb's phone, she had to "break into" the phone in order to do so. The foregoing historical facts are supported by the record and are therefore not clearly erroneous. Our next question is whether, based on these facts, McMillion had standing to challenge the search of Caleb's phone and memory card.

McMillion argues that she had a legitimate expectation of privacy in the memory card because she had dominion and control over it. We disagree. Although McMillion and Caleb testified their various memory cards could have been switched when they were living together prior to their separation, McMillion was unable to say whether she had ever used this particular memory card. The card contained information specific to Caleb's cell phone, including applications he had manually installed and photographs and videos he had taken with his phone and saved to the memory card. On the other

hand, the memory card contained no information or data specific to McMillion. Moreover, the memory card was inside Caleb's phone when the phone was seized from him, and he had actively attempted to exclude McMillion from using and accessing his phone during the prior 5 months. He testified that after they separated, McMillion did not know the passcode to his phone and he did not want her to have it, so he changed it often.

In cases where the accused is not the owner of the premises but has been found to possess standing to challenge the search, the accused generally has permission from the owner to exert control over the premises at the time. See e.g., *State v. Nelson*, 282 Neb. 767, 807 N.W.2d 769 (2011) (driver of rental vehicle found to have standing to challenge search of vehicle upon proof authorized lessee gave permission to operate vehicle), and *State v. Lara*, 258 Neb. 996, 607 N.W.2d 487 (2000) (guest had standing as to certain areas of home in which he was staying). The Supreme Court has acknowledged that standing is not limited to property rights or ownership, but Nebraska precedent shows the importance of dominion and control in the standing analysis. See *State v. Nelson, supra*.

In the context of a cell phone, the Fifth Circuit in *U.S. v. Finley*, 477 F.3d 250 (5th Cir. 2007), determined that the defendant did have standing to challenge the search of his cell phone, which had been issued to him by his employer, based on his dominion and control over the phone. However, the employee had a right to exclude others from using the phone, he was permitted to use the phone for personal use, he exhibited a subjective expectation of privacy in the phone, and he took normal precautions to maintain his privacy in the phone. *Id*.

To the contrary in the present case, McMillion did not possess an ownership interest in or dominion or control over Caleb's cell phone or the memory card it contained. Not only did she not possess a right to use the phone, but she did

not have the right to exclude others from the phone either. That right belonged solely to Caleb. We therefore find that the district court did not err in concluding that McMillion lacked standing to challenge the search of Caleb's phone and memory card.

[14] Based on this conclusion, we need not address McMillion's other arguments related to the search of Caleb's cell phone and denial of her motion to suppress. See *State v. Planck*, 289 Neb. 510, 856 N.W.2d 112 (2014) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

### 3. Denial of Motion to Withdraw

McMillion contends that the district court erred in failing to order withdrawal of her trial counsel. She specifically claims the district court erred in denying her attorney's motion to withdraw because it failed to engage in the balancing test set forth in *Wheat v. United States*, 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). In *Wheat*, the analysis focused on an attorney's joint representation of coconspirators and the effect of waiver on multiple representations. The Supreme Court held that in determining whether to disqualify counsel, a court must balance two Sixth Amendment rights: (1) the defendant's right to be represented by counsel of choice and (2) his or her right to a defense conducted by an attorney who is free of conflicts of interest. *Id*.

[15,16] McMillion's reliance on *Wheat* is misplaced. Here, the State's witnesses against her were not charged in the same conspiracy as McMillion and the cases in which they were represented by McMillion's trial counsel had ended. More importantly, however, McMillion was represented by the public defender's office. The public defender's duty is to represent all indigent felony defendants. See Neb. Rev. Stat. § 23-3402 (Reissue 2012). An indigent criminal defendant's Sixth Amendment right to counsel does not include the right to counsel of the indigent defendant's own choice. *State v. Dixon*,

286 Neb. 157, 835 N.W.2d 643 (2013). Thus, no balancing test was necessary, because McMillion did not have a constitutional right to counsel of her choice.

[17,18] She did have a Sixth Amendment right to effective assistance of counsel, however, which includes representation free of conflicts of interest which adversely affect her lawyer's performance. See *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010). In Nebraska, the right to effective assistance of counsel has been interpreted to entitle the accused to the undivided loyalty of an attorney, free from any conflict of interest. *Id*. Whether a defendant's lawyer's representation violates a defendant's right to representation free from conflicts of interest is a mixed question of law and fact that an appellate court reviews independently of the lower court's decision. *Id*.

[19-21] The fact that an attorney has other clients, including one who would be a State witness and testify at trial, is not sufficient in and of itself to constitute a conflict of interest. *State v. Marchese*, 245 Neb. 975, 515 N.W.2d 670 (1994). The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard for another or where a lawyer's representation of one client is rendered less effective by reason of his or her representation of another client. *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001). The defendant who shows that a conflict of interest actually affected the adequacy of his or her representation need not demonstrate prejudice, but such conflict of interest must be shown to have resulted in conduct by counsel that was detrimental to the defense. *Id*.

[22] In the case at hand, the State's witnesses were former clients of McMillion's counsel, and thus, this is not a case of concurrent representation, but, rather, a case of successive representation. Because no direct or concurrent representation is involved, there is no actual conflict. See *State v. Ehlers*, 262 Neb. 247, 631 N.W.2d 471 (2001). Therefore, the question is whether McMillion's trial counsel's former representation

of the State's two witnesses resulted in a potentially serious conflict of interest. See *id*. In other words, Did counsel's duty to his former clients result in disregard for McMillion or result in less effective representation of McMillion? We find it did not.

[23] According to the Nebraska Rules of Professional Conduct governing former client conflicts of interest, a lawyer who formerly represented a client in a matter is prohibited from thereafter representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. Neb. Ct. R. of Prof. Cond. § 3-501.9(a).

In the present case, the parties stipulated that there was no relationship between the witnesses' cases and McMillion's case. At the time the witnesses signed their affidavits, their cases had been resolved and the time for appeal had passed. The witnesses' affidavits indicate that neither of them provided any information during the time they were represented by the public defender's office that would be useful in McMillion's case. Moreover, both witnesses signed waivers of any conflicts of interest and attorney-client privilege. As a result, we find no error in the district court's denial of McMillion's counsel's motion to withdraw.

### 4. Denial of Motion to Sequester Jury

McMillion assigns that the district court erred in denying her motion to sequester the jury. We disagree.

[24-26] Neb. Rev. Stat. § 29-2022 (Reissue 2008) requires that a jury be sequestered "[w]hen a case is finally submitted to the jury . . . ." Whether a jury is to be kept together before submission of the cause in a criminal trial is left to the discretion of the trial court. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). To warrant reversal, denial of a motion to sequester the jury before submission of the cause must be shown to have prejudiced the defendant. *Id*.

McMillion argues that she was prejudiced because the county attorney's office was posting information about her case on social media, there was extensive media publicity, and one of the jurors told her mother that she was selected for the case. At a hearing on the sequestration motion, McMillion offered into evidence six news articles relating to the case. The evidence included information the county attorney's office posted on social media in January 2014 indicating that Caleb entered no contest pleas to several of his charges. As will be discussed below, there was also an incident where the mother of a juror contacted the county attorney's office with a question after the juror informed her mother that she had been selected for a jury.

Contrary to McMillion's argument, none of this evidence indicates that the jurors were seeking out information related to the case. The fact that there was media coverage of the case does not mean the jurors were aware of it or that it impacted their impartiality as to the case. Voir dire is not contained in the record before us, but the district court observed that only one prospective juror indicated that he may have heard something about the case in the media. Further, the e-mail sent by the selected juror's mother simply stated that the juror had informed her mother that she was selected for a jury; there was no evidence that she told her mother which case she was selected for.

The district court found that although there had been media coverage, the coverage was not so pervasive as to require the court to sequester the jury prior to submission of the case. At each recess, the court admonished the jury to refrain from listening to any information about the case outside of the courtroom, talking about the case, and forming or expressing an opinion of the case until it was submitted for their deliberation. There was no evidence presented rebutting the presumption that the jurors followed the instructions they were given. See *State v. Gales, supra*. Accordingly, the district court did not abuse its discretion in refusing to sequester the jury prior to submission of the case.

5. Denial of Motion for Mistrial

McMillion asserts that the court erred in failing to grant a mistrial when, during opening statements, the State improperly referenced her right to remain silent under the Fifth Amendment. We find no merit to this argument.

[27] Whether to grant a mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion. *State v. Ramirez*, 287 Neb. 356, 842 N.W.2d 694 (2014).

[28-31] Prosecutors are charged with the duty of conducting criminal trials in such a manner that an accused may have a fair trial. *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989). A prosecutor's comment on a defendant's silence in the defendant's trial is a violation of an accused's right to remain silent under the 5th and 14th Amendments to the U.S. Constitution and under article I, § 12, of the Nebraska Constitution. *State v. Pierce, supra*. The prohibition against a prosecutor's comment on a defendant's right to remain silent applies throughout a trial, including the opening statement and closing argument during the defendant's trial. *Id*. In an opening statement for a jury trial, a prosecutor's comment concerning the necessity of the defendant's testimony or an expression concerning the plausibility or credibility of anticipated testimony from a defendant violates an accused's right to remain silent at trial. *Id*.

The defendant in *Pierce* was charged with criminal mischief. During opening statements at trial, the prosecutor told the jury that the defendant "'will testify but we do not know which version of the facts to which he will testify.'" *Id*. at 969, 439 N.W.2d at 439. The defendant moved for mistrial, arguing the remark violated his constitutional right to remain silent. His motion was denied.

On appeal, the Supreme Court observed that the prosecutor's remark immediately made the defendant's credibility an issue in the case before introduction of any evidence. As a result, either the defendant could remain silent and thereby

give credence to, or even substantiate, the innuendo that he had previously given inconsistent versions of the incident on which the criminal charge was based, or he could take the witness stand and recount a version without any inconsistency, thereby responding to the prosecutor's intimation of inconsistency but subjecting himself to cross-examination.

The Supreme Court observed that the insinuation of multiple versions could lead a jury to believe that the defendant, before trial, had admitted his criminality in the charged offense, rendering all in-court evidence irrelevant because the defendant had already admitted his guilt. Therefore, the court held that the prosecutor's statement compelled the defendant to testify and was therefore a violation of his constitutional right to remain silent. *State v. Pierce, supra*.

The dangers from *Pierce* are not present in the instant case. The State referenced that McMillion *may* take the stand and *may* tell "her . . . stories," whereas the prosecution in *Pierce* affirmatively asserted that the defendant would testify. Furthermore, the only evidence of liability adduced by the State in *Pierce* was from the driver of a damaged vehicle. Therefore, the Supreme Court questioned how the prosecution could know that the defendant gave more than one version of the incident and concluded that the insinuation of multiple versions could lead a jury to believe that he had admitted his culpability before trial.

In the present action, however, the fact that McMillion expressed more than one version of facts was known and proved at trial by evidence from multiple witnesses. It was undisputed that McMillion admitted to "put[ting her] mouth on" S.M., immediately recanted, and continued to deny assaulting S.M. until the photographs were found. Unlike many sexual assault cases, the question was not whether McMillion had sexually assaulted S.M., but, rather, whether her defense was plausible. So the fact that McMillion initially denied assaulting S.M. had less of an impact than it would in a case such as *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989), where

the State was attempting to prove that the defendant committed acts which he denied.

Furthermore, in *Pierce*, the court found the prosecutor's statement was prejudicial because the defendant felt compelled to testify in order to deny the State's insinuation that he had previously admitted to committing the crime, and his credibility was placed at issue by the State's remark. Here, McMillion's credibility was already an issue; the State's theory was that her later claims that she committed the acts because Caleb coerced her into doing them were unbelievable because she changed her story so many times. This theory was supported by admissible evidence regardless of the State's comments during opening statements. See, also, *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006) (finding no error in opening statement that highlighted defendant's contradictory statements and concluding that if defendant felt compelled to take stand, it was result of evidence adduced and not opening statement setting forth anticipated evidence).

[32-35] Moreover, before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). A party is allowed considerable latitude in making an opening statement. See *State v. Ruegge*, 21 Neb. App. 249, 837 N.W.2d 593 (2013). The impact of any comment made at trial depends on the atmosphere at trial. *State v. Ramold*, 2 Neb. App. 545, 511 N.W.2d 789 (1994). The trial judge is in a better position to measure the impact a comment has on a jury, and his or her decision will not be overturned unless clearly erroneous. *Id.*

[36] Here, the disputed comment was a single remark made during opening statements of a 6-day trial. In denying the motion for mistrial, the district court properly recognized that it is permissible for the State to discuss what the evidence may show. See *U.S. v. Kalagian*, 957 F.2d 527 (8th Cir. 1992) (prosecutor's opening statement should objectively outline evidence reasonably expected to be introduced during trial). As

stated above, the evidence presented at trial established that McMillion had changed her story over the course of time, and whether she had, in fact, engaged in sexual acts with S.M. was affirmatively proved by way of the photographs. We therefore find the court's conclusion that the prosecutor's comment did not have a prejudicial impact on the jury was not clearly erroneous. Accordingly, the court did not abuse its discretion in denying the motion for mistrial.

[37] We note that McMillion also points out that the State commented on the Project Harmony interview during its opening statement, and she moved for mistrial on that basis as well. However, she does not argue this error on appeal and concludes her argument regarding prosecutorial misconduct with the statement that because the State violated her Fifth Amendment rights, the case should be remanded. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Harris*, 284 Neb. 214, 817 N.W.2d 258 (2012).

### 6. Failure to Remove Juror

[38] McMillion challenges the district court's refusal to remove a juror after the juror's mother contacted the county attorney's office. Her entire argument is contained in one sentence: She was prejudiced by the court's failure to remove the juror. The retention or rejection of a juror is a matter of discretion for the trial court. *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010). This rule applies both to the issue of whether a venireperson should be removed for cause and to the situation involving the retention of a juror after the commencement of trial. *Id*.

[39,40] In a criminal case, jury misconduct must be demonstrated by clear and convincing evidence. *Id*. Where the jury misconduct in a criminal case involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct. *Id*.

In the instant case, the evidence establishes only that the juror informed her mother that she had been selected for a jury, which is permissible. There was no evidence that the juror asked her mother to contact the county attorney's office or informed her mother for which case she was selected. There was nothing to suggest any improper behavior on the part of the juror. As such, McMillion has failed to establish that she was prejudiced by the contact, and thus, the court did not abuse its discretion in denying her request to remove the juror.

### 7. Allowing Improper Expert Opinion

McMillion claims the district court erred in allowing Howell, a detective, to give an improper expert opinion. During his testimony at trial, Howell explained that he conducted a forensic examination of Caleb's cell phone and memory card and discovered the two photographs of McMillion and S.M. Howell was asked several questions about his opinion as to the creation dates of the photographs, whether creation dates can be modified, and whether he can tell if the creation dates of the photographs are accurate. McMillion interposed several objections on the grounds of foundation and speculation, but her objections were overruled. Howell ultimately opined as to the file creation dates, but said he could not give a date as to when the photographs were actually taken.

On appeal, McMillion claims that Howell's opinions of the file creation dates were inadmissible because he is not an expert in date forgery analysis and his opinion is not appropriate lay witness testimony under Neb. Rev. Stat. § 27-701 (Reissue 2008). She claims that Howell did not have the qualifications to testify about date forgery analysis, and the court did not investigate whether he had such qualifications.

[41,42] We first observe that none of the opinions that McMillion claims were erroneously admitted were objected to at trial on the grounds she now asserts. On appeal, the defendant may not assert a different ground for his or her objection to the admission of evidence than was offered to the trier of

fact. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002). The Supreme Court has specifically determined that an objection on the basis of insufficient foundation is a general objection and fails to preserve a challenge on appeal to admissibility of expert testimony. See *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005).

Here, because McMillion objected to Howell's opinions at trial only on the grounds of foundation and speculation, appellate review of her argument that Howell was permitted to give an improper expert opinion has been waived.

### 8. Receiving Exhibits into Evidence

The photographs found on Caleb's cell phone of McMillion and S.M. were offered into evidence at trial as exhibits 31 and 32. Caleb was the first witness to testify for the State at trial, and he explained that in June 2012, he witnessed McMillion perform oral sex on S.M. He recorded a video of it on his cell phone. He deleted the video, but photographs from it were later recovered by police. He confirmed the photographs contained in exhibits 31 and 32 were from the video he recorded and identified the people in the photographs as McMillion and S.M. He agreed that the photographs fairly and accurately depict what he observed in June 2012. McMillion objected on foundational grounds, but her objection was overruled. The photographs were then received into evidence.

On appeal, McMillion argues that the court erred in receiving the photographs into evidence. She claims the photographs lack sufficient foundation because the date they were taken was disputed when Caleb said they were taken in June 2012, but the forensic examination showed they were created in December 2011. We disagree.

[43,44] Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined on a case-by-case basis. *State v. Anglemyer*, 269 Neb. 237, 691 N.W.2d 153 (2005). A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion. *Id.*

[45,46] Neb. Rev. Stat. § 27-901 (Reissue 2008) provides in relevant part:

> (1) The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (2) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> (a) Testimony that a matter is what it is claimed to be;
>
> . . . .
>
> (d) Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances;
>
> . . . .
>
> (i) Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result[.]

Photographic evidence is admissible when it is shown that it is a correct reproduction of what it purports to show, and such showing may be made by any evidence that bears on whether the photographic evidence correctly depicts what it purports to represent. *State v. Anglemyer, supra*. Under the illustrative model of authenticating photographic evidence, a photograph, motion picture, videotape, or other recording is viewed merely as a graphic portrayal of oral testimony and is admissible only when a witness testifies that it is a correct and accurate representation of facts that the witness personally observed. *Id*.

In the instant case, the State presented sufficient foundation to support the finding that the photographs depicted what they were purported to depict. Caleb's testimony, summarized above, connects what is depicted in exhibits 31 and 32 with what he personally observed and recorded on his cell phone. The photographs were stored in a folder on the memory card in Caleb's phone until they were recovered by police after his

arrest. McMillion claims the photographs lacked sufficient foundation because their creation dates were disputed. The dispute was not raised, however, until later in trial, when Howell testified. The photographs were received into evidence while Caleb, the State's first witness, was testifying. Consequently, we find no abuse of discretion in the district court's decision to receive the photographs into evidence. Any disparity in the testimony as to when the photographs were taken is a matter of weight and credibility, not a matter of admissibility. See *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003).

### 9. Granting Motion in Limine as to Falk

During trial, the State made an oral motion in limine as to the testimony of defense witness Falk due to a discovery violation. Falk was McMillion's treating physician from 2011 until the time of McMillion's arrest. The defense notified the State on September 5, 2014, of its intention to call Falk as a witness, 4 days before trial began. On September 12, the defense provided the State with approximately 1,000 pages of Falk's medical records. Defense counsel said he turned the records over the day after he received them, but he admitted that he had not requested the records earlier because it was "not high on the priority list of things that needed to get done" on the case.

The district court noted that the case had been pending for 19 months and that there had been a reciprocal discovery order in place for a significant period of time. Finding there was no good reason for the defense to provide the records "at this late date," the court granted the motion in limine and refused to allow Falk to testify. McMillion then made an offer of proof as to the substance of Falk's testimony.

On appeal, McMillion claims the district court erred in refusing to allow Falk to testify. We find no merit to this argument.

[47] Discovery in a criminal case is generally controlled by either a statute or court rule. Therefore, unless granted

as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion. *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014).

[48,49] Whether rooted directly in the Due Process Clause of the 14th Amendment or in the Compulsory Process or Confrontation Clauses of the 6th Amendment, the federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. *State v. Henderson, supra*. However, with respect to admission of evidence, a defendant does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. *State v. Henderson, supra*. See, also, *Taylor v. Illinois*, 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988).

[50-52] The defendant's right to compulsory process is itself designed to vindicate the principle that the ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. *Id.* Rules that provide for pretrial discovery of an opponent's witnesses serve the same high purpose. *Id*. Discovery, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony. *Id*. The State's interest in protecting itself against an 11th-hour defense is merely one component of the broader public interest in a full and truthful disclosure of critical facts. *Id*.

In *Taylor*, the defendant failed to identify a defense witness in response to a pretrial discovery request, instead waiting, until after trial began, to disclose the witness' identity. As a sanction, the trial judge refused to allow the undisclosed witness to testify. On appeal to the U.S. Supreme Court, the defendant argued that that refusal violated his constitutional right to obtain the testimony of favorable witnesses. The Supreme Court rejected the defendant's argument that a

preclusion sanction is never appropriate no matter how serious the defendant's discovery violation may be and upheld the sanction.

Likewise, in the present case, McMillion failed to abide by the pretrial discovery order, which required disclosure of the names and addresses of McMillion's anticipated witnesses by August 27, 2014, and instead, she did not identify Falk until September 5. Moreover, she produced approximately 1,000 pages of medical records for the State's review 3 days after trial began. McMillion's counsel admitted that although he had known that Falk was McMillion's treating physician for some time, he had not requested medical records sooner because it was not a high priority. Thus, sanctioning McMillion in some manner, including disallowing Falk's testimony, was appropriate.

The Nebraska Supreme Court has said that the discovery process is not a game of "'hide the ball'" and that discovery orders must be completed in a timely manner. See *State v. Kula*, 252 Neb. 471, 487, 562 N.W.2d 717, 727 (1997). In *Kula*, the State did not produce material reports until the first day of trial, and thus, the defendant was unable to outline certain witnesses' testimony in his opening statements. The Supreme Court recognized that defense counsel should not have been forced into investigating the content of the reports by night while defending against a murder charge by day. As a result, "[defense] counsel was put in the position of trying [the] case on the run." *Id*. Had Falk been permitted to testify, the State would have been in the same position in the instant case, where it would have been forced to review voluminous medical records at night while prosecuting a case involving multiple felonies by day.

[53] We note that McMillion asserts that there was no discovery violation because she produced the medical records upon receipt. The pretrial discovery order, however, required that McMillion disclose the names and addresses of her witnesses by August 27, 2014, and Falk's name was not disclosed

to the State until September 5, 4 days prior to trial. As such, McMillion failed to comply with the court's discovery order. She also argues the court's sanction exceeded the scope of the State's request, which asked only that Falk be limited in the substance of her testimony. Trial courts have broad discretion with respect to sanctions involving discovery procedures, however. See *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010). We therefore find that the district court did not abuse its discretion in refusing to allow Falk to testify.

### 10. Failure to Give Proposed Jury Instructions

McMillion offered three proposed jury instructions. Proposed instruction No. 1 stated, "'Knowingly' means to be aware of what you [are] doing at the time an act is being committed." Proposed instruction No. 2 stated, "'Knowingly' is a synonym of 'Willfully' and is distinguished from accidentally or involuntarily." Proposed instruction No. 3 stated, "'Willfully' means intentionally and purposely."

In relevant part, instruction No. 6 given to the jury provided: "'Intentionally' means willfully or purposely and not accidentally or involuntarily. 'Knowingly' means willfully as distinguished from accidentally or involuntarily. 'Willfully' means intentionally and purposely."

When discussing McMillion's proposed instructions during the instruction conference, the district court observed that proposed instruction No. 3 was adopted into the given instruction No. 6, and McMillion agreed. The court also observed that proposed instruction No. 2 was "pretty similar" to the given instruction No. 6. The court declined to give proposed instruction No. 1 in any form.

On appeal, McMillion argues that the district court erred in refusing to give her proffered instructions. She acknowledges that the proposed jury instruction No. 3 was contained in the

given jury instruction No. 6 but argues that it should have been given separately. She also asserts that her other two proposed instructions more clearly and correctly stated the definitions of "knowingly" than did the given jury instruction No. 6. She claims that she was prejudiced by the jury's not having been instructed correctly.

[54] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision. *State v. Ruegge*, 21 Neb. App. 249, 837 N.W.2d 593 (2013).

[55,56] 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. *Id*. In reviewing a claim of prejudice from jury instructions given or refused, an appellate court must read the instructions 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 evidence, there is no prejudicial error. *Wilkins v. Bergstrom*, 17 Neb. App. 615, 767 N.W.2d 136 (2009).

[57] McMillion does not argue that the given instructions were an incorrect statement of law or were misleading; she argues only that the court's instructions did not adequately cover the definition of "knowingly." The same argument was tendered in *Wilkins v. Bergstrom, supra*, and this court rejected it. We reiterated that a trial court is not required to give a proffered instruction which unduly emphasizes a part of the evidence in the case. See, *First Mid America, Inc. v. Palmer*, 197 Neb. 224, 248 N.W.2d 30 (1976); *Wilkins v. Bergstrom, supra*.

Likewise here, assuming that the tendered instructions were correct statements of the law and warranted by the evidence, McMillion has not demonstrated that she was prejudiced by failure to give the instructions. The jury was given several

definitions of "knowingly," and adding the proposed instruction No. 1 would have been superfluous and would have unduly emphasized the element of "knowingly," which we note is not a required element for all of the offenses with which McMillion was charged. In short, the instructions given, taken as a whole, correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings.

[58] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006). McMillion has failed to demonstrate prejudice resulting from the refusal of her tendered instructions. Therefore, this assignment of error is meritless.

### 11. Sufficiency of Evidence

McMillion asserts that the evidence presented at trial was insufficient to sustain her convictions. We disagree.

[59,60] In reviewing a criminal conviction for 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. Escamilla*, 291 Neb. 181, 864 N.W.2d 376 (2015). 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*.

[61] McMillion was convicted of five counts: first degree sexual assault of a child under age 12, incest, two counts of visual depiction of sexually explicit conduct, and child abuse. As charged, a person commits first degree sexual assault of a child when he or she subjects another person under 12 years of age to sexual penetration and the actor is at least 19 years

of age or older. Neb. Rev. Stat. § 28-319.01(1)(a) (Cum. Supp. 2014). Sexual penetration includes fellatio. Neb. Rev. Stat. § 8-318(6) (Cum. Supp. 2014).

The photographs received into evidence depict McMillion performing fellatio on S.M., and McMillion admitted to having done so. S.M. was 7 years old at the time of trial, and thus, he was under 12 years of age when the photographs were taken. McMillion was born in 1981 and was therefore over age 19 at the time the photographs were taken. Accordingly, the evidence is sufficient to support the conviction for first degree sexual assault of a child under 12.

[62] This evidence also establishes the elements of incest. Any person who knowingly engages in sexual penetration with his or her child commits incest. See Neb. Rev. Stat. §§ 28-702 and 28-703 (Reissue 2008). McMillion and Caleb both identified the child in the photographs as S.M., their son. In light of the photographs, McMillion's argument hinged on whether she committed the charged acts "'knowingly.'" Brief for appellant at 41. She claimed at trial that she did not remember performing the acts depicted in the photographs and that she was controlled by Caleb. She also presented expert testimony as to her mental conditions, the fact that she may have been dissociating during the acts, leaving her with no memory of them, and the fact that she had been manipulated by Caleb. However, there was evidence to the contrary, both lay and expert, which the jury found credible. Ultimately, there was evidence presented that McMillion knowingly engaged in sexual penetration with her son, which is sufficient to sustain the conviction of incest.

McMillion was also convicted of two counts of visual depiction of sexually explicit conduct, in violation of Neb. Rev. Stat. § 28-1463.03 (Cum. Supp. 2014). She was charged under two separate subsections of § 28-1463.03, which provide in relevant part:

> (1) It shall be unlawful for a person to knowingly make, publish, direct, create, provide, or in any manner

> generate any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.
>
> . . . .
>
> (4) It shall be unlawful for a parent, . . . knowing the content thereof, to consent to such child engaging in any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.

The applicable definition of "[s]exually explicit conduct" includes oral-genital intercourse. See Neb. Rev. Stat. § 28-1463.02(5)(a) (Cum. Supp. 2014). Visual depiction of sexually explicit conduct includes photographs and videos. See § 28-1463.02(6). As such, the State in the present case was required, for one count, to prove that McMillion knowingly generated photographs or videos depicting oral-genital intercourse with a child as one of the participants. For the second count, the State needed to establish that McMillion consented to the participation of her child in photographs or videos depicting oral-genital intercourse with the child as one of the participants.

Caleb's testimony establishes all of the required elements. He testified that in June 2012, he walked into his bedroom and witnessed McMillion performing oral sex on S.M. He testified that he asked McMillion if he could "take a video of what she was doing," and she agreed. Caleb identified the two photographs received into evidence as photographic stills from the video he recorded.

By agreeing to allow Caleb to create videos of the sexual activity between herself and S.M., McMillion knowingly generated visual depiction of sexually explicit conduct with a child as a participant, and she consented to her minor child's participation in a video depicting sexually explicit conduct. Consequently, all of the required elements of both offenses were established by sufficient evidence.

McMillion's final conviction was for child abuse. In relevant part, a person commits child abuse if he or she knowingly or intentionally causes or permits a minor child to be placed in

a situation that endangers his or her life or physical or mental health. § 28-707.

Viewed in a light most favorable to the State, there is sufficient evidence to sustain McMillion's conviction for child abuse. S.M. was diagnosed with adjustment disorder, anxiety disorder, posttraumatic stress disorder, and mood disorder as a result of McMillion's actions. As such, it was rational for the trier of fact to have concluded that McMillion knowingly and intentionally permitted S.M. to be placed in a situation that endangered his physical or mental health.

On appeal, McMillion generally challenges the credibility of the witnesses, which it is well established that we will not reweigh or pass on. Viewed in the light most favorable to the State, the evidence satisfies all of the statutory elements necessary to sustain the convictions.

### 12. Sentencing

McMillion raises several issues related to sentencing.

#### (a) Additional Condition Imposed

McMillion first observes that the district court's oral pronouncement of her sentence indicated that S.M. should not "be required" to have any contact with her during her sentences, but the written sentencing order prohibited contact between McMillion and S.M. She urges us to strike the provision contained in the written sentencing order. McMillion further argues that imposing a condition restricting contact with S.M. was impermissible under the sentencing statute contained in Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014).

The State claims that any issue relating to McMillion's ability to have contact with S.M. is moot because McMillion's parental rights to S.M. are no longer intact and he has been adopted. The State asks that we take judicial notice of the case from the separate juvenile court of Sarpy County involving McMillion and S.M.

[63,64] The Nebraska Supreme Court has recognized that, as a subject for judicial notice, existence of court records

and certain judicial action reflected in a court's record are, in accordance with Neb. Rev. Stat. § 27-201(2)(b) (Reissue 2008), facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990). Thus, a court may judicially notice existence of its records and the records of another court, but judicial notice of facts reflected in a court's records is subject to the doctrine of collateral estoppel or of res judicata. *Id.*

[65,66] Further, under § 27-201(6), judicial notice may be taken at any stage of the proceeding. Proceeding under this section has been found to include judicial activity which occurs after commencement of an action and includes judicial action in an appeal. See *Gottsch v. Bank of Stapleton, supra*. Section 27-201(4) provides that a judge or court shall take judicial notice if requested by a party and supplied with the necessary information.

The State, in the instant case, asked that we take judicial notice of the related juvenile case and provided the case number. We judicially notice that in that case, McMillion relinquished her parental rights to S.M. and he has been adopted. The juvenile court terminated its jurisdiction over S.M. on March 17, 2015, and the time for appeal has passed.

[67,68] A natural parent who relinquishes his or her rights to a child by a valid written instrument gives up all rights to the child at the time of the relinquishment. *Monty S. & Theresa S. v. Jason W. & Rebecca W.*, 290 Neb. 1048, 863 N.W.2d 484 (2015). After a decree of adoption has been entered, the natural parents of an adopted child shall be relieved of all parental duties and responsibilities for the child and shall have no rights over the child. Neb. Rev. Stat. § 43-111 (Reissue 2008).

[69] Because McMillion relinquished her parental rights to S.M. and his adoption has been finalized, McMillion's rights to S.M. have been extinguished. She therefore has no legal right to have contact with him. Consequently, the issues before us as to the contact condition pronounced by the district court

and that included in the sentencing order are moot. See *In re Interest of Nathaniel M.*, 289 Neb. 430, 855 N.W.2d 580 (2014) (issue is moot when it seeks to determine question which does not rest upon existing facts or rights, in which issues presented are no longer alive).

### (b) Consecutive and Excessive Sentences

McMillion asserts that her case should be remanded for resentencing due to the district court's uncertainty as to whether consecutive sentences were required. She also claims that regardless of the requirements, the court erred in imposing consecutive as opposed to concurrent sentences, and that her sentences are therefore excessive. We find no abuse of discretion in the sentences imposed.

First degree sexual assault of a child under 12 is a Class IB felony with a mandatory minimum sentence of 15 years in prison for the first offense. § 28-319.01(2). Generally, Class IB felonies carry a sentencing range of 20 years' to life imprisonment. § 28-105. McMillion was sentenced to 30 to 50 years' imprisonment.

Incest, under the statute applicable at the time, was a Class III felony. § 28-703(2). Class III felonies were punishable by 1 to 20 years' imprisonment at the time McMillion was sentenced. § 28-105(1). McMillion's sentence for this offense was 1 to 5 years' imprisonment.

Visual depiction of sexually explicit conduct committed by a person who is 19 years of age or older is a Class ID felony, which is punishable by a mandatory minimum sentence of 3 years' imprisonment and a maximum of 50 years' imprisonment. Neb. Rev. Stat. § 28-1463.04 (Cum. Supp. 2014) and § 28-105(1). McMillion received sentences of 3 to 5 years' imprisonment for each of these offenses.

Child abuse, as charged in the information, is a Class IIIA felony if it is committed knowingly and intentionally and does not result in serious bodily injury or death. § 28-707.

Class IIIA felonies are punishable by a maximum of 5 years' imprisonment. § 28-105(1). The court sentenced McMillion to 2 to 5 years' imprisonment for this crime.

McMillion's sentences all fall within the statutory limits. Her convictions for sexual assault and both counts of visual depiction of sexually explicit conduct carry mandatory minimum sentences, but none of the applicable statutes requires consecutive sentences. There was discussion between the parties and court at sentencing as to not only whether those offenses carried mandatory minimum sentences but whether those sentences were also required to be served consecutively.

[70-72] Generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively. *State v. Lantz*, 290 Neb. 757, 861 N.W.2d 728 (2015). The Supreme Court recently clarified that not all convictions carrying a mandatory minimum sentence must be served consecutively to all other sentences. See, *id.*; *State v. Berney*, 288 Neb. 377, 847 N.W.2d 732 (2014). Rather, a court is required to order consecutive sentences only for those specific crimes that require a mandatory minimum sentence to be served consecutively to other sentences imposed. *State v. Lantz, supra*. If the conviction requires only a mandatory minimum sentence but the statute does not mandate that the minimum sentence run consecutively to other sentences, the decision as to whether to run the sentences consecutively or concurrently is left to the sentencing court. See *id*.

Although the district court expressed uncertainty as to whether consecutive sentences were required, we find nothing in the record indicating that it acted under the mistaken impression that it was, in fact, required to order consecutive sentences. The court found that regardless of "whether those mandatory minimums mandate consecutive sentences," the nature of the offenses merits consecutive sentences. This finding was within the district court's discretion. And we find that this conclusion was not an abuse of that discretion.

Nevertheless, McMillion challenges her sentences, arguing that her sentences should have been ordered to be served concurrently. We disagree.

[73,74] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015). It is within the discretion of the trial court to direct that sentences imposed for separate crimes be served consecutively. *State v. Elliott*, 21 Neb. App. 962, 845 N.W.2d 612 (2014). The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction or the same chain of events, is whether the offense charged in one count involves any different elements than an offense charged in another count and whether some additional evidence is required to prove one of the other offenses. *Id*.

Here, it is clear that each of the offenses of which McMillion was convicted is a separate offense containing different elements. We have discussed the required elements of each offense above and summarized the evidence presented to sustain the convictions. In short, because additional evidence is necessary to prove the elements of each of the offenses, it was within the district court's discretion to impose consecutive rather than concurrent sentences for the separate crimes. We therefore find no abuse of discretion in the sentences imposed.

## V. CONCLUSION

For the foregoing reasons, we find no merit to any of the issues raised on appeal. Therefore, we affirm the convictions and sentences.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Debra Yost, appellant and cross-appellee, v. Davita, Inc., appellee and cross-appellant.

877 N.W.2d 271

Filed March 1, 2016. Nos. A-15-197, A-15-234, A-15-235.

## Supplemental opinion

Appeal from the Workers' Compensation Court: Daniel R. Fridrich, Judge. Former opinion modified. Motion for rehearing overruled.

Eric B. Brown, of Atwood, Holsten, Brown, Deaver & Spier Law Firm, P.C., L.L.O., for appellant.

Caroline M. Westerhold and Stephen J. Schultz, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

Pirtle, Riedmann, and Bishop, Judges.

Per Curiam.

This matter is before the court on the motion for rehearing filed by Davita, Inc., regarding our opinion reported in *Yost v. Davita, Inc.*, 23 Neb. App. 482, 873 N.W.2d 435 (2015). We overrule the motion, but for purposes of clarification, we modify the opinion as follows:

In the section of the opinion designated "*Increase in Incapacity*," we withdraw the eighth paragraph, *id.* at 495, 873 N.W.2d at 446, and substitute the following:

> We also note that the compensation court made a factual finding that the L2-3 level was not a pain generator

based on an opinion by Dr. Cornett. Although Davita argues there was evidence to the contrary, we cannot say the compensation court was clearly wrong in determining that all of the pain Yost experiences in her back is, in fact, related to the work accident. And it is her back pain and limitations from her work-related back injury that have exacerbated her depression symptoms to the point that she is unable to work.

The remainder of the opinion shall remain unmodified.

Former opinion modified.
Motion for rehearing overruled.

**Nebraska Court of Appeals**
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# In re Estate of Bruce F. Evertson, deceased. Travelers Indemnity Company, appellant, v. Julie A. Wamsley, Personal Representative of the Estate of Bruce F. Evertson, deceased, appellee.

876 N.W.2d 678

Filed March 8, 2016. No. A-15-104.

1. **Workers' Compensation: Judgments: Appeal and Error.** Distribution of the proceeds of a judgment or settlement under Neb. Rev. Stat. § 48-118.04 (Reissue 2010) is left to the trial court's discretion and is reviewed by an appellate court for 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. **Statutes.** To the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute.
4. **Courts: Appeal and Error.** The authority to dismiss an appeal conferred by Neb. Rev. Stat. § 30-1601(3) (Cum. Supp. 2014) is permissive or discretionary in nature.

Appeal from the County Court for Morrill County: Paul G. Wess, Judge. Affirmed.

Gregory W. Plank, of Ray Lego & Associates, for appellant.

R. Kevin O'Donnell, of Law Office of R. Kevin O'Donnell, P.C., L.L.O., for appellee.

Moore, Chief Judge, and Irwin and Inbody, Judges.

Inbody, Judge.

## INTRODUCTION

Travelers Indemnity Company (Travelers) appeals the order of the Morrill County Court finding that Travelers was to receive no proceeds in a fair and equitable distribution of third-party settlement proceeds.

## STATEMENT OF FACTS

On February 4, 2014, Bruce F. Evertson, chief executive officer of Evertson Well Service, Inc., was killed after being involved in a motor vehicle accident with a tractor-trailer unit driven by Dennis Dobrinski. Evertson was killed while acting in the course and scope of his employment. Travelers provided insurance for Evertson Well Service pursuant to the Nebraska Workers' Compensation Act. Travelers is paying benefits to Darla Evertson (Darla), Evertson's surviving spouse, of $728 per week, which benefits will be paid until she dies or remarries. If Darla remarries, Travelers will pay her a 2-year lump sum settlement. According to the life expectancy table found in the "Nebraska Workers[']  Compensation Rules of Procedure Addendum 2," Darla has a life expectancy of 27.6 years.

The Estate of Bruce F. Evertson (Estate) resolved the wrongful death claims with Dobrinski's insurance carrier, Employers Mutual Casualty (EMC). Travelers consented to the settlement. EMC paid $500,000 from the policy to the Estate, of which $125,000 was allocated to Evertson's adult son, $125,000 was allocated to Evertson's adult daughter, and $250,000 was allocated to Darla.

On August 4, 2014, Travelers filed a statement of claim asserting a workers' compensation lien and future credits. A hearing was held on November 17 to determine a fair and equitable division of the $250,000 of settlement proceeds between Travelers and Darla and the amount, if any, of Travelers' future credit. See Neb. Rev. Stat § 48-118.04 (Reissue 2010).

At the hearing, Travelers claimed a subrogation interest in the entire $250,000 allocated to Darla pursuant to Neb.

Rev. Stat. § 48-118 (Reissue 2010) of the Nebraska Workers' Compensation Act. Six exhibits were received into evidence at the hearing: exhibit 1, the settlement agreement reached, inter alia, between EMC, Dobrinski, Darla, Evertson's son, and Evertson's daughter; exhibit 2, Darla's affidavit with Evertson's obituary attached; exhibit 3, an affidavit by the chief financial officer of Evertson Operating Company, Inc., the insured administrative company, setting forth premiums paid by Evertson Operating Company for workers' compensation insurance between May 1, 2009, and May 1, 2015; exhibit 4, an affidavit setting forth that the attorney fees, expenses, and court costs billed by Darla's attorneys in this case were $42,583.31; exhibit 5, a negotiation letter; and exhibit 6, the affidavit of the workers' compensation adjuster with attachments. The evidence showed that EMC had paid $26,208 in indemnity payments to Darla and $10,000 in funeral expenses. In addition to the EMC settlement, the parties stipulated that the agreement referenced an underinsured motorist (UIM) policy for Evertson Well Service with a policy limit of $1 million. Travelers requested that a second supplemental transcript be filed with this court which showed that on March 18, 2015, the county court entered orders approving the settlement of the UIM claim and approving the distribution of $500,000 of UIM settlement proceeds. However, these were obviously not considered by the county court at the hearing on November 17, 2014, and we likewise do not consider them on appeal. An appellate court reviews a case upon the evidence actually received and considered in the trial court. See *In re Estate of Baer*, 273 Neb. 969, 735 N.W.2d 394 (2007) (reason for rule presuming that, in absence of record of evidence considered by trial court, trial court's order was supported by evidence and was correct is to ensure that appellate court reviews case upon evidence actually received and considered in trial court). See, also, *Lincoln Lumber Co. v. Fowler*, 248 Neb. 221, 533 N.W.2d 898 (1995) (before appellate court can consider issue of fact, evidence

must have been offered at trial and embodied in bill of exceptions filed with appellate court). Accord *Kellner v. Kellner*, 8 Neb. App. 316, 593 N.W.2d 1 (1999).

On December 29, 2014, the county court filed an order finding that a "fair and equitable" distribution of the settlement proceeds was for Darla to receive $207,416.69; for the Estate attorneys to receive $42,583.31 for their fees; and for Travelers to receive nothing. The county court set forth in its order that it considered factors contained in Evertson's obituary, including his 25-year marriage to Darla; their enjoyment of travel, family time, and fishing trips to Canada and Alaska; and their purchase of a "'dream home'" in California in 2013. The court also considered factors such as there was no evidence that Travelers helped finance the settlement between EMC and the Estate; there was evidence Travelers had charged and received the necessary premiums to provide workers' compensation coverage for Evertson Operating Company; and under all the circumstances, Travelers' financial risk was minimal and insurance companies are in the business of assuming risk.

On January 23, 2015, Travelers timely appealed that decision to this court. On February 2, the county court held that no supersedeas bond was required by Travelers in pursuing its appeal. Despite the court's ruling that no supersedeas bond was required, the following day Travelers paid a $75 cost bond.

## ASSIGNMENTS OF ERROR

Travelers' assignments of error, consolidated and restated, are that the county court erred (1) in failing to consider the potential settlement proceeds from the UIM policy in determining its award and (2) in denying Travelers any portion of the third-party settlement for amounts paid or future credits.

## STANDARD OF REVIEW

[1,2] Distribution of the proceeds of a judgment or settlement under § 48-118.04 is left to the trial court's discretion

and is reviewed by an appellate court for an abuse of that discretion. *Sterner v. American Fam. Ins. Co.*, 19 Neb. App. 339, 805 N.W.2d 696 (2011). See *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (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. *Sterner, supra*. See *Burns, supra*.

## ANALYSIS

*Jurisdiction.*

Before addressing the merits of the assignments of error raised by Travelers, we address the Estate's claim that this court lacks jurisdiction over this appeal. The Estate argues that Travelers failed to timely file a cost bond, which the Estate contends was required by Neb. Rev. Stat. § 25-1914 (Reissue 2008). The Estate raised this same claim in a motion for summary dismissal which was denied.

[3] Contrary to the Estate's argument that a cost bond under § 25-1914 is applicable in the instant case, the probate code provides its own requirement for a supersedeas bond under Neb. Rev. Stat. § 30-1601(3) (Cum. Supp. 2014) in probate and trust appeals which supplants in such appeals the provisions of Neb. Rev. Stat. § 25-1916 (Reissue 2008) (general statute regarding supersedeas bonds). See *In re Interest of Kayla F. et al.*, 13 Neb. App. 679, 698 N.W.2d 468 (2005). Section 30-1601 applies to appeals "[i]n all matters arising under the Nebraska Probate Code . . . ." To the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute. *Jeffrey B. v. Amy L.*, 283 Neb. 940, 814 N.W.2d 737 (2012).

[4] A supersedeas bond is mandatory in a probate appeal unless the appellant is a party specifically exempted from the requirement pursuant to § 30-1601(3). Section 30-1601(3) provides:

> When the appeal is by someone other than a personal representative, conservator, trustee, guardian, or guardian

> ad litem, the appealing party shall, within thirty days after the entry of the judgment or final order complained of, deposit with the clerk of the county court a supersedeas bond or undertaking in such sum as the court shall direct, with at least one good and sufficient surety approved by the court, conditioned that the appellant will satisfy any judgment and costs that may be adjudged against him or her, including costs under subsection (6) of this section, unless the court directs that no bond or undertaking need be deposited. If an appellant fails to comply with this subsection, the Court of Appeals on motion and notice may take such action, including dismissal of the appeal, as is just.

The authority to dismiss an appeal conferred by § 30-1601(3) is permissive or discretionary in nature. See *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007).

In the instant case, on January 23, 2015, Travelers filed its notice of appeal and docket fee, which was the same date it filed a motion to require the personal representative of the Estate to hold a portion of EMC funds in the attorney trust account. On February 2, the county court denied Travelers' motion and determined that no supersedeas bond was required by Travelers in pursuing its appeal. The authority to dismiss an appeal is permissive, and it would not be just to dismiss Travelers' appeal because the determination that Travelers was not required to post a supersedeas bond was made more than 30 days after the entry of the final order. Thus, the Estate's claim that we lack jurisdiction over this appeal is without merit.

*Failure to Consider Potential UIM Policy Proceeds.*

Travelers contends that the county court erred in failing to consider the potential settlement proceeds from the UIM policy in determining its award. At the hearing, the parties stipulated that the settlement agreement referenced a UIM

policy for Evertson Well Service and that the UIM had a policy limit of $1 million. However, in *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006), the Nebraska Supreme Court rejected a claim that the district court erred in failing to consider UIM insurance available because the record did not establish that those benefits had been received or would be received. Likewise, in the instant case, although the parties indicated the presence of a UIM policy, the record at the time of the hearing did not establish that those benefits had been received or would be received. Therefore, this assignment is without merit.

*Failure to Award Travelers Anything on Subrogation Claim.*

Travelers also contends that the county court erred in denying Travelers any portion of the third-party settlement for amounts paid or future credits.

Section 48-118 provides that when a third party is liable to an employee or employee's dependents for the injury or death of the employee, "the employer shall be subrogated to the right of the employee or to the dependents against such third person." Accord *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007). Section 48-118.04 provides that a settlement is void unless agreed to in writing by the employee and employer or the court determines that the settlement is "fair and reasonable." Specifically, § 48-118.04 provides:

> If the employee or his or her personal representative or the employer or his or her workers' compensation insurer do not agree in writing upon distribution of the proceeds of any judgment or settlement, the court, upon application, shall order a fair and equitable distribution of the proceeds of any judgment or settlement.

Although Travelers claims that the county court erred in applying a "made whole" analysis instead of a "rule of proportionality" analysis, § 48-118.04 does not prescribe an exact formula for the trial court to apply when making a fair and

equitable distribution. *Turco, supra*. The Nebraska Supreme Court has refused to read such a formula into the statute and has specifically rejected the adoption of the "made whole" doctrine or the "rule of proportionality" to determine what constitutes a fair and equitable distribution. *Turco, supra*; *Sterner v. American Fam. Ins. Co.*, 19 Neb. App. 339, 805 N.W.2d 696 (2011) (abuse of discretion for court to apply "made whole" analysis in dividing settlement). Under the plain language of § 48-118.04, the trial court shall make a fair and equitable distribution; the distribution is left to the court's discretion and is to be determined by the trial court under the facts of each case. See, *Turco, supra*; *Sterner, supra*.

In the instant case, the county court conducted a fair and equitable analysis, taking into consideration various factors including Evertson's long-term marriage to Darla, their enjoyment of travel and family trips both in and out of this country, and their purchase of a "'dream home'" in California in 2013. The county court also considered factors such as that Travelers had charged and received the necessary premiums to provide workers' compensation coverage for Evertson Operating Company and that under all the circumstances, Travelers' financial risk was minimal and insurance companies are in the business of assuming risk. We disagree with Travelers' assessment that the county court was considering an equitable assessment in considering there was no evidence that Travelers helped finance the settlement between EMC and the Estate; rather, the county court's language indicates that the court was considering that Travelers did not expend any funds in securing the settlement.

Further, regarding Travelers' claim that the district court erred in failing to grant Travelers a future credit, Travelers claims that an employer or workers' compensation carrier is entitled under § 48-118 to treat amounts recovered by an employee from a settlement with a third-party tort-feasor exceeding the compensation benefits the employer or compensation carrier has paid as "advances against possible future

compensation." Brief for appellant at 17. In support of its claim, Travelers relies upon language contained in § 48-118 which provides:

> Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employee or to the dependents and shall be treated as an advance payment by the employer on account of any future installments of compensation.

The plain language of this portion of the statute refers to "[a]ny recovery by the employer against such third person . . . ." In this case, the recovery against the tort-feasor was not made by the employer or workers' compensation carrier; rather, it was made by the employee's personal representative on behalf of the Estate, which recovery would then be distributed to Darla, Evertson's son, and Evertson's daughter. Thus, the language relied upon by Travelers is not applicable to the instant case.

## CONCLUSION

After reviewing the record, we cannot say that the county court abused its discretion. Therefore, the decision of the county court determining a fair and equitable distribution of settlement proceeds is affirmed.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v.
Raymundo M. Perez-Cruz,
appellant.
874 N.W.2d 905

Filed March 8, 2016. No. A-15-273.

1. **Criminal Law: Jury Trials: Waiver.** The right to trial by jury is personal and may be waived by a criminal defendant.
2. **Jury Trials: Waiver.** In order to waive the right to trial by jury, a defendant must be advised of the right to jury trial, must personally waive that right, and must do so either in writing or in open court for the record.
3. **Jury Trials: Waiver: Presumptions.** The waiver of a right to jury trial must be express and intelligent and cannot be presumed from a silent record.
4. **Jury Trials: Waiver.** Once trial by jury is knowledgeably and voluntarily waived, a defendant has no absolute right to withdraw or revoke the waiver and demand a jury trial.
5. **Jury Trials: Waiver: Appeal and Error.** Whether one accused of a crime who has previously waived the right to trial by jury will be permitted to withdraw the waiver is within the discretion of the trial court; there is no error absent an abuse of discretion.
6. **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 Lancaster County: Andrew R. Jacobsen, Judge. Reversed and remanded for a new trial.

Jim K. McGough, of McGough Law, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

Moore, Chief Judge, and Irwin and Inbody, Judges.

Inbody, Judge.

## INTRODUCTION

Raymundo M. Perez-Cruz appeals his conviction and sentence in Lancaster County District Court for first degree sexual assault of a child. For the reasons that follow, we find that the district court abused its discretion by overruling Perez-Cruz' motion to withdraw the waiver of his right to a jury trial. Perez-Cruz' conviction and sentence are reversed, and the matter is remanded to the district court for a new trial.

## STATEMENT OF FACTS

On October 18, 2013, the State filed an information charging Perez-Cruz with one count of first degree sexual assault of a child, a Class IB felony, in violation of Neb. Rev. Stat. § 28-319.01(2) (Cum. Supp. 2014) based upon allegations that Perez-Cruz, who at that time was older than 25 years old, subjected a victim, born in 1999, to sexual penetration.

On January 30, 2014, Perez-Cruz came before the court for purposes of entering a waiver of his right to a speedy trial and right to a jury trial. Counsel for Perez-Cruz indicated that a plea agreement might be reached with the State and requested 60 days to do so. The court advised Perez-Cruz of his right to a speedy trial and right to a jury trial. Perez-Cruz indicated, in open court, that he understood those rights and wished to waive them both. The district court found that Perez-Cruz had freely, voluntarily, knowingly, and intelligently waived his right to a speedy trial and right to a jury trial. The district court set the matter for entry of plea for April 2014.

On May 5, 2014, Perez-Cruz filed a motion to withdraw his waiver of a jury trial. The motion alleged that the waiver was premised upon "inducement, expectancy on a partial plea agreement and would not have been made but for the fact that

the case was put on a Plea Calendar." The motion alleged that on April 26, he was informed that there would be no plea, and that thus, he wished to reinstate his right to a jury trial. On May 19, Perez-Cruz' motion came before the court. In response to the motion, the State indicated that it had missed an opportunity to try the case during the February, April, and June term because it was "too late" and that the State was not going to be in a position to try the case in June. The trial court took the matter under advisement and, on June 2, overruled the motion. The trial court ordered that "[b]ased on the evidence, [Perez-Cruz'] motion to withdraw his waiver of a jury trial is overruled."

The matter came on for bench trial in November 2014, after which the district court found that the State had proved beyond a reasonable doubt that Perez-Cruz was guilty of the charge as alleged in the information. The district court later sentenced Perez-Cruz to 25 to 40 years' imprisonment with 606 days' credit for time served.

## ASSIGNMENTS OF ERROR

Perez-Cruz assigns that the district court erred by overruling his request to withdraw his waiver of a jury trial, by finding that the evidence was sufficient to convict him of first degree sexual assault, and by imposing an excessive sentence. Perez-Cruz also assigns that trial counsel was ineffective for advising him to waive his right to a jury trial.

## ANALYSIS

*Withdraw Waiver of Jury Trial.*

Perez-Cruz assigns that the district court abused its discretion by denying his motion to withdraw his waiver of the right to a jury trial.

[1-3] The right to trial by jury is personal and may be waived by a criminal defendant. *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995); *State v. Zemunski*, 230 Neb. 613, 433 N.W.2d 170 (1988). In order to waive the right to trial by jury, a defendant must be advised of the right to jury trial, must

personally waive that right, and must do so either in writing or in open court for the record. *State v. Russell, supra*; *State v. High*, 225 Neb. 690, 407 N.W.2d 776 (1987). The waiver of a right to jury trial must be express and intelligent and cannot be presumed from a silent record. See, *State v. Miller*, 226 Neb. 576, 412 N.W.2d 849 (1987); *State v. Bishop*, 224 Neb. 522, 399 N.W.2d 271 (1987). See, also, *State v. Predmore*, 220 Neb. 336, 370 N.W.2d 99 (1985).

[4,5] Once trial by jury is knowledgeably and voluntarily waived, a defendant has no absolute right to withdraw or revoke the waiver and demand a jury trial. See *State v. Kaba*, 217 Neb. 81, 349 N.W.2d 627 (1984). Whether one accused of a crime who has previously waived the right to trial by jury will be permitted to withdraw the waiver is within the discretion of the trial court; there is no error absent an abuse of discretion. See *id*.

Perez-Cruz argues that his motion to withdraw should have been granted because there was no prejudice to the State or the court as the case was not yet scheduled for trial.

In the case of *State v. Zemunski, supra*, the record indicated that the defendant was advised of his right to a jury trial and waived that right. By his own admission, the defendant chose to waive his right to jury trial at that time in order to gain a tactical advantage through delay. Once he achieved his objective, the defendant sought to withdraw his waiver. The trial court denied the motion, and the Nebraska Supreme Court found that there was no abuse of discretion evident from the record because the waiver was made in order to gain a tactical advantage. *Id*.

In the case of *State v. Kaba, supra*, the defendant alleged that the district court abused its discretion in overruling his motion to withdraw his right to a jury trial. The Nebraska Supreme Court found no abuse of discretion because the defendant did not file his motion until the date set for trial. See, also, *Sutton v. State*, 163 Neb. 524, 80 N.W.2d 475 (1957).

In the case of *Sutton v. State, supra*, the defendant was convicted by a jury in a justice of the peace court for speeding. The defendant appealed the matter to the district court and waived a jury trial. The matter was continued to the next term of the court and came on for trial. On the date which the trial without a jury was set, the defendant asked to withdraw the previous waiver of the jury trial for no reason other than he wished to withdraw the waiver and requested a jury trial. The Nebraska Supreme Court generally cited "46 A. L. R. 2d 920 [and] 50 C. J. S., Juries, § 111 b, p. 825," for authorities which pointed out the elements which must appear in the record to be considered by an appellate court to determine whether or not the trial court abused its discretion in refusing to permit the withdrawal of a waiver. *Sutton v. State*, 163 Neb. at 526, 80 N.W.2d at 476. The court then went on to find: "To enumerate them here would serve no purpose. It is sufficient to say that defendant herein made no affirmative showing with relation thereto. He simply sought to withdraw the voluntary waiver at his mere will, which he had no right or power to do." *Id*. at 527, 80 N.W.2d at 476.

We are mindful that once trial by jury is knowledgeably and voluntarily waived, a defendant has no absolute right to withdraw or revoke the waiver and demand a jury trial. See *State v. Kaba*, 217 Neb. 81, 349 N.W.2d 627 (1984). However, that determination is made at the discretion of the trial court. *Id*. In this case, the trial court gave no indication whatsoever, other than "[b]ased on the evidence," for the reason it was overruling Perez-Cruz' motion to withdraw his waiver of his right to a jury trial.

We find that upon our review of the record, clearly, Perez-Cruz made an affirmative showing the district court abused its discretion by not allowing him to withdraw his waiver. There is no evidence in the record to indicate that reinstating Perez-Cruz' right to a jury trial was made to gain a tactical advantage, was made on the date set for trial, or was made for any other reason other than Perez-Cruz' belief that a plea

agreement would be reached. At the waiver hearing, counsel for Perez-Cruz indicated that he was hopeful that a plea agreement would be reached, an indication with which the State did not object, and the State acknowledged that the parties were working toward a plea agreement. However, at the motion to withdraw hearing, the State argued that it would not be ready to try the case during the upcoming June trial term, although the record shows that Perez-Cruz also waived his right to a speedy trial, and there is nothing to indicate that the State would not be able to set the matter for trial during the following term in order to have more time to prepare for trial. In fact, the record shows that the bench trial was not held until the following November and that setting the matter for a subsequent jury term would not have adversely affected the State's ability to have time to try the case.

Furthermore, we are dealing with a set of circumstances much different than those in the cases cited above wherein the denial of a motion to withdraw the waiver of the right to a jury trial was denied. See, *State v. Zemunski*, 230 Neb. 613, 433 N.W.2d 170 (1988); *State v. Kaba, supra*. Perez-Cruz was not using the waiver of his jury trial to gain a tactical advantage, nor was he using it to delay the start of a previously scheduled trial. The parties were in the preliminary stages of the case and were very clearly in contemplation of reaching a plea agreement. At the waiver hearing, the district court asked Perez-Cruz if the parties were continuing the matter for a bench trial, which Perez-Cruz denied and instead requested that it be set for a plea. Obviously, the parties had an inclination that, most likely, there would not be a need for a trial date, bench or jury, and, as such, preemptively waived the right to a jury trial in order to avoid any unnecessary scheduling. The State cannot now contend that such a procedure would have impeded its ability to adequately prepare for a trial which was not contemplated at the time of the waiver of Perez-Cruz' right to a jury trial.

Therefore, based upon the record before the court and the circumstances of this case, we find that the trial court abused its discretion by overruling Perez-Cruz' motion to withdraw the waiver of his right to a jury trial. Therefore, the judgment of conviction and sentence are hereby reversed and the matter is remanded to the district court for a new trial.

*Remaining Assignments of Error.*

[6] Having made this determination regarding the motion to withdraw Perez-Cruz' right to a jury trial, we need not address his remaining assignments of error. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Johnson v. Nelson*, 290 Neb. 703, 861 N.W.2d 705 (2015).

## CONCLUSION

In conclusion, we find that the district court abused its discretion by overruling Perez-Cruz' motion to withdraw his right to a jury trial. Perez-Cruz' conviction and sentence are reversed, and the matter is remanded to the district court for a new trial.

Reversed and remanded for a new trial.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Melanie M. Burke, also known as Melanie M. Marshall, appellant.

876 N.W.2d 922

Filed March 8, 2016. No. A-15-293.

1. **Pleadings.** A judicial admission is a formal act done in the course of judicial proceedings.
2. **Pleadings: Intent.** Judicial admissions must be deliberate, clear, and unequivocal, and they do not extend beyond the intent of the admission as disclosed by its context.
3. **Pleadings.** Judicial admissions must occur within judicial proceedings and occur within the case being tried.
4. **Administrative Law.** Administrative proceedings are not judicial and are without judicial effect.
5. **Directed Verdict: Waiver.** Where a defendant makes a motion for a directed verdict at the end of the State's case, whether ruled upon or not, and the defendant thereafter presents evidence, the defendant has waived any error in connection with the motion for directed verdict made at the end of the State's case.
6. **Criminal Law: Intent: Proof: Circumstantial Evidence.** When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence.
7. **Criminal Law: Intent: Circumstantial Evidence.** Intent may be inferred from the words and acts of the defendant and the circumstances surrounding her conduct.
8. **Criminal Law: Public Assistance.** A person commits the offense of violation of public assistance when he or she, by means of a willfully false statement or representation, obtains or attempts to obtain any supplemental nutrition assistance program benefit or electronic benefit card, or any payment to which such individual is not entitled, or a larger payment than to which he or she is entitled.

9. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
10. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested jury 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.

Appeal from the District Court for Lincoln County: Donald E. Rowlands, Judge. Affirmed.

William J. Erickson and Blaine T. Gillett for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Pirtle, Riedmann, and Bishop, Judges.

Riedmann, Judge.

## INTRODUCTION

Melanie M. Burke, also known as Melanie M. Marshall, appeals from her conviction in the district court for Lincoln County, Nebraska, for the crime of "Violation of Public Assistance." After our review of the record on appeal, we affirm.

## BACKGROUND

Burke was convicted by a jury of violation of public assistance, a Class IV felony. In June, August, and September 2010, Burke submitted a series of applications for the State's Supplemental Nutrition Assistance Program (SNAP). The State's case centers on Burke's failure to report her husband's workers' compensation income after her first application. The State also highlights other changes Burke made to her subsequent applications, including her valuation of the household's vehicles and her eventual exclusion of her husband as a household member.

Burke's first application in June 2010 listed herself; her husband, Stephen Marshall (Stephen); and her six children as members of her household. Burke reported that Stephen received $644 per week in workers' compensation benefits. She also listed five household vehicles, most notably a Chevy Tahoe with a $4,500 value. After an interview, Burke's application for benefits was denied as being outside the income guidelines.

Burke then submitted a second application in August 2010. She again listed herself, Stephen, and her children as members of her household. On this application, Burke listed no workers' compensation income. However, she had recently won a 2010 Dodge Caliber which she reported as worth $10,000 with no money owed. She also made changes to the values of the other vehicles listed. In particular, Burke now listed the Chevy Tahoe as worth only $1,000 rather than her previous estimate of $4,500, and stated that she owed $380 on it, rather than $0 in her previous application. Burke's application for benefits was again denied as being outside the income guidelines.

Burke then submitted a third application about a week later, in September 2010. Burke again listed that Stephen was a member of her household and not receiving workers' compensation benefits. On this application, Burke listed her new Dodge Caliber as being worth $11,000 rather than $10,000. She listed the Chevy Tahoe as worth $7,100 rather than $1,000, but also stated that she owed $11,000 on it rather than the $380 she had stated on the previous application. In each of these applications, Burke also listed a $1,647 monthly mortgage payment as shared by herself and Stephen. Burke was approved for SNAP benefits of $1,202 per month after her third application.

In her December 2010 and December 2011 interim reports, Burke reported no changes to her household members or income. She continued receiving $1,202 per month over this time period. In her June 2012 reapplication, Burke reported that Stephen had moved out of the household. She also reported monthly mortgage expenses of only $500 and

explained that the rest of the mortgage expenses were still paid by Stephen. After this application, Burke's SNAP benefits were reduced to $957 per month.

When an investigator contacted Burke in February 2013 about the variance in her applications, she submitted a written statement that Stephen "resides [with] his mother [but] comes & goes [at] the house, as he is an active part in raising the kids."

Stephen received weekly workers' compensation benefits during the entire period from June 2010 through August 2011. He received a letter in August 2010 that his permanent partial disability benefits had been paid in full. However, he continued receiving temporary total disability workers' compensation payments after the date of that letter and until January 2013.

If Burke had listed Stephen's workers' compensation income, the family would have been ineligible for SNAP benefits in 2010 and 2011. Burke testified at trial that she had seen Stephen's August 2010 letter about his permanent partial disability benefits ending and had believed that all of his workers' compensation benefits ended.

Burke also testified that between July 2009 and January 2013, Stephen lived in her home for only 6 to 8 weeks. She testified that he was in the home when she submitted all three of her 2010 applications in June, August, and September. She testified that he was not in the household during her January 2011 interim application when she reported no changes, but that she thought she had told a caseworker prior to that time that he was no longer in the home and that she was therefore accurate in reporting no changes. However, there was no record of her telling her caseworker that Stephen had moved out. Burke testified that Stephen was in her home in July 2011 when she made another application to the Department of Health and Human Services reporting him as a household member, but that he moved out again shortly thereafter. She reported "NO CHANGES" in a December 2011 interim report. Burke did not explain why she reported no changes to

household members in December 2011 despite her assertion that Stephen was not then in the home. In June 2012, Burke first reported that Stephen was no longer a household member. Because SNAP benefits are based upon the number of people in the house as well as the household income, listing him as a household member without income increased benefits from September 2010 through June 2012 by approximately $150 per month.

Burke testified that Stephen was always responsible for the couple's mortgage payment, but that she has nothing to do with his finances. She testified that she never intentionally misled anyone.

After the jury found Burke guilty of wrongfully obtaining $6,370 of public assistance, the district court sentenced her to 2 years' probation and restitution.

## ASSIGNMENTS OF ERROR

Burke assigns, restated, that the district court erred in failing to (1) dismiss the matter due to a judicial admission; (2) sustain Burke's motion to dismiss, thus allowing the case to go to the jury with insufficient evidence; (3) properly instruct the jury as to the definition of "willful"; and (4) properly instruct the jury that the amount of pecuniary loss must be determined beyond a reasonable doubt.

## STANDARD OF REVIEW

In reviewing a criminal conviction for 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. Escamilla*, 291 Neb. 181, 864 N.W.2d 376 (2015). 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*.

On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). Whether jury instructions are correct is a question of law, which an appellate court resolves independently. *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015).

Consideration of plain error occurs at the discretion of an appellate court. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007). Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Magallanes*, 284 Neb. 871, 824 N.W.2d 696 (2012).

## ANALYSIS

*Judicial Admission.*

Burke first assigns that the district court erred in failing to dismiss the case after she presented evidence that the State made an alleged judicial admission that Burke's reporting errors were inadvertent. We note that the State argues that this issue was not properly preserved for appellate review because counsel did not use the language "judicial admission" in the hearing on its plea abatement motion below. Assuming without deciding that this issue was properly preserved, we find that it is substantively without merit because the State did not make a judicial admission as to Burke's intent in this case.

[1,2] A judicial admission is "'a formal act done in the course of judicial proceedings.'" *State v. Canady*, 263 Neb. 552, 560, 641 N.W.2d 43, 51 (2002). It may substitute for evidence by conceding for the purpose of litigation that the proposition of fact alleged by an opponent is true. *State v. Canady, supra*. Judicial admissions must be deliberate, clear, and unequivocal, and they do not extend beyond the intent of the admission as disclosed by its context. See *Robison v. Madsen*, 246 Neb. 22, 516 N.W.2d 594 (1994).

[3,4] As an initial matter, judicial admissions must occur within judicial proceedings and occur within the case being tried. See *Nichols Media Consultants v. Ken Morehead Inv. Co.*, 1 Neb. App. 220, 491 N.W.2d 368 (1992). Burke submits evidence that the State pursued recoupment of its overissuance of benefits to her as an "Inadvertent Household Error" rather than as an "Intentional Program Violation" in a separate administrative proceeding. However, administrative proceedings are not judicial and are without judicial effect. See *State ex rel. Stenberg v. Murphy*, 247 Neb. 358, 527 N.W.2d 185 (1995). Thus, any admissions made by the Department of Health and Human Services in the administrative proceeding would not be judicial admissions. The trial court did not err in refusing to dismiss the criminal case on the basis of a statement made by the department in the administrative hearing.

*Directed Verdict and Sufficiency of Evidence.*

[5] Burke next assigns that the district court erred in overruling her motion for directed verdict at the close of the State's case and in allowing the case to go to the jury with insufficient evidence. Burke has waived error in relation to the ruling on a directed verdict by presenting evidence after her motion. *State v. Rodriguez*, 6 Neb. App. 67, 80, 569 N.W.2d 686, 695 (1997) ("where a defendant makes a motion for a directed verdict at the end of the State's case, whether ruled upon or not, and the defendant thereafter presents evidence, the defendant has waived any error in connection with the motion for directed verdict made at the end of the State's case").

However, Burke may proceed on her insufficiency of the evidence argument. She argues in particular that the State did not submit sufficient evidence that her conduct was intentional. She also argues that the State failed to establish a causal connection between any false statements and her provision of benefits. Burke additionally contends that Neb. Rev. Stat. § 68-1017 (Cum. Supp. 2014) requires the State to show that she obtained her SNAP benefits for her use and not for her children. Finally, Burke argues that there was insufficient

evidence to support the jury's finding that she wrongfully obtained over $500 in benefits.

In reviewing an argument that the evidence was insufficient to support 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. Escamilla*, 291 Neb. 181, 864 N.W.2d 376 (2015). We begin with Burke's argument that there was insufficient evidence of her intent.

[6,7] When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence. *State v. Kennedy*, 239 Neb. 460, 476 N.W.2d 810 (1991). Intent may be inferred from the words and acts of the defendant and the circumstances surrounding her conduct. *Id.*

We find sufficient circumstantial evidence on the record to allow a rational trier of fact to find beyond a reasonable doubt that Burke willfully made false statements to obtain SNAP benefits or to obtain more SNAP benefits than she would otherwise be entitled to receive. Here, the evidence establishes that Burke reported her husband's workers' compensation income in one application but then denied this income in two separate applications weeks later after her first application was denied because her household had too high a level of income. Stephen's workers' compensation income, if claimed, would have caused her to continue to be ineligible for benefits. Although Burke stated that she believed her husband's workers' compensation benefits had ended, she also stated that he was always responsible for the parties' $1,647 mortgage payment and she attributed no other income or financial accounts to him. A reasonable trier of fact could conclude from this information that Burke knew Stephen had a source of income and that in order to obtain benefits, she was not reporting it on her SNAP application.

Burke continued to report no changes in her application until June 2012, when she reported that Stephen had moved out of her home; she still did not claim his workers' compensation income at this time. From these actions, when viewed in the light most favorable to the prosecution, a reasonable trier of fact could determine beyond a reasonable doubt that Burke intentionally omitted Stephen's workers' compensation income in order to receive SNAP benefits to which she would not otherwise be entitled. Alternatively, if the jury believed Burke's assertions that Stephen was not a member of the household for almost all of the time period in question, it could find that she intentionally omitted removing him from her applications in order to continue receiving the approximately $150 per month in additional benefits based upon an eight-member household rather than a seven-member household.

Because the State submitted evidence that Burke received $1,202 per month in SNAP benefits to which she would not have been entitled if she had reported Stephen's workers' compensation income, sufficient evidence on the record would allow a finder of fact to find beyond a reasonable doubt that the amount of pecuniary loss was over $500. Alternatively, if the jury accepted that Stephen was not a member of the household during the relevant time period, the State submitted evidence that Burke would have been overpaid by approximately $150 per month due to her statement that Stephen was a member of the household. A rational trier of fact could conclude beyond a reasonable doubt from this evidence that over the time period from September 2010 through June 2012, this type of false reporting would also have resulted in more than $500 in pecuniary loss.

[8] Finally, we disagree with Burke's assertion that § 68-1017 requires the State to show that Burke obtained SNAP benefits for herself rather than for her children. Section 68-1017 provides that a person commits an offense when she, by means of a willfully false statement or representation, "obtains or attempts to obtain . . . any [SNAP] benefit or electronic benefit

card, or any payment to which such individual is not entitled, or a larger payment than to which he or she is entitled." This statute does not include a requirement that the benefits be obtained for one's own use. Because Burke obtained the benefits at issue in this case, it is immaterial whether she used them for herself, for her children, or both.

For these reasons, the evidence on the record is sufficient to uphold the conviction and this assignment of error is without merit.

*Jury Instruction on Definition of "Willful."*

[9,10] Burke next assigns that the district court erred in rejecting her proposed jury instruction on the definition of "willful." Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision. *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015). 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. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

Burke's proposed jury instruction stated that "willfully means intentionally or purposefully and not accidentally or inadvertently." The district court instead elected the pattern jury instruction, which states that "'[w]illfully' means intentionally or purposely, and not accidentally or involuntarily." Therefore, the only difference between the two instructions is Burke's substitution of the word "inadvertently" for the word "involuntarily." Although the pattern instruction omits the word "inadvertently," Burke cannot show that she was prejudiced by the court's adoption of the pattern instruction because "accidentally" is included in the pattern instruction and is synonymous with "inadvertently." Black's Law Dictionary 877 (10th ed. 2014) defines "inadvertence" as follows: "*n.* (15c)

An accidental oversight; a result of carelessness." Burke's proposed instruction also omits the word "involuntarily," but we find nothing confusing in the word's exclusion. Because there is no substantive difference between the instructions in the context of this case, Burke cannot show prejudice. This assignment of error is without merit.

*Jury Instruction on Pecuniary Loss.*

Burke finally assigns that the district court committed plain error in not properly instructing the jury that the amount of pecuniary loss must be found beyond a reasonable doubt. This assignment of error is based upon *State v. Esch*, 290 Neb. 88, 858 N.W.2d 219 (2015), in which we remanded a conviction of criminal mischief for a determination of the amount of loss beyond a reasonable doubt. In that case, the jury instruction stated, "'If you find the State has proven the elements of Criminal Mischief beyond a reasonable doubt, you must also determine what, if any, pecuniary loss was suffered.'" *Id.* at 90, 858 N.W.2d at 221. The instruction did not specify the degree of certainty required for ascertaining the amount of pecuniary loss.

Here, however, the jury instruction did properly instruct the jury that it needed to find the amount of pecuniary loss beyond a reasonable doubt. Jury instruction No. 7 provided in relevant part: "The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the Defendant of the crime charged are . . . (5) [t]he value of the property or payment which the Defendant obtained or attempted to obtain." Therefore, we find no error in the district court's instruction.

## CONCLUSION

After our review of the record, we find no error by the district court. Accordingly, we affirm its judgment.

Affirmed.

Nebraska Court of Appeals
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# State of Nebraska, appellee, v. James R. Newcomer, appellant.

875 N.W.2d 914

Filed March 8, 2016. No. A-15-790.

1. **Constitutional Law: Criminal Law.** The Excessive Fines Clause limits those fines directly imposed by, and payable to, the government, and provides that no excessive fines shall be imposed.
2. **Pleas: Waiver.** The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional.
3. **Constitutional Law: Criminal Law.** The Eighth Amendment to the U.S. Constitution and article I, section 9, of the Nebraska Constitution prohibit the imposition of excessive fines.
4. ____: ____. The purpose of the Excessive Fines Clause is to limit the government's power to extract payments, whether in cash or in kind, as punishment for some offense.
5. ____: ____. A criminal forfeiture is a form of monetary punishment no different, for Eighth Amendment purposes, than a traditional fine.
6. ____: ____. In determining whether a fine is so excessive as to violate the Excessive Fines Clause, the test is whether the penalty is grossly disproportional to the gravity of the defendant's offense.
7. **Constitutional Law: Criminal Law: Proof.** The party claiming that a fine violates the Excessive Fines Clause must first make a prima facie showing of gross disproportionality, and if the claimant does so, the court then considers whether the disproportionality reaches such a level of excessiveness that the punishment is more criminal than the crime.
8. **Criminal Law.** The gravity of an offense can be considered more serious when the defendant has previously committed the same act.
9. **Sentences: Legislature.** Judgments about the appropriate punishment for an offense belong in the first instance to the Legislature.

10. **Criminal Law: Affidavits: Time.** A defendant in a criminal case must file an application to proceed in forma pauperis within 30 days after the entry of judgment, order, or sentence.
11. ____: ____: ____. The relevant date under Neb. Rev. Stat. § 29-2306 (Reissue 2008) is the date the defendant files the application to proceed in forma pauperis, not the date on which the court grants the application.

Appeal from the District Court for Sarpy County: David K. Arterburn, Judge. Affirmed.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

Pirtle, Riedmann, and Bishop, Judges.

Riedmann, Judge.

## INTRODUCTION

James R. Newcomer appeals from his conviction in the district court of Sarpy County of forgery of a certificate of title. On appeal, he challenges the fine he received as part of his sentence and the rejection of his initial poverty affidavit attached to his motion to proceed in forma pauperis. Finding no merit to his claims, we affirm.

## BACKGROUND

Newcomer was initially charged with four counts of forgery of a certificate of title, a Class IV felony. Pursuant to a plea agreement with the State, Newcomer pled no contest to one count and the State dismissed the remaining three counts.

According to the factual basis provided by the State at the plea hearing, on November 3, 2014, police officers located three vehicles parked outside of Newcomer's residence, all of which had fictitious license plates. Newcomer admitted to the officers that the vehicles were his and that he had placed the

license plates on the vehicles. Through investigation, police determined that Newcomer had purchased 12 vehicles in 2014 and titled them under his own name, his girlfriend's name, and his two daughters' names. With respect to four of the vehicles, police confirmed that the bills of sale submitted to the Sarpy County Department of Motor Vehicles for title processing were forged. The true sales prices of the vehicles were $450, $500, $800, and $600.

The court accepted Newcomer's plea and found him guilty. On August 3, 2015, Newcomer received a sentence of 60 days in jail and a $10,000 fine.

On August 27, 2015, Newcomer filed a notice of appeal, a motion to proceed in forma pauperis, and a poverty affidavit. The court found that the poverty affidavit was insufficient and allowed Newcomer to submit a new affidavit which fully set forth his income and assets. Newcomer did so on September 1, and his motion to proceed in forma pauperis was granted 2 days later. His appeal is now before this court.

## ASSIGNMENTS OF ERROR

Newcomer assigns that the district court erred in imposing a grossly disproportionate fine for his crime and in denying his first poverty affidavit in support of his application to proceed in forma pauperis.

## ANALYSIS

*Excessive Fine.*

[1] Newcomer argues that the fine he received is excessive and grossly disproportionate to the crime, in violation of the Excessive Fines Clauses of the U.S. and Nebraska Constitutions. The Excessive Fines Clause limits those fines directly imposed by, and payable to, the government, and provides that no excessive fines shall be imposed. See, U.S. Const. amend. VIII; Neb. Const. art. I, § 9; *State v. Hynek*, 263 Neb. 310, 640 N.W.2d 1 (2002). By arguing that the fine imposed on him is excessive and unconstitutional, Newcomer is raising

an as-applied constitutional challenge. See *State v. Harris*, 284 Neb. 214, 817 N.W.2d 258 (2012).

[2] The State recognizes that challenges to the constitutionality of a statute as applied to a defendant are properly preserved by a plea of not guilty and argues that because Newcomer pled no contest to the charge, this claim has been waived. See *id*. The State is correct that the voluntary entry of a guilty plea or a plea of no contest "waives every defense to a charge, whether the defense is procedural, statutory, or constitutional." See *State v. Albrecht*, 18 Neb. App. 402, 407, 790 N.W.2d 1, 6 (2010). But Newcomer's constitutional challenge is not a "defense to a charge"; rather, he now challenges the sentence he received, claiming that it violates the constitutional prohibition on excessive fines.

In *State v. Brand*, 219 Neb. 402, 363 N.W.2d 516 (1985), the defendant pled guilty to a sexual assault charge. On appeal, he argued that, as applied in his particular case, his sentence was so excessive that it violated the Cruel and Unusual Punishment Clauses of the U.S. and Nebraska Constitutions. The Supreme Court found that to the extent his argument could be directed to the claim that the statute is unconstitutional by its terms, such argument was waived. But the Supreme Court addressed the constitutionality of the sentence as applied to the defendant and determined that the sentence imposed passed constitutional muster.

Similarly here, Newcomer does not challenge the constitutionality of the statute allowing a $10,000 fine to be imposed for the conviction of forgery of a certificate of title. Instead, he claims that imposing a $10,000 fine *in this case* was so excessive as to be unconstitutional. This claim has not been waived by his no contest plea, and therefore, we will address its merits.

[3,4] Both the Eighth Amendment to the U.S. Constitution and article I, section 9, of the Nebraska Constitution prohibit the imposition of "excessive fines." The purpose of the Excessive Fines Clause is to limit "the government's power to

extract payments, whether in cash or in kind, 'as *punishment* for some offense.'" *Austin v. United States*, 509 U.S. 602, 609-10, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993).

[5] There is little case law interpreting the Excessive Fines Clause, particularly as it applies to criminal fines as opposed to forfeitures. However, the U.S. Supreme Court has determined that a criminal forfeiture is a form of monetary punishment no different, for Eighth Amendment purposes, than a traditional fine. See *Alexander v. United States*, 509 U.S. 544, 113 S. Ct. 2766, 125 L. Ed. 2d 441 (1993). Thus, criminal forfeiture cases are instructive on analyzing whether a fine is unconstitutionally excessive.

[6] In determining whether a fine is so excessive as to violate the Excessive Fines Clause, the test is whether the penalty is grossly disproportional to the gravity of the defendant's offense. See *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998).

[7] The U.S. Supreme Court has expressly declined to enunciate a test of gross disproportionality. See *Austin v. United States, supra*. But the Eighth Circuit applies a two-pronged approach that first requires the claimant to make a prima facie showing of gross disproportionality. *U.S. v. Dodge Caravan Grand SE/Sport Van*, 387 F.3d 758 (8th Cir. 2004). If the claimant can make this showing, the court then considers whether the disproportionality reaches such a level of excessiveness that the punishment is more criminal than the crime. *Id*.

[8] In the present case, Newcomer argues that his fine is excessive because it is disproportionate to the value of the vehicles at issue. There is no requirement that the fine be proportionate to the pecuniary value of the vehicles, however. Rather, the fine must be proportionate to the gravity of the offense. Newcomer was initially charged with four counts of forgery of a certificate of title before he agreed to plead no contest to one count. Thus, without the benefit of the plea agreement, Newcomer faced a total of $40,000 in fines. In

addition, as the district court noted at sentencing, this was not Newcomer's first time committing this offense, and he does so for the purpose of profit. Newcomer has an extensive history of vehicle-related charges, including two counts of forged title in 2001, for which he completed a diversion program, and four counts of forged title in 2005, for which he received a $250 fine on each count. The gravity of an offense can be considered more serious when the defendant has previously committed the same act. See *State v. Brand*, 219 Neb. 402, 363 N.W.2d 516 (1985).

[9] We further note that the U.S. Supreme Court has cautioned that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *United States v. Bajakajian*, 524 U.S. at 336. Forgery of a certificate of title is a Class IV felony, which carries a punishment of up to 5 years' imprisonment, a $10,000 fine, or both. See Neb. Rev. Stat. §§ 60-179 (Reissue 2010) and 28-105 (Cum. Supp. 2014). The Legislature chose to make the crime of forgery of a certificate of title a felony offense, punishable by a maximum fine of $10,000. Thus, although the fine imposed on Newcomer is the maximum allowed by statute, it falls within the statutory limits set by the Legislature.

When considering the gravity of the offense, including Newcomer's history, number of current offenses, and motivation for the crimes, we find that Newcomer has failed to make a prima facie showing that the fine is grossly disproportionate to the offense committed. Accordingly, the fine imposed does not constitute an unconstitutionally excessive fine.

*Poverty Affidavit.*

Out of an "abundance of caution," Newcomer also assigns that the district court erred in denying his initial poverty affidavit filed in support of his motion to appeal in forma pauperis. Brief for appellant at 9. We need not address this claim because the notice of appeal, application to proceed in forma pauperis, and poverty affidavit were filed timely.

[10,11] Under Neb. Rev. Stat. § 29-2306 (Reissue 2008), a defendant in a criminal case must file an application to proceed in forma pauperis within 30 days after the entry of judgment, order, or sentence. The relevant date under § 29-2306 is the date the defendant files the application, not the date on which the court grants the application. *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002). Here, even though the district court rejected Newcomer's initial poverty affidavit, Newcomer filed a replacement affidavit within 30 days after the sentencing order was filed. Therefore, the requirements of § 29-2306 were satisfied, and this court has jurisdiction over the appeal.

## CONCLUSION

We find no merit to the arguments raised on appeal. We therefore affirm the conviction and sentence.

Affirmed.

Nebraska Court of Appeals
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Angela M. Hiller, appellee, v.
Corey A. Hiller, appellant.
876 N.W.2d 685

Filed March 15, 2016. No. A-15-140.

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. **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 entrusted for disposition through a judicial system.
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 Custody: Proof.** There is a two-step process before a custodial parent is allowed to remove a child from the State of Nebraska. The custodial parent must satisfy the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to continue to live with that parent.
5. **Child Custody.** Removal jurisprudence has been applied most frequently when a custodial parent requests permission to remove a child from the state and custody has already been established. However, the Nebraska Supreme Court has used the factors considered in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), when determining whether removal is appropriate in an initial custody determination.

6. **Child Custody: Proof.** To prevail on a motion to remove a minor child, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state.
7. **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.
8. **Child Custody: Visitation.** In determining whether removal to another jurisdiction is in the children's best interests, the trial court evaluates three considerations: (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 children and the custodial parent, and (3) the impact such a move will have on contact between the children and the noncustodial parent.
9. **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 removal in an effort to frustrate or manipulate the other party.
10. ____. In determining the potential that removal to another jurisdiction holds for enhancing the quality of life of the children and the custodial parent, a court should evaluate 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 removal would antagonize hostilities between the parties; and (9) the living conditions and employment opportunities for the custodial parent.
11. **Child Custody: Visitation.** A reduction in visitation time does not necessarily preclude a custodial parent from relocating for a legitimate reason.

Appeal from the District Court for Otoe County: Jeffrey J. Funke, Judge. Affirmed.

Terrance A. Poppe and Andrew K. Joyce, of Morrow, Poppe, Watermeier & Lonowski, P.C., L.L.O., for appellant.

Jenny L. Panko, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

Pirtle, Riedmann, and Bishop, Judges.

Pirtle, Judge.

## I. INTRODUCTION

Corey A. Hiller appeals from the order of the district court for Otoe County entered on January 15, 2015. The order dissolved his marriage to Angela M. Hiller and awarded the parties joint legal custody of their two minor children. The court awarded Angela physical custody of the children and granted her permission to remove the children from Nebraska to Virginia. For the reasons that follow, we affirm.

## II. BACKGROUND

Corey and Angela married in August 1997 and separated in June 2014. The parties have twin daughters, Brooke Hiller and Hannah Hiller, who were born in 2001. Shortly after the parties separated, they began alternating time in the family home with the children, with each party spending certain days and nights in the home.

Angela filed a complaint for dissolution of the parties' marriage in the district court for Otoe County in August 2014. The complaint requested dissolution, custody of the children, and permission to remove the children from the State of Nebraska. Angela had an offer of employment at the Department of Veterans Affairs (VA) in Washington, D.C., and planned to move to Sterling, Virginia, with the children. She stated the move was in the children's best interests and was "being made for legitimate purposes regarding [Angela's] employment." In November, Corey filed a response, as well as a "cross complaint," in which he also requested custody of the parties' children.

The matter was tried before the district court on November 12 and 21 and December 19, 2014. Angela testified that she was the primary caretaker, seeing to the children's daily needs, including cooking, cleaning, laundry, grocery shopping, assisting with homework, and purchasing clothing, school supplies, and personal care items. She also testified that she took care

of the children's medical and dental needs, maintained their schedule of extracurricular activities, and attended their sporting events.

Angela testified that in the time that Corey resided in the home with the children, he failed to keep the house clean, failed to shop for or provide nutritious food for the children, and could not assist with the children's homework at the level that was required. She testified that he lacked organizational skills, he did not maintain the children's schedules, and he did not assist them in getting ready for activities. She testified that after they began alternating time in the family home, she routinely returned to the home after Corey stayed there to find dirty and clean laundry commingled and covered in pet hair, dried dog urine on the floor, dirty dishes in the sink, dirty pots sitting on the stove, and unclean bathrooms. Angela and her mother, Judy Moritz, testified that they spent hours cleaning the home after Corey spent time there. Angela testified that she began stocking the refrigerator with fresh fruits and vegetables for the children to eat during the days when Corey stayed with them because he did not always make healthy food purchases for the children.

Angela testified that Corey displayed carelessness with firearm safety in the home. She presented evidence that firearms and ammunition were left unsecured in the home despite her requests that they be placed in a gun safe. She said that in September 2014, Brooke retrieved an unsecured gun from a closet in the home and took it outside to shoot. Corey testified that he did leave firearms outside of the parties' gun safes and acknowledged that it was possible that the children's friends, some of whom may not be well trained in firearm safety, could be in the home.

Angela testified that she holds a bachelor's degree in English and had worked for the VA in Lincoln, Nebraska, for 14 years. Her job title at the VA in Lincoln was "Rating Quality Review Specialist." Her duties included performing quality review of other employees' work and giving feedback

to management, who made personnel decisions based on error rates. She also was responsible for mentoring those individuals she reviewed and for conducting training related to the federal regulations governing disability benefits to veterans for injuries incurred during service. She testified that she had looked for positions outside of the VA at times, but found that the skills she uses and the knowledge she has gained at the VA do not transfer well to other positions. She did not apply for any jobs outside of the VA because she was not aware of any positions that she would be qualified for that would have a similar salary.

She testified that prior to the parties' separation, it was her intention to stay in Syracuse, Nebraska, until the children finished school. However, for reasons that will be discussed in further detail in our analysis, she felt her reputation had been damaged because Corey had caused her personal life to become an issue at work. She believed this called her integrity into question, which, in turn, adversely affected her ability to do her job.

Angela accepted a position at the VA in Washington, D.C., on August 29, 2014, which is at the same pay grade as her position in Lincoln, so it is considered a lateral move. She testified that the position in Washington, D.C., paid $101,000, compared to the $93,000 she earned in Lincoln, and that some of the difference in pay is attributable to cost of living expenses. She testified that the position she vacated in Lincoln had been filled by another person and would no longer be available to her. She was aware of only three positions in Lincoln that she could be potentially promoted to, and none were likely to be vacant in the near future. She testified that there is enhanced opportunity for advancement in the Washington, D.C., office and that the next promotion would include a base salary of $108,000.

Angela testified that she had secured a residence in a townhouse in Virginia. She testified that the townhouse is near the school the children would attend and had square footage

similar to that of the marital home. The townhouse has three bedrooms, 3½ bathrooms, a yard, and a basement which would allow Moritz to live with them. Angela testified that she had not yet signed the lease, but she intended to sign it on the day of trial.

Moritz testified that she lived with the parties for about a year shortly after the children were born and continued to be present in the home throughout their lives. She said she observed Angela maintaining the children's schedules, helping with homework, and seeing to their daily needs. She said she did not observe Corey helping with schedules or homework and described him as a "slob" who lacked organizational skills. Moritz testified that if Angela were given permission to remove the children, she would move with them to Virginia and would help with transportation and general care of the children. If Angela were not given permission to remove the children, Moritz did not intend to stay in Syracuse. She stated she would not stay because she believed Corey "would never let [her] see the children, and if [she] did get to see the children, [Corey] would want [her] to raise them from sunup to sundown." She testified that Corey lacked some parenting skills. She said, "He can't talk to the girls about certain things without getting angry with them," and stated her belief that he was "always barking orders" instead of trying to reason with them.

Corey testified that he is employed by the Nebraska Army National Guard as an "Initial Active Duty Training Manager." His work location is Camp Ashland, which is located 38 miles from Syracuse. At the time of trial, he had been a full-time employee of the National Guard for 16 years and his rank was "Sergeant First Class." As part of the National Guard, he was deployed twice, once in 2003 to Fort Riley, Kansas, for 67 days and once in 2010-11 to Afghanistan for a period of 10½ months.

He testified that his average workday is from 7:30 a.m. to 4 p.m. and that he has one "drill weekend" per month. He

testified that he had at least 4 more years before he was eligible to retire and that he had not decided whether he would retire at that time. He investigated transferring his job to a guard in the Washington, D.C., area, but because he was nearing 17 years of active service, he was unsure whether he would be able to secure a position. If he were to transfer, he would need to go through an application process, and a position in his job skill would need to be available. Corey testified that he liked his job and his position at Camp Ashland.

Corey testified that he attends the majority of the children's extracurricular events, attends the majority of parent-teacher conferences at school, helps with transportation to medical appointments, and has coached a few of the children's softball and soccer teams. He testified that he enjoys spending leisure time with the children, including hunting, rafting, attending football games, fishing, and riding four-wheelers.

Corey testified that he has a support network in Syracuse, including his mother, church members, and several family friends upon whom he could rely if he needed help, or if there was an emergency. He testified that at the time, he was living with his mother, but that he planned to purchase a new home in Syracuse after the divorce.

Corey and Angela both testified that they believed their daughters exercise "good judgment for their age" or are "fairly responsible for their age," and both said they believed the children's wishes should be considered by the trial court.

Brooke and Hannah testified that there are activities they enjoy doing with both parents, but both stated that Angela helped more with the day-to-day parenting functions and that they felt more comfortable talking with her about personal issues, including boyfriends, makeup, puberty, and shopping for undergarments. They testified that they would miss their friends and Corey in Syracuse, but that they would prefer to move to Sterling and to live with Angela. Hannah testified that she had a closer emotional bond with Angela and felt more comfortable talking with her about problems. She

expressed concerns about Corey's ability to take care of daily tasks, such as laundry, and said Angela cooks healthier, does her laundry, and helps with homework. Brooke testified that Angela listens to her, helps make her day better, and "takes better care of us."

Both Brooke and Hannah expressed concerns about how Corey handles stressful situations, including yelling and breaking things. They testified that when they told Corey they would prefer to live with Angela, he refused to speak with them for the rest of the night, and Hannah testified that the next morning he said, "'I guess I'm not part of your life anymore.'" Brooke testified that on occasion, Corey says things that make her feel bad about herself. They also expressed a belief that if they lived with Corey in Syracuse, they would not be able to see Angela very often.

The district court's order sets out a detailed discussion of the various elements used to determine the custodial issues based on the best interests of the minor children before analyzing the elements used for removal. The court noted that according to Angela, she has been the primary caregiver and has tended to the children's needs, including cooking, laundering clothes, cleaning the home, scheduling, transporting the children to activities and medical appointments, helping with homework, and planning for birthdays and holidays. Angela still performed these duties and prepared schedules and meals ahead of any travel so the children were prepared for school and extracurricular activities and had healthy meals to eat in her absence. The court also noted that the children are age 13 and that Angela suggested the children would need her assistance in dealing with puberty, issues related to their health, and making right choices. Corey testified that he has been active in the children's lives and cared for the children independently while Angela traveled for work and during the parties' rotating parenting time schedule after their separation.

The court also considered testimony regarding Corey's poor housekeeping skills, Angela's alleged extramarital

relationships, and the interaction and assistance the maternal and paternal grandmothers have with and provide to the family. The court found the evidence indicated that both parties were fit and proper parents who have been active in the children's lives and that the children's needs are being met. The court considered the testimony of both children, because they were of sufficient age and maturity to understand the need to tell the truth and were able to articulate their desires based on sound reasoning. The children testified that their preference would be to reside with Angela.

Based on the totality of the facts presented, the court found it was in the best interests of the minor children that their physical custody be placed with Angela, subject to rights of reasonable visitation with Corey.

In reaching a determination on the issue of removal, the court presumed that it was not required to consider the factors ordinarily considered in removal cases, as there was no permanent custody order previously entered. However, the court still discussed and considered each of the factors traditionally used to determine whether removal is appropriate, and it granted Angela's request for removal.

Corey timely appealed.

## III. ASSIGNMENTS OF ERROR

Corey asserts the district court erred by finding that Angela had a legitimate reason to move and by finding that it is in the children's best interests to remove the children from Nebraska.

## IV. 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. *Mamot v. Mamot*, 283 Neb. 659, 813 N.W.2d 440 (2012).

[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 entrusted for disposition through a judicial system. *Geiss v. Geiss*, 20 Neb. App. 861, 835 N.W.2d 774 (2013).

[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. *Freeman v. Groskopf*, 286 Neb. 713, 838 N.W.2d 300 (2013).

## V. ANALYSIS

In this case, Angela requested permission to remove the children from Nebraska as part of the original complaint for dissolution of her marriage to Corey.

The district court considered the totality of the facts presented and found that it was in the best interests of the parties' minor children to place physical custody with Angela, subject to rights of reasonable visitation with Corey. The court found that Angela was the parent who provided the children with the daily care they required and that they were more bonded with her. Then the court considered the issue of removal of the children from the State of Nebraska, before ultimately concluding that Angela had met her burden of showing that it is in the children's best interests to relocate to the State of Virginia, and the court authorized her to relocate with the children.

On appeal, Corey asserts only that the district court erred by finding that Angela had a legitimate reason to move and by finding that it was in the children's best interests to remove the children from Nebraska. He does not argue that the trial court's determination of custody was in error. Therefore, we need not address the trial court's decision to place physical custody with Angela, and we will address only the issue of removal.

[4] There is a two-step process before a custodial parent is allowed to remove a child from the State of Nebraska. The custodial parent must satisfy the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to continue to live with that parent. *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999).

In this case, the district court determined that the factors considered in *Farnsworth, supra*, and later in *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002), "presumably" do not apply where a permanent custody order had not been previously entered. Nonetheless, the district court set forth the factors considered when determining whether removal is appropriate and determined that they were relevant to the present case; therefore, they would be considered by the court. Ultimately, the district court determined that Angela had shown a legitimate reason for leaving the State of Nebraska and that the move was in the children's best interests.

[5] Removal jurisprudence has been applied most frequently when a custodial parent requests permission to remove a child from the state and custody has already been established. However, the Nebraska Supreme Court has used the factors considered in *Farnsworth* when determining whether removal is appropriate in an initial custody determination. See *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000). In December 2014, this court considered whether removal jurisprudence applied to a situation where the mother removed the child from the State of Nebraska prior to filing for dissolution or a request for removal; thus, there was no prior custody determination. See *Rommers v. Rommers*, 22 Neb. App. 606, 858 N.W.2d 607 (2014). In *Rommers*, the district court dissolved the parties' marriage and found that because there was no prior custody determination, the court was not required to engage in a removal analysis, although the court still considered the relevant factors in determining custody based upon the child's best interests. On appeal, we found that the trial court should have made a

determination of custody first, then conducted a proper *Farnsworth* removal analysis.

Although the district court's presumption that *Farnsworth* did not apply in this case was in error, see *Kalkowski, supra*, and *Rommers, supra*, it still engaged in a thorough analysis of the *Farnsworth* factors before reaching its ultimate conclusion authorizing removal. In an action for the dissolution of marriage, we review the record de novo on appeal. See *Mamot v. Mamot*, 283 Neb. 659, 813 N.W.2d 440 (2012).

### 1. Legitimate Reason to Relocate

[6] To prevail on a motion to remove a minor child, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999).

Corey asserts that the district court erroneously relied on this court's decision in *Schrag v. Spear*, 22 Neb. App. 139, 849 N.W.2d 551 (2014), which was subsequently reversed by the Nebraska Supreme Court in *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015). The district court's order herein was entered prior to the release of the Supreme Court's decision in that case; however, the district court's reference to the Court of Appeals' underlying decision was solely to provide one example of a factual basis supporting a legitimate reason for removal. The Supreme Court's subsequent determinations that the mother had ulterior motives for the move and that the decision to move was made with no firm or likely prospects for career enhancement had no bearing on the instant matter, because the facts are distinguishable. See *id.* In this case, Angela was offered, and accepted, a new position in the Washington, D.C., division of the VA. Although the position was considered a lateral move, it included an increased salary and presented a greater likelihood of advancement within the VA than the position in Lincoln did.

Corey also asserts Angela had ulterior motives in deciding to move, namely his belief that Angela's desire to move is not

work related, but, rather, to be closer to a male friend. Although there is evidence that Angela began a relationship with that friend shortly after the parties separated, there is also evidence that the relationship was not romantically serious at the time and was not the motivating factor for her decision to relocate. Angela testified that she does not "love" the friend and that although she enjoys spending time with him, she is not ready to make a commitment or introduce him to her daughters. When Angela was asked whether his presence nearby had "anything to do with the move to [Washington,] D.C.," she replied, "No." The friend stated in his deposition that he cares for Angela and loves her as a friend, but that they have no definite plans for a serious romantic relationship.

In addition to the potential for advancement opportunities in Washington, D.C., Angela testified that she felt it was necessary for her to leave the Lincoln VA offices because her professional reputation was damaged by Corey's interference with her work and by speculation regarding her personal life. Corey also believed that Angela was having an affair with a male coworker in Lincoln. Corey confronted the coworker about the alleged affair and spoke numerous times with the coworker's wife about the issue. The male coworker and Angela both denied any affair, and there is no evidence to substantiate this allegation. However, Angela testified that she overheard other coworkers discussing the alleged affair at work and that she felt it adversely affected her ability to do her job. She testified that her position at the VA requires a high level of integrity, and she felt it was impugned by these rumors.

Angela also testified that after she was denied the opportunity to participate in a special work project, Corey went to see Angela's supervisor at her home after work hours. The supervisor testified that she did not feel frightened by the visit, but that she did ask her husband to join her and Corey for the conversation. She testified that Corey's visit did not impact her opinion of Angela. Nonetheless, Angela testified that she

no longer felt that she could perform her duties in the Lincoln office because she had intentionally kept her personal life separate from her employment and these incidents adversely affected her professional role. One of Angela's coworkers testified that she observed a change in Angela's demeanor at work, in that she was more emotional, was less confident, and no longer assumed leadership roles in meetings.

In reaching the conclusion that Angela had a legitimate reason to relocate, the court expressed concern about the "timing of the employment decision and the commencement of [Angela's] relationship" with the aforementioned male friend, but found that relationship was not the main reason for Angela's decision to relocate. The court found the evidence showed that Angela had additional opportunities for advancement of her career which were not available in Lincoln and that Corey's actions related to Angela's workplace created a "charged environment" which adversely affected her ability to do her job.

[7] 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. *Freeman v. Groskopf*, 286 Neb. 713, 838 N.W.2d 300 (2013). Upon our review of the evidence, we find the trial court did not err in finding Angela's new position and potential for career advancement, and her desire to obtain and maintain a professional work environment, were legitimate reasons to relocate.

### 2. Best Interests

Corey asserts that if the second step of the analysis in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), is applied, the court would find that it is not in the children's best interests to leave the State of Nebraska. Specifically, he asserts the move would be detrimental to his relationship with the children and would have a negative effect on their emotional, physical, and developmental needs.

The record shows that the court engaged in a detailed analysis of the *Farnsworth* factors and found that it was in the children's best interests to allow them to move to Virginia with Angela.

[8] In determining whether removal to another jurisdiction is in the children's best interests, the trial court evaluates three considerations: (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 children and the custodial parent, and (3) the impact such a move will have on contact between the children and the noncustodial parent. See *Bird v. Bird*, 22 Neb. App. 334, 853 N.W.2d 16 (2014).

(a) Each Parent's Motives

[9] 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 removal in an effort to frustrate or manipulate the other party. *Dragon v. Dragon*, 21 Neb. App. 228, 838 N.W.2d 56 (2013), citing *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007).

The court determined that Angela's motive for the move appeared to be based on her desire to end her marriage, her desire to advance her employment opportunities, her limited contacts within the State of Nebraska, and her desire to further her relationship with a male friend. The court found that none of the motives appeared to be centered upon denying Corey the opportunity to have a relationship with Brooke and Hannah. The court found Corey's motive for opposing the move was based upon his genuine desire to maintain a strong relationship with the children. The court noted that it did not appear that Corey wanted the divorce to occur, but his opposition to the move did not seem to be based upon animosity toward or manipulation of Angela.

The evidence supports the court's analysis of the situation, and we do not find either party acted in bad faith. Thus, this factor does not weigh for or against removal.

(b) Quality of Life

[10] In determining the potential that removal to another jurisdiction holds for enhancing the quality of life of the children and the custodial parent, a court should evaluate 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 removal would antagonize hostilities between the parties; and (9) the living conditions and employment opportunities for the custodial parent. See *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999).

*(i) 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 their lives.

The district court found that the evidence did not show the move would improve these areas of the children's lives, but that requiring the children to remain in Nebraska with Corey would be detrimental to their emotional and developmental needs because they are not as emotionally bonded to him as they are to Angela. The court considered the children's testimony that they prefer to talk about personal issues with Angela. The court also noted that Corey did not handle emotionally charged situations very well; when he was told that the children wanted to move, he initially refused to speak with them and the next morning told them: "'I guess I'm not part of your life anymore.'"

Upon our de novo review, we find the evidence shows Angela was the children's primary caregiver from birth, and

even when the children were not in Angela's physical presence, she made every effort to ensure their needs were tended to. She was responsible for the children's daily needs, including preparation of food, laundry, school supplies, taking them to appointments and activities, helping with homework, and helping them through their personal issues. The evidence shows Corey is capable of caring for the children, but that his interactions with them were more limited to leisure activities. Although it appears the emotional, physical, and developmental needs may be met at a baseline level with either parent, the evidence indicates Angela is able to meet these needs more effectively. This factor weighs in favor of removal.

*(ii) Children's Opinion or Preference*

The children each stated that they preferred to move with Angela. Their testimony focused on their emotional bond with Angela and Moritz, their maternal grandmother, who testified that she planned to move with them if Angela were given permission to remove the children from Nebraska.

The record indicates that the children are old enough to evaluate the benefits of living in Nebraska versus Virginia. In their testimony, they articulated the reasons for their decision, including the level of care they receive in Angela's home and the bond that they share with her. They testified that they would miss Corey and the fun things they do together, but they stated their preference to live with Angela in Virginia. The parties agree that this factor weighs in favor of removal.

*(iii) Enhancement of Relocating Parent's Income or Employment*

As previously discussed, the evidence shows Angela's relocation to Virginia includes a nominal increase in income, but will offer greater opportunities for advancement and additional income within her field. The evidence shows Angela's expertise in her position at the VA is best suited for advancement within the VA system, and there are limited opportunities for

advancement in the Lincoln office. This factor weighs slightly in favor of removal.

*(iv) Degree to Which Housing or Living Conditions Would Be Improved*

At the time of trial, both parties were residing with their mothers, as the marital home had been recently sold. The parties also owned a smaller home which was being rented by Angela's mother, Moritz. Moritz testified that she did not plan to stay in Syracuse after the parties divorced. Corey testified that he would move into the smaller home until he could find another home in Syracuse. The district court noted the evidence indicated that the smaller home in Syracuse would not be suitable as a long-term residence for Corey if the children were to live with him full time.

Angela testified that she had secured a residence in a townhouse in Virginia. She testified that the townhouse is near the school the children would attend and had square footage similar to that of the marital home. The townhouse has three bedrooms, 3½ bathrooms, a yard, and a basement which would allow Moritz to live with them. Angela testified that she had not yet signed the lease, but she intended to sign it on the day of trial.

In previous cases, where the evidence does not establish any significant improvement in housing or living conditions, we have determined that the factor does not weigh in favor of or against removal. See *Dragon v. Dragon*, 21 Neb. App. 228, 838 N.W.2d 56 (2013), citing *Colling v. Colling*, 20 Neb. App. 98, 818 N.W.2d 637 (2012). The townhouse Angela planned to lease is potentially more suitable than the smaller home Corey would reside in. However, because Angela had not yet committed to the lease and Corey stated his intention to find a more suitable home in Syracuse, the housing conditions are relatively fluid and this factor does not weigh in favor of or against removal.

*(v) Existence of Educational Advantages*

Another factor to consider is whether the school in Virginia offers educational advantages. The evidence shows the school the children would attend was held out as an "up-and-coming" school in the state and was labeled by the "Virginia Middle School Association" as a "school to watch." The middle school and high school the children would attend in Virginia were ranked highly within the state and were recognized nationally. The schools in Syracuse were recently renovated and offered an excellent education. The children were doing well in school, and neither had special needs. Angela testified that she believed the schools in Syracuse and in Virginia were good schools and that she did not believe one was better than the other. It appears that schools in both locations are capable of serving the children's educational needs and that neither school has an advantage over the other. We find this factor does not weigh in favor of or against removal.

*(vi) Quality of Relationship Between Children and Each Parent*

The district court stated the move to Virginia would significantly reduce Corey's parenting time and negatively impact the children's relationship with him, as their school and extracurricular activities would be at a greater distance from his home. The district court also noted that the children have a stronger bond with Angela, as indicated by their desire to reside with her. The district court did not make a specific finding with regard to whether this factor weighed in favor of removal.

At trial, the children testified that they share a good relationship with both Corey and Angela. The children have certain activities that they enjoy doing with each parent, and both parents attend the majority of the children's parent-teacher conferences and extracurricular events.

A psychologist who did not work directly with either party testified that time and distance impact children's relationship

with their parents. She opined that a distance over 75 miles affects the relationship, because it is more difficult for them and their parents to see each other on a regular basis. She further testified that a weakened paternal relationship leads to risk factors, including drugs and alcohol, premarital sex, early pregnancy, and dropping out of school. Corey asserts that if the children were to move, it would weaken their relationship with him, and he implies that the children will be at a greater risk for the negative outcomes the psychologist discussed. Thus, he asserts, "it is in the children's best interests to maintain the bond with [Corey]." Brief for appellant at 28.

There is no question that it is in the children's best interests to maintain a bond with Corey, but that is not the question we are asked to consider. Rather, we must determine the impact on the quality of the relationship between the children and each parent. The evidence shows the children have a good relationship with both parents. The children enjoy golfing and hunting with Corey and shopping, getting their nails done, and playing games with Angela. Both parents have unique and beneficial relationships with the children, and it appears that both parties are willing to cooperate to ensure that those relationships are maintained. However, the children testified that Angela listens better to their problems, they believed their relationship with her would suffer if they were not allowed to move, and both stated their desire to reside with her. One child also testified that she believed Angela would be more proactive than Corey in ensuring that the children would have more frequent opportunities to see the noncustodial parent.

Angela testified that she would be willing to videotape the children's extracurricular activities so Corey would be able to see them, would keep him informed regarding the children's academic performance, and would help them to have regular telephone or "Skype" contact with Corey. She testified that she would make sure that Corey was able to maintain his relationship with the children if they were allowed to move with her.

We find that the children's strong bond with Angela, coupled with Angela's willingness to help the children maintain a strong bond with Corey, weighs in favor of allowing removal.

*(vii) Strength of Children's Ties to Present Community and Extended Family*

The district court considered the evidence that the children appeared to have strong ties to the Syracuse community through their school, extracurricular activities, and friends. They testified that they enjoy their school and activities, but believed that they would be able to participate in similar activities in Virginia and that they would be able to make new friends in their new school. The court noted that Corey did not work in Syracuse, but, rather, worked in Ashland, Nebraska, and that with the exception of the children's grandmothers, neither party had extended family in Nebraska. One grandmother, Moritz, testified that she intended to move from Syracuse after the divorce was final, no matter what finding the court made with regard to removal. Moritz said that if the children were to move to Virginia, she would move there too, and that if they did not, she would move to Colorado.

The evidence shows that the children do not have significant extended family in either Syracuse or Virginia and that no matter where they live, they would have one parent and at least one grandparent nearby. However, the children have lived in Syracuse for their entire lives, so their ties to their community through school, church, and extracurricular activities are strong, and although they are willing to create those types of community relationships in Virginia, they did not exist in Virginia at the time of trial. This factor weighs slightly against removal.

*(viii) Likelihood That Allowing or Denying Move Would Antagonize Hostilities Between Parties*

The court found that any relocation would likely antagonize hostilities between the parties. The court noted that the

parties appeared to be communicating well and cooperating with each other to meet the children's needs. However, if the children were to move, the court found, it was obvious that Corey would be "emotionally harmed and that [the] strain may antagonize the parties' relationship."

We find that either granting or denying removal has the potential to antagonize hostilities between the parties, so we do not find this factor weighs in favor of or against removal. See *Dragon v. Dragon*, 21 Neb. App. 228, 838 N.W.2d 56 (2013).

*(ix) Well-Being of Custodial Parent*

The final "quality of life" factor listed in *Farnsworth v. Farnsworth*, 257 Neb. 242, 250, 251, 597 N.W.2d 592, 598, 599 (1999), is consideration of the "living conditions and employment opportunities for the custodial parent because the best interests of the child are interwoven with the well-being of the custodial parent." A comparison of the physical residences is considered under a separate factor, as is the custodial parent's income or employment enhancements; therefore, we view this factor to focus more on how the proposed new living conditions and employment impact the well-being of the custodial parent.

We have already established that the move to Virginia allows Angela the opportunity for advancement of her career and a "fresh start" at her place of employment. Additionally, at the time of trial, Angela resided with Moritz because the family home had been sold. In Virginia, Angela planned to move into a townhouse with three bedrooms, a yard, and ample space for the children and Moritz to live with her. Angela expressed her desire to move for personal and professional reasons. We find the move to Virginia has the potential to enhance Angela's well-being, and we find this factor weighs in favor of removal.

*(x) Conclusion Regarding Quality of Life*

After considering all of the quality-of-life factors, we conclude upon our de novo review that Angela established

removal would enhance the quality of life for the children and for herself.

(c) Impact on Noncustodial Parent's Visitation

Relocating to Virginia will undoubtedly have an effect on the time Brooke and Hannah spend with Corey. Corey would not have the opportunity to exercise weekly parenting time, and it would undoubtedly affect his relationship with the children. Angela recognized the impact this change would have, and she stated that she believed Corey should have as much parenting time with the children as reasonably possible. She proposed a visitation schedule which would be used no matter what the court determined with regard to removal. The proposed plan allowed the noncustodial parent to take advantage of long weekends and breaks in the children's school schedule. The plan set forth a proposal for the parents to share time on the major holidays and allow the noncustodial parent to have the children for an extended period during the summer breaks. She testified that parenting time was a high priority and proposed offsetting child support costs to pay for transportation. Angela testified that she was willing to fly or drive with the children for visitation with Corey and that she had researched programs to allow the children to fly as unaccompanied minors to and from Nebraska.

The district court considered the impact the move would have on Corey's relationship with the children and ultimately concluded that Angela's role as the day-to-day caregiver was more important than Corey's role as "the 'fun' parent." The court found that the extended parenting time during summer and school breaks would allow the children to participate in the activities they enjoy sharing with Corey.

[11] Nebraska courts have recognized that a noncustodial parent's visitation rights are important, but a reduction in visitation time does not necessarily preclude a custodial parent from relocating for a legitimate reason. See *Hicks v. Hicks*, 223 Neb. 189, 388 N.W.2d 510 (1986). Rather, we focus on

the ability of the noncustodial parent to maintain a meaningful parent-child relationship, and such relationship is possible even if Brooke and Hannah move to Virginia. See *Maranville v. Dworak*, 17 Neb. App. 245, 758 N.W.2d 70 (2008). This factor weighs slightly against removal, because it will reduce the amount of in-person weekly contact the children have with Corey, but removal would still allow them to maintain a meaningful relationship.

(d) Conclusion on Best Interests

A de novo review of the evidence shows that the parents were not motivated by an effort on the part of either parent to frustrate the relationship of their children with the other and that the move would enhance the children's quality of life. Though the move has the potential to impact the relationship between Corey and the children, we find they will still be able to see one another frequently and continue sharing in the activities they enjoy; thus, Corey and the children will be able to maintain a meaningful relationship despite the distance. The record demonstrates sufficient evidence that it is in Brooke's and Hannah's best interests to move from Nebraska to Virginia.

## VI. CONCLUSION

Upon our de novo review, we find the district court did not err in finding that Angela had a legitimate reason to remove the children from the State of Nebraska and that the move was in the children's best interests.

Affirmed.

**Nebraska Court of Appeals**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# In re Interest of Alec S., a child under 18 years of age. State of Nebraska, appellee, v. Brenda G., appellant.

876 N.W.2d 395

Filed March 15, 2016. No. A-15-658.

1. **Parental Rights: Proof.** Neb. Rev. Stat. § 43-292 (Cum. Supp. 2014) 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.
2. ____: ____. Neb. Rev. Stat. § 43-292(7) (Cum. Supp. 2014) operates mechanically and, unlike the other subsections of the statute, does not require the State to adduce evidence of any specific fault on the part of a parent.
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. 2014), the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground.
4. **Parental Rights.** Parental rights may only be terminated if the court finds that termination is in the child's best interests.
5. ____. A termination of parental rights is a final and complete severance of the child from the parent.
6. ____. Parental rights should be terminated only in the absence of any reasonable alternative and as the last resort.
7. **Parental Rights: Presumptions: Proof.** There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that a parent is unfit.

8. **Parental Rights: Proof.** When termination is sought under Neb. Rev. Stat. § 43-292(7) (Cum. Supp. 2014), the element of best interests to support the termination of parental rights requires the State to prove by clear and convincing evidence that the parent is unfit.
9. **Parental Rights: Words and Phrases.** Parental unfitness means a personal deficiency or incapacity which has prevented, or probably will prevent, performance of a reasonable parental obligation in child rearing and which caused, or probably will result in, detriment to a child's well-being.
10. **Parental Rights: Parent and Child.** The law does not require perfection of a parent. Instead, a court should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child.

Appeal from the Separate Juvenile Court of Douglas County: Christopher Kelly, Judge. Reversed and remanded for further proceedings.

Matthew R. Kahler, of Finley & Kahler Law Firm, P.C., L.L.O., for appellant.

Donald W. Kleine, Douglas County Attorney, Anthony Hernandez, and Jocelyn Brasher, Senior Certified Law Student, for appellee.

Irwin, Pirtle and Riedmann, Judges.

Riedmann, Judge.

## INTRODUCTION

Brenda G. appeals from the order of the separate juvenile court of Douglas County which terminated her parental rights to her minor child, Alec S. We conclude that the State failed to adduce clear and convincing evidence that terminating Brenda's parental rights is in Alec's best interests. We therefore reverse, and remand for further proceedings.

## BACKGROUND

The State filed a petition on September 13, 2013, alleging that Alec, who was 8 years old at the time, was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008)

due to the faults or habits of Brenda. The petition asserted that Brenda had been diagnosed with posttraumatic stress disorder, depression, and anxiety and that her medical providers recommended inpatient treatment. As of September 13, Brenda had failed to check herself into "the in-patient program recommended by Dr. Patera." The petition alleged that Brenda was unable to provide proper parental care, support, or supervision for Alec and that he was at risk for harm. An amended petition filed 4 days later added a claim that Brenda's use of alcohol and/or controlled substances placed Alec at risk for harm. Alec was removed from Brenda's care and placed in the temporary custody of the Nebraska Department of Health and Human Services. He was adjudicated pursuant to § 43-247(3)(a) in January 2014.

In a disposition and permanency plan order dated March 18, 2014, Brenda was ordered to participate in a "Level 1 outpatient chemical dependency therapy program," submit to random drug and alcohol testing, participate in "programs at Community Alliance," attend family therapy with Alec, attend individual therapy, participate in psychiatric care, and attend supervised visitation. A September 16 review order continued the same requirements for Brenda, except she was no longer ordered to participate in a chemical dependency therapy program. The requirements contained in an order dated January 20, 2015, mirrored those in the September 2014 order.

On February 6, 2015, the State filed a motion to terminate Brenda's parental rights to Alec. The State sought termination under Neb. Rev. Stat. § 43-292(2), (6), and (7) (Cum. Supp. 2014). The State also alleged that termination of Brenda's parental rights was in the best interests of Alec. A termination hearing was held on June 12.

The State presented the testimony of four witnesses. Randy LaGrone is a clinical psychologist who Brenda began seeing for outpatient treatment in January 2013, before this case was initiated. She attended six sessions over the following year, but missed or canceled numerous other sessions due to "ongoing

major stressors in her life that disrupted compliance." LaGrone diagnosed Brenda with posttraumatic stress disorder, a panic disorder, and depression. He testified that she had experienced significant trauma in her life, including the death of her husband, his business partner, and her mother, as well as the assault of her mentally ill adult son. LaGrone testified that Brenda's conditions were very treatable and conditions with which people can make substantial progress. The biggest goal for Brenda was to establish consistency in treatment because structure and routine are important for those who have experienced trauma.

The State also presented the testimony of two mental health therapists, Mary Atwood and Jennifer Ratliff. Atwood saw Alec in September 2013, and he was diagnosed with adjustment disorder with mixed emotions. A treatment plan was developed for "working with [Alec's] emotions," but he said that he had already had trauma therapy and did not feel that he needed additional therapy. Alec only had one more individual session with Atwood, but Alec and Brenda saw Atwood for three sessions of family therapy beginning in March 2014. The goal was to enhance communication between Alec and Brenda because he did not feel that he could speak honestly with her. However, Brenda spent the session time "fussing" over Alec, asking him questions such as whether he had eaten and how his foster parents were treating him, so no progress was made during the sessions.

Ratliff began providing individual therapy to Alec in January 2015. She likewise diagnosed him with adjustment disorder, unspecified, and also identified features of attention deficit disorder. The goals for Alec's therapy were to identify coping skills, conflict resolution skills, and anger management skills; identify and express emotions; and address past trauma. Ratliff said he has made "some" progress on his goals.

In March 2015, Alec and Brenda began seeing Ratliff for family therapy. One of the goals for family therapy was to establish and improve communication, especially identifying

and expressing emotions and feelings. Similar to Atwood, Ratliff testified that during the early sessions, Brenda seemed preoccupied with how Alec was doing—whether he was eating, attending school, and bathing—and the pending case. They did, however, make progress at two later sessions in May, because Brenda did not talk about the case and was able to engage in therapeutic dialog with Alec.

Ratliff testified that there is a bond and attachment between Alec and Brenda. She said that Alec needs an environment where his physical and emotional needs are met consistently and any ongoing mental health services are provided to him, including psychiatric care for medication management. He also needs an environment where there are consistent rules and nonphysical discipline. In addition, according to Ratliff, Alec needs a structured and stable environment because he has features of attention deficit disorder.

If Brenda's parental rights were to be terminated, Ratliff would recommend that Brenda's relationship with Alec continue because of their established bond and attachment. Ratliff testified that she offered to facilitate a family therapy session with Alec's foster parents and Brenda to create a plan to maintain the relationship because she believes it would be detrimental to Alec's well-being if his relationship with Brenda was severed. Ratliff opined that it is in Alec's best interests that he maintain a relationship with Brenda.

The State's final witness was the caseworker who had taken over the case in February 2015, just 4 months prior to the termination hearing. She observed that Brenda had been ordered to participate in various services such as random drug and alcohol testing, therapy, and visitation, but her participation had been inconsistent. The caseworker was concerned because Brenda had made very little progress in the case, which had been pending for 21 months at the time of the termination hearing. She was also concerned because as late as February 2015, Brenda was still unable to display an understanding of why she needed to participate in the required services. The

caseworker opined that termination of Brenda's parental rights was in Alec's best interests due to the lack of progress in the case. She acknowledged Ratliff's recommendation that the relationship between Alec and Brenda continue and indicated that she would support the recommendation if the foster family was willing to allow the relationship to continue.

The juvenile court entered an order dated June 15, 2015. It found that although Brenda's performance in certain areas improved following the filing of the motion to terminate, she had failed to participate in services to the degree necessary to move toward reunification. Thus, the court determined that the State presented sufficient evidence to satisfy termination under § 43-292(2), (6), and (7). The court also determined that clear and convincing evidence supported a finding that termination of Brenda's parental rights was in Alec's best interests. Brenda timely appeals to this court.

## ASSIGNMENTS OF ERROR

Brenda assigns that the juvenile court erred in finding that (1) the State proved statutory grounds for termination by clear and convincing evidence and (2) the termination of her parental rights is in Alec's best interests.

## 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 Nicole M.*, 287 Neb. 685, 844 N.W.2d 65 (2014).

## ANALYSIS

*Grounds for Termination.*

[1] The bases for termination of parental rights in Nebraska 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 Brenda's parental rights to Alec, the juvenile court found that the State had presented clear and convincing evidence to satisfy § 43-292(2), (6), and (7), which provides in relevant part:

> The court may terminate all parental rights . . . when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .
>
> (2) The parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection;
>
> . . . .
>
> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts to preserve and reunify the family if required under section 43-283.01, under the direction of the court, have failed to correct the conditions leading to the determination; [and]
>
> (7) The juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months.

[2] Brenda concedes that Alec has been in an out-of-home placement for 15 or more months of the most recent 22 months. Alec was removed from Brenda's home on or about September 13, 2013. At the time the motion to terminate parental rights was filed on February 6, 2015, Alec had been in an out-of-home placement for almost 17 months. At the time the termination hearing began on June 12, Alec had been in an out-of-home placement for approximately 21 months. Despite Brenda's argument, § 43-292(7) operates mechanically and, unlike the other subsections of the statute, does not require the State to adduce evidence of any specific fault on the part of a parent. See *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). Our de novo review of the

record clearly and convincingly shows that grounds for termination of Brenda'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) or (6). Once a statutory basis for termination has been proved, the next inquiry is whether termination is in the child's best interests.

*Alec's Best Interests.*

[4-6] Although we find that statutory grounds for termination exist, parental rights may only be terminated if the court finds that termination is in the child's best interests. § 43-292. A termination of parental rights is a final and complete severance of the child from the parent. *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004). Therefore, with such severe and final consequences, parental rights should be terminated only in the absence of any reasonable alternative and as the last resort. *Id*.

[7] There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. *In re Interest of Nicole M.*, 287 Neb. 685, 844 N.W.2d 65 (2014). Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that a parent is unfit. *Id*.

[8,9] When termination is sought under § 43-292(7), the element of best interests to support the termination of parental rights requires the State to prove by clear and convincing evidence that the parent is unfit. *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007). Parental unfitness means a personal deficiency or incapacity which has prevented, or

probably will prevent, performance of a reasonable parental obligation in child rearing and which caused, or probably will result in, detriment to a child's well-being. *In re Interest of Nicole M., supra*.

In the present case, the State presented only four witnesses, including three mental health professionals and the caseworker who was assigned to the case at the time the motion to terminate Brenda's parental rights was filed. We find that the evidence in this case is similar to that presented in *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). In *In re Interest of Aaron D.*, the State presented the testimony of only one witness, the caseworker. On appeal, the Nebraska Supreme Court acknowledged that the caseworker for a family is likely to be an important witness, but cautioned that a caseworker should not be used as a proxy for all of the other witnesses whose expertise and testimony would have been helpful, and perhaps essential, in determining what was in the child's best interests. The Supreme Court also recognized that while some of the caseworker's testimony was based on her own observations, she largely testified based on her review of the records and reports generated by others who observed the parties. Reiterating that the evidence establishing that termination is in the child's best interests must be clear and convincing, the Supreme Court found that "the evidence in this record is, simply stated, neither clear nor convincing." *Id*. at 263, 691 N.W.2d at 175.

Similarly, the caseworker in the present case testified in large part based on her review of the records from others such as visitation supervisors and medical professionals, the vast majority of which records were not offered into evidence at the termination hearing. The case began because Brenda's medical providers, specifically a Dr. Patera, recommended that she undergo inpatient mental health treatment. There was no evidence received from Dr. Patera, either by way of testimony or medical records, as to the basis for Brenda's diagnoses or why he recommended inpatient treatment. Nor was there any

evidence presented as to how Brenda's mental health diagnoses and treatment needs affected her ability to safely parent Alec. There are some references in the record to Brenda's seeing a psychiatrist and taking prescription medication, but the State did not present any evidence from the psychiatrist who manages her prescriptions or offer any medical records detailing the need for medication or Brenda's prognosis. In sum, although LaGrone, a clinical psychologist, testified as to the multiple stressors in Brenda's life, there was very little evidence presented regarding what is continually and vaguely referred to as Brenda's "mental health needs" upon which the removal and adjudication were primarily based.

Further, the amended petition for adjudication references Brenda's use of alcohol and/or controlled substances, and she has been required to undergo random testing. There is no evidence in the record, however, of why. There was no evidence establishing that Brenda has an alcohol or drug addiction or that her use of drugs impacted her ability to parent Alec. We note that after September 2014, the juvenile court no longer required Brenda to participate in a chemical dependency program. From our review of the record, it appears that any treatment recommendations for Brenda were to address mental health issues, not substance abuse issues.

More important, however, the record lacks substantive testimony from those close to Alec such as visitation supervisors, his foster parents, his doctors, or his teachers. As iterated in *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005), the primary consideration in determining whether to terminate parental rights is the best interests of the child, and thus, a juvenile court should have at its disposal the information necessary to make the determination regarding the minor child's best interests. Yet here, similar to *In re Interest of Aaron D.*, the evidence focused on Brenda's personal shortcomings, as opposed to placing the focus on Alec, and there was little evidence presented from any of the people most able to testify as to Alec's condition, circumstances, and best

interests. Atwood, a mental health therapist, testified she only saw Alec on two occasions for individual therapy and three occasions for family therapy. We gather from the record that the purpose of her testimony was to show Brenda's inconsistency in attending family therapy, which Atwood primarily attributed to transportation issues, and her perception of a disconnect between Alec and Brenda, although that perception is contrary to the visitation records and Ratliff's testimony evidencing a bond between the two.

Although Ratliff, who provides current therapy for Alec and Brenda, testified, we have no information as to how Alec does in school, whether he experiences behaviors in his foster home, whether he is physically healthy, or how he responds after visits with Brenda. Ratliff testified generally that in therapy, Alec is working on coping skills, handling his emotions, and addressing past trauma, but there is no explanation as to whether Alec's shortcomings stem from Brenda's parenting or from general trauma such as the death of his stepfather. The record is largely devoid of any explanation of the nature and extent of Alec's physical, mental, or emotional condition. Ratliff referenced psychiatric care for medication management for Alec, but the record lacks any evidence indicating that Alec is currently taking medication or should be taking medication, nor was there any evidence that Alec is seeing a psychiatric provider who is prescribing or could prescribe medication for him.

Significantly, Ratliff, the witness who had the most personal contact with Alec, recommended that the relationship between Alec and Brenda continue even if Brenda's parental rights were terminated. Not only was that her recommendation, but she opined that it would be in Alec's best interests to maintain a relationship with Brenda and that it would be "detrimental to [his] well-being" to sever that relationship.

Despite this, we recognize that the State's evidence raises questions about Brenda's ability to parent Alec. The fact that Brenda has been diagnosed with several mental health

disorders and has failed to consistently attend treatment for those conditions is concerning. It is also concerning that as of February 2015, Brenda still lacked an understanding as to why the case was ongoing and why her participation in the services offered to her was necessary and best for Alec. Between February and June 2015, Brenda did make progress, however. The caseworker acknowledged that in that timeframe, Brenda found stable and appropriate housing for herself, consistently attended visitation, made progress during family therapy sessions with Alec, and improved her communication with the caseworker, including signing release forms to allow access to her medical records. Additionally, the more recent visitation notes no longer report any inappropriate questions from Brenda inquiring into the case or treatment by Alec's foster parents nor are there mentions of Brenda yelling or her anger escalating during visits.

We acknowledge that the caseworker opined that terminating Brenda's parental rights would be in Alec's best interests based on the length of the case and the absence of progress toward the case plan goals. However, the Nebraska Supreme Court has noted the limits of caseworker testimony, given that caseworkers spend relatively little time in the home with the families and often serve as proxies for the visitation workers and therapists who have closer family contact. See, e.g., *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005).

[10] We also keep in mind that the law does not require perfection of a parent. See *id*. Instead, we should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child. *Id*. Brenda has shown recent improvement in addressing her goals, particularly between February and June 2015, but progress was reported in June 2014 as well. A visitation note from that month indicated that Brenda had been working on staying consistent with the services offered through different agencies and workers and had been doing better. A visitation report

from the following month recommended that visits should be increased.

The record is also replete with references to the bond and loving relationship between Alec and Brenda. The visitation notes include comments such as, "Brenda is very loving towards Alec. She is very attentive during visits and always gives him her full attention. In return Alec is very affectionate and provides lots of information for her so they never run out of things to talk about." A note from June 2014 reads, "Brenda loves Alec very much, and it shows at every visit." A July 2014 visitation note reported, "Brenda shows lots of love and affection to Alec who shows it back. Both hope to have more visits plus visits at home."

Based on our de novo review of the record, we conclude that the juvenile court erred in finding that the State established, by clear and convincing evidence, that termination of Brenda's parental rights was in Alec's best interests.

## CONCLUSION

Because the evidence does not show clearly and convincingly that termination of Brenda's parental rights is in the best interests of Alec at this time, we reverse, and remand for further proceedings.

Reversed and remanded for
further proceedings.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# In re Interest of Kylie P., a child under 18 years of age. State of Nebraska, appellee, v. Kylie P., appellant.

877 N.W.2d 583

Filed March 15, 2016. No. A-15-707.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which the appellate court must resolve independently of the trial court.
3. **Juvenile Courts: Probation and Parole.** Neb. Rev. Stat. § 43-286 (Cum. Supp. 2014), governing placement of a juvenile at a youth rehabilitation and treatment center as a condition of an order of intensive supervised probation, requires that before a juvenile is placed in a youth rehabilitation and treatment center, the Office of Probation Administration must review and consider thoroughly what would be a reliable alternative to commitment at such a center. Upon reviewing the juvenile's file and record, the Office of Probation Administration shall provide the court with a report stating whether any such untried conditions of probation or community-based services have a reasonable possibility for success or that all levels of probation and options for community-based services have been studied thoroughly and that none are feasible.
4. ____: ____. Neb. Rev. Stat. § 43-286 (Cum. Supp. 2014), governing placement of a juvenile at a youth rehabilitation and treatment center, does not require that every conceivable probation condition has been tried and failed, nor does it require repetition of ineffective measures or the provision of services that have already proved to be unsuccessful.

5. ____: ____. The record must establish that all levels of probation and options for community-based services have been thoroughly considered before the court may commit a juvenile to a youth rehabilitation and treatment center.

Appeal from the Separate Juvenile Court of Sarpy County: Lawrence D. Gendler, Judge. Reversed and remanded for further proceedings.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, and Hannah McFall, Senior Certified Law Student, for appellant.

Carolyn A. Rothery, Deputy Sarpy County Attorney, and Andrew T. Erickson, Senior Certified Law Student, for appellee.

Irwin, Pirtle, and Riedmann, Judges.

Pirtle, Judge.

## INTRODUCTION

Kylie P., a minor, was committed to the Office of Juvenile Services for placement at the Youth Rehabilitation and Treatment Center (YRTC) in Geneva, Nebraska. She appeals, asserting the juvenile court erred by not following the statutory procedure for a commitment and erred in finding she had exhausted all levels of probation supervision and options for community-based services. For the reasons that follow, we reverse, and remand for further proceedings consistent with this opinion.

## BACKGROUND

On February 3, 2015, a juvenile petition was filed alleging multiple counts against Kylie, a child as described in Neb. Rev. Stat. § 43-247(1), (2), or (4) (Cum. Supp. 2014). The allegations included theft by shoplifting; violation of a city curfew; truancy; and being a wayward, habitually disobedient, or uncontrollable child.

On February 23, 2015, Kylie appeared for her arraignment in the separate juvenile court of Sarpy County, Nebraska, and was advised of her rights. She agreed to a bond contract and a mental health evaluation with the understanding that she was being placed on a supervisory status with the juvenile probation office.

At a review hearing on March 2, 2015, probation officer CJ Zimmerer submitted a supervision summary to the court. The summary described Kylie as uncooperative and argumentative, and stated that it was clear she was not going to abide by the conditions of the bond contract, including curfew, school attendance, and making progress in her school courses. The summary stated that Kylie admitted to having a "mental health affliction," but that she was not taking the medications prescribed to her. Instead, Zimmerer stated that it appeared Kylie was self-medicating with marijuana. Zimmerer reported that Kylie did not attend the sessions she was scheduled to at an alternative education program. Zimmerer explored other options, but "SCEP or the Daily Reporting Center" were not available at that time because each program had a waiting list. The summary stated, "Kylie has completely disregarded major portions of the bond contract, and shows no signs of changing her behaviors. This officer lacks the sufficient power to sanction Kylie to address the issues that are occurring."

A supplemental juvenile petition was filed on March 13, 2015, alleging an additional count of possession of marijuana, 1 ounce or less. The factual basis for this count was that friends brought the drug into Kylie's home and that they were preparing to use it when a court officer made an unannounced visit.

Kylie's attorney filed a motion for hearing on April 3, 2015, and a hearing took place on April 7. A memorandum prepared by the Sarpy County sheriff's office, Juvenile Justice Center, noted that Kylie had been placed on "lockdown" because she had not complied with the Juvenile Justice Center's "CARE" program, a structured supervision program. Zimmerer

indicated that Kylie's efforts in school had improved, but that she felt "trapped" and anxious when wearing an ankle monitor used by the CARE program. The court vacated the CARE program and ordered Kylie to be placed on "tracker services" under the supervision of the juvenile probation office, which allowed her to be tracked and supervised without a monitor attached to her.

An application for a capias arrest warrant was submitted on April 23, 2015, because Kylie had run from her home. On April 27, Kylie's mother indicated her belief that it would be best if Kylie did not return to her home.

On May 4, 2015, the juvenile court reviewed Kylie's placement, per her request. On May 15, Kylie sought permission for individual therapy because she was having difficulty with the group setting of her drug treatment program. The court authorized "applications for placement, including shelter care."

On May 29, 2015, placement was discussed again, including possible group homes, foster care, and independent living. The court entertained the option to place Kylie with her grandparents in Mead, Nebraska, and scheduled a disposition hearing on June 4 to provide time to investigate the placement options.

On June 4, 2015, per an agreement between the parties, the court placed Kylie in the custody of her paternal grandparents subject to the continued supervision by probation. Arrangements had to be made for school, drug testing, and monitoring, because the grandparents lived outside of Sarpy County.

On June 24, 2015, the State filed a motion for expedited hearing, because Kylie had violated the terms of her placement. An application was filed for a capias arrest warrant on June 29, because Kylie left her home and had removed her electronic monitor tracking device.

At a hearing held on July 2, 2015, the court found that all efforts for probation and placement had been exhausted. The

court reviewed Kylie's history, specifically her lack of success in the CARE program, the unsuccessful placements with her mother and paternal grandparents, and the necessity to issue a capias arrest warrant twice in a short period of time. The court found that probation was "no longer an option." Kylie requested to be released and unsuccessfully terminated from her probation. Instead, the court ordered Kylie to be placed on intensive supervision probation and committed to the Office of Juvenile Services for placement at the YRTC in Geneva.

## ASSIGNMENTS OF ERROR

Kylie asserts the juvenile court erred in committing her to YRTC in Geneva because the statutory procedure for making such a commitment was not followed. She also asserts her commitment was in error because all levels of probation supervision and options for community-based services had not been exhausted.

## 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 Nedhal A.*, 289 Neb. 711, 856 N.W.2d 565 (2014). Statutory interpretation is a question of law, which we resolve independently of the trial court. *Id.*

## ANALYSIS

Kylie asserts the juvenile court erred in committing her to YRTC because the statutory procedure set forth in Neb. Rev. Stat. § 43-286 (Cum. Supp. 2014) was not followed. At all times relevant to this case, § 43-286(1)(b)(ii) applied to all juveniles committed to the Office of Juvenile Services for placement at the YRTC on or after July 1, 2013. Section 43-286(1)(b)(ii) provides:

> When it is alleged that the juvenile has exhausted all levels of probation supervision and options for

community-based services and section 43-251.01 has been satisfied, a motion for commitment to a youth rehabilitation and treatment center may be filed and proceedings held as follows:

(A) The motion shall set forth specific factual allegations that support the motion and a copy of such motion shall be served on all persons required to be served by sections 43-262 and 43-267; and

(B) The juvenile shall be entitled to a hearing before the court to determine the validity of the allegations. At such hearing the burden is upon the state by a preponderance of the evidence to show that:

(I) All levels of probation supervision have been exhausted;

(II) All options for community-based services have been exhausted; and

(III) Placement at a youth rehabilitation and treatment center is a matter of immediate and urgent necessity for the protection of the juvenile or the person or property of another or if it appears that such juvenile is likely to flee the jurisdiction of the court.

[3,4] In *In re Interest of Nedhal A., supra*, the Nebraska Supreme Court considered the question of what is required to "exhaust" all levels of probation supervision and options for community-based services in the context of § 43-286. The court found that the Legislature intended the placement of a juvenile at YRTC to be a "last resort" and concluded that "before a juvenile is placed in YRTC, the Office of Probation Administration must review and consider thoroughly what would be a reliable alternative to commitment at YRTC." *In re Interest of Nedhal A.*, 289 Neb. at 715, 716, 856 N.W.2d at 569. The court determined that upon a review of the juvenile's file and record, the Office of Probation Administration "shall provide the court with a report stating whether any such untried conditions of probation or community-based services have a reasonable probability for success or that all levels of

probation and options for community-based services have been studied thoroughly and that none are feasible." *Id.* at 716, 856 N.W.2d at 569. The court noted this was not meant to imply that "every conceivable probation condition has been tried and failed" or that the statute requires repetition of ineffective measures or the provision of services that have already proved to be unsuccessful. *Id.*

In *In re Interest of Nedhal A.*, 289 Neb. 711, 717, 856 N.W.2d 565, 569 (2014), the Nebraska Supreme Court also stated, "In its determination whether all levels of probation supervision had been exhausted, the juvenile court should have required a review by the Office of Probation Administration concerning what levels of probation and options for community-based services, if any, could have been used in [the juvenile's] case." The Supreme Court held that the procedure followed in that case did not conform to the requirements of § 43-286 and that without a report, the court could not determine which possible probationary conditions, if any, could be successful. The Supreme Court concluded that "[a] review by the Office of Probation Administration may determine that there are no less restrictive alternatives to confinement at YRTC, but until this has been established, all levels of probation pursuant to § 43-286 have not been exhausted." *In re Interest of Nedhal A.*, 289 Neb. at 717, 856 N.W.2d at 570.

In this case, Kylie was subjected to multiple levels of probation supervision and community-based services, and although she made sporadic progress, none were successful. It is not clear from the decision in *In re Interest of Nedhal A., supra*, whether the report from probation must be written or whether it may be orally presented to the court. What is clear, however, is that in this case there was no specific motion for commitment or report of any kind presented by the Office of Probation Administration stating whether any "untried conditions of probation or community-based services have a reasonable possibility for success or that all levels of probation and options for community-based services have been studied

thoroughly and that none are feasible." See *id.* at 716, 856 N.W.2d at 569.

An individual from the Office of Probation Administration was present at each of the hearings and discussed Kylie's progress, but there was no written or oral recommendation specifically requesting commitment to YRTC, or a representation that Kylie had exhausted the options which were less restrictive than commitment to YRTC. The only written report that probation submitted to the court, and is included in the record before us, is a supervision summary dated February 27, 2015. The report noted that Kylie was not cooperative with the programs in place, but it makes no reference to other options which may have been available and makes no specific recommendation regarding the disposition of Kylie's case.

At the hearing on May 8, 2015, the court ordered a predisposition report from probation. Probation officer Zimmerer was present at the hearing on May 27 and indicated a report was "in the process of being completed," but there is no indication that it was provided to the court and it is not included in the record before us. On May 29, Zimmerer stated that applications for group homes, foster homes, and independent living were being submitted and that interviews with two group home programs were possible. At that time, Zimmerer recommended that Kylie be detained until "we can figure out a solid option" and noted that placement with Kylie's paternal grandparents was a possibility.

[5] The court set forth the case history at the hearing on July 2, 2015, and ultimately determined that Kylie had "run out of options." It is evident that multiple probationary conditions and community-based services had been unsuccessful. However, the Nebraska Supreme Court has held that "the record must establish that all levels of probation and options for community-based services have been thoroughly considered before the court may commit [the juvenile] to YRTC." See *In re Interest of Nedhal A.*, 289 Neb. 711, 717, 856 N.W.2d 565, 570 (2014). There was no report from the Office of

Probation Administration detailing whether any further services were available to Kylie or were likely to be successful. Accordingly, we find that the juvenile court erred in determining all levels of supervision and options for community-based services had been exhausted and that it was an error to commit Kylie to YRTC at that time.

Because we conclude that the juvenile court erred in committing Kylie to YRTC at the July 2, 2015, hearing, we do not reach her remaining assertion that the court erred in finding that the State met its burden of proof to show that commitment to YRTC was necessary. See *Facilities Cost Mgmt. Group v. Otoe Cty. Sch. Dist.*, 291 Neb. 642, 868 N.W.2d 67 (2015) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

## CONCLUSION

For the reasons stated above, we reverse the judgment of the juvenile court placing Kylie at YRTC and remand the cause for further proceedings consistent with this opinion.

Reversed and remanded for
further proceedings.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Israhel Cruz, appellant.

876 N.W.2d 404

Filed March 22, 2016. No. A-15-097.

1. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, regardless of whether the evidence is direct, circumstantial, or a combination thereof, 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.
2. **Criminal Law: Evidence: Appeal and Error.** The relevant question for an appellate court reviewing the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **Criminal Attempt: Intent.** A defendant's conduct rises to criminal attempt if he or she intentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime.
4. ____: ____. Conduct shall not be considered a substantial step unless it is strongly corroborative of the defendant's criminal intent.
5. **Criminal Attempt: Intent: Sexual Assault.** To support a conviction of either attempted first degree sexual assault of a child or attempted incest, the actor's conduct must be strongly corroborative of an intent to penetrate the victim.
6. **Double Jeopardy: Evidence: Appeal and Error.** The Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient.
7. **Trial: Rules of Evidence: Appeal and Error.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

8. **Trial: Evidence: Witnesses.** An offer of proof must demonstrate to the court that questions put to a witness call for competent evidence.
9. **Sexual Assault: Evidence: Proof.** Evidence of a victim's allegedly false prior claims of sexual assault is properly excluded where the defendant made no showing that the prior claims were, in fact, false.
10. **Effectiveness of Counsel: Proof.** In order to prevail on a claim for ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that he or she was prejudiced by such deficiency.
11. ____: ____. The two prongs of the ineffective assistance test, deficient performance and prejudice, may be addressed in either order.
12. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. Rather, the determining factor is whether the record is sufficient to adequately review the question.
13. **Trial: Joinder.** The standard for joinder of offenses is set forth in Neb. Rev. Stat. § 29-2002 (Reissue 2008).
14. ____: ____. Offenses are properly joinable under Neb. Rev. Stat. § 29-2002(1) (Reissue 2008) if they are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
15. ____: ____. Whether offenses are properly joined involves a two-stage analysis in which it is determined first whether the offenses are related and properly joinable and second whether an otherwise proper joinder was prejudicial to the defendant.
16. **Trial: Joinder: Proof.** A defendant opposing joinder has the burden of proving prejudice.
17. **Trial: Joinder: Evidence: Juries.** Prejudice usually does not occur from joined charges if the evidence is sufficiently simple and distinct for the jury to easily separate evidence of the charges during deliberations.
18. **Sentences: Evidence.** A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed.
19. **Sentences: Probation and Parole.** When attempting to determine at sentencing whether the defendant is a proper candidate for probation and rehabilitation, the court, of necessity, must consider whether the defendant acknowledges his or her guilt.
20. **Sentences.** A defendant's lack of remorse is a proper factor for the court to consider at sentencing.
21. ____. A defendant's failure to take responsibility for his or her actions is a proper factor for the court to consider at sentencing.

22. ____. When imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education and experience, social and cultural background, past criminal record, and motivation for the offense, as well as the nature of the offense and the violence involved in the commission of the crime.
23. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.

Appeal from the District Court for Dakota County: Paul J. Vaughan, Judge. Affirmed in part, and in part reversed and vacated.

Zachary S. Hindman, of Bikakis, Mayne, Arneson, Hindman & Hisey, for appellant.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

Irwin, Pirtle, and Riedmann, Judges.

Irwin, Judge.

## I. INTRODUCTION

Israhel Cruz appeals his convictions and sentences for attempted first degree sexual assault of a child and attempted incest as to his daughter, G.C., as well as his sentence for child abuse of G.C. Cruz also appeals his convictions and sentences for seven charges relating to his other daughter, V.C.: first degree sexual assault of a child, incest, two counts of manufacturing a visual depiction of sexually explicit conduct with a child as a participant, two counts of possessing a visual depiction of sexually explicit conduct with a child as a participant, and child abuse. On appeal, Cruz argues that there was insufficient evidence to support his convictions for attempted first degree sexual assault and attempted incest as to G.C., that the district court erred in not permitting evidence of V.C.'s allegation of a prior sexual assault, that Cruz'

trial counsel was ineffective, and that Cruz received excessive sentences.

Upon our review, we find that there was insufficient evidence to support Cruz' convictions for attempted first degree sexual assault of G.C. and attempted incest with G.C. We reverse Cruz' convictions for attempted first degree sexual assault of a child and attempted incest and vacate his sentences for those charges. We find no merit to Cruz' other assertions on appeal. Accordingly, we affirm Cruz' convictions and sentences for child abuse as to G.C. and for all of the charges relating to V.C.

## II. BACKGROUND

The events giving rise to this action involve G.C. and V.C., the biological daughters of Cruz. V.C. was born in May 2001 and G.C. was born in May 2003. Cruz was born in July 1984.

On February 27, 2014, G.C. told a friend that her father, Cruz, had been sexually abusing her. The friend informed her mother, who reported the abuse to the Department of Health and Human Services. As a result of the report to the department, a child and family services specialist went to the Cruz home on the evening of February 27. The specialist interviewed G.C. and V.C. separately. After interviewing the girls, the child and family services specialist determined G.C. and V.C. should be removed from the home for their safety.

The day after G.C. and V.C. were removed from their home, both girls met with a sexual assault nurse examiner and a forensic interviewer. An examination revealed that V.C. had missing hymenal tissue consistent with repeated penetration. V.C. also tested positive for chlamydia, a sexually transmitted infection frequently spread through penetration. G.C. was too upset to submit to a physical examination that day, but a later examination revealed no abnormalities. Cruz later tested positive for chlamydia.

Cruz was arrested and eventually charged with three counts relating to G.C.: first degree sexual assault of a child, incest,

and child abuse. Cruz was also charged with seven counts relating to V.C.: first degree sexual assault of a child, incest, two counts of manufacturing a visual depiction of sexually explicit conduct with a child as a participant, two counts of possessing a visual depiction of sexually explicit conduct with a child as a participant, and child abuse.

At the trial, both girls testified. According to V.C., Cruz would come into her room at night and have sex with her. When asked what she meant by "sex," V.C. said, "Like a mom and dad will create a baby." With respect to the specific body parts involved, V.C. identified Cruz' "bottom" as an area encompassing his penis on a diagram. V.C. identified her "bottom" as an area encompassing her lower abdomen, thighs, and vagina. V.C. testified that her father, Cruz, would put his bottom in her mouth. V.C. also testified that he would touch her bottom with his bottom, move up and down, and then her bottom would hurt afterward. The State asked V.C. if what "you were describing earlier when your dad would come into your room" had happened more than once. V.C. testified that it had happened more than once and that it had started when she was 9 or 10 years old. V.C. testified that the last time it happened was the Saturday before she was interviewed.

V.C. also testified that Cruz had taken inappropriate pictures of her. V.C. testified that Cruz had used his cell phone to take two pictures that depicted V.C. in her bra and Cruz in his boxers. According to V.C., Cruz also had naked pictures of V.C. on his cell phone that V.C. had taken herself.

G.C. testified that Cruz would come into her room while she was sleeping. According to G.C., Cruz would remove G.C.'s clothes, remove his own clothes, and touch G.C. with what she called Cruz' "bottom parts." On a diagram depicting a naked man, G.C. circled an area that included the penis as being the man's "bottom parts." G.C. testified that Cruz would touch his "bottom parts" to her "bottom parts," which she identified on a diagram as being the area below her navel and encompassing her right hip, crotch, and thighs. The State asked G.C.

whether "[w]hat you just described with his bottom part touching your bottom part" had happened more than one time. G.C. testified that it had happened more than once and that "the last time" was 1 or 2 weeks before her interview.

At the close of the State's case, Cruz moved to dismiss all 10 counts. The court denied the motion as to eight of the counts, but reserved ruling on the counts of first degree sexual assault of G.C. and incest with G.C. The court stated it was not satisfied that the State had presented evidence of a required element of both first degree sexual assault of a child and incest, namely penetration.

Cruz then proceeded to put on his case in chief, including calling G.C. to the stand. Cruz' attorney asked G.C., "[When was] the last time . . . anything happened between you and your father . . . ?" G.C. testified that "the last time my dad did it" was 2 to 3 weeks before she was removed from the home. G.C. testified that during the last incident, Cruz had removed G.C.'s pants. Cruz' attorney asked G.C., "[D]id he then touch you on any part — any part of your body?" to which G.C. replied, "Yes."

On the final day of trial, the court ruled on Cruz' motion to dismiss the counts of first degree sexual assault of a child and incest pertaining to G.C. The court overruled the motion to dismiss the counts outright, but decided to instruct the jury as to the lesser-included offenses of attempted first degree sexual assault of a child and attempted incest.

The jury found Cruz guilty of all 10 counts.

For the charges involving G.C., the trial court imposed the following sentences: (1) 15 to 20 years' imprisonment for attempted sexual assault of a child in the first degree, (2) 1 to 3 years' imprisonment for attempted incest, and (3) 2 to 5 years' imprisonment for child abuse. For the charges involving V.C., the court imposed the following sentences: (1) 30 to 40 years' imprisonment for first degree sexual assault of a child, (2) 3 to 5 years' imprisonment for incest, (3) 3 to 5 years' imprisonment for the first count of manufacturing a visual

depiction of sexually explicit conduct with a child as a participant, (4) 3 to 5 years' imprisonment for the second count of manufacturing a visual depiction of sexually explicit conduct with a child as a participant, (5) 1 to 3 years' imprisonment for the first count of possession of a visual depiction of sexually explicit conduct with a child as a participant, (6) 1 to 3 years' imprisonment for the second count of possession of a visual depiction of sexually explicit conduct with a child as a participant, and (7) 2 to 5 years' imprisonment for child abuse. The court ordered that the sentences be served consecutively and gave Cruz credit for 314 days previously served.

Cruz appeals from his convictions on all the counts except child abuse as to G.C. and from his sentences on all 10 convictions. Additional facts will be discussed, as necessary, in the analysis section of this opinion.

## III. ASSIGNMENTS OF ERROR

On appeal, Cruz assigns numerous errors. Those assigned errors, restated and renumbered, are that (1) there was insufficient evidence to support Cruz' convictions for attempted first degree sexual assault of G.C. and attempted incest with G.C.; (2) the trial court erred in excluding evidence of V.C.'s lack of credibility with respect to a prior allegation of sexual abuse; (3) Cruz' trial counsel was ineffective in several ways, including failing to request a limiting instruction, failing to move to sever the charges, failing to investigate V.C.'s sexual history, and failing to object to a violation of Cruz' Fifth Amendment rights at sentencing; and (4) the sentences imposed upon Cruz were excessive.

## IV. ANALYSIS

### 1. Sufficiency of Evidence for Attempted First Degree Sexual Assault of G.C. and Attempted Incest With G.C.

Cruz argues that there was insufficient evidence to support his convictions for attempted first degree sexual assault

of G.C. and attempted incest with G.C. We note that Cruz does not argue the sufficiency of the evidence for child abuse of G.C. With respect to attempted first degree sexual assault and attempted incest of G.C., Cruz argues that there was inadequate evidence to prove an essential element of both crimes—attempted penetration. Cruz also asserts that there was insufficient evidence that the attempted sexual assault and attempted incest occurred within the timeframe set forth in the jury instructions. The evidence presented does not strongly corroborate Cruz' intent to penetrate G.C. as required by law. We therefore agree that there was insufficient evidence to support Cruz' convictions for attempted first degree sexual assault of a child and attempted incest.

[1,2] In reviewing a sufficiency of the evidence claim, regardless of whether the evidence is direct, circumstantial, or a combination thereof, 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. See *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015). 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. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015).

[3] A defendant's conduct rises to criminal attempt if he or she intentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime. *State v. Babbitt*, 277 Neb. 327, 762 N.W.2d 58 (2009); Neb. Rev. Stat. § 28-201 (Cum. Supp. 2014).

[4] Conduct shall not be considered a substantial step unless it is strongly corroborative of the defendant's criminal intent. *Babbitt, supra*.

In the case at hand, both first degree sexual assault of a child and incest require penetration. The incest statute provides:

"Any person who shall knowingly . . . engage in sexual penetration with any person who falls within the [applicable] degree[] of consanguinity . . . commits incest." Neb. Rev. Stat. § 28-703(1) (Reissue 2008). The relationship between parents and children is a prohibited degree of consanguinity for incest. Neb. Rev. Stat. § 28-702 (Reissue 2008).

The statute prohibiting first degree sexual assault of a child provides as follows: "A person commits sexual assault of a child in the first degree . . . [w]hen he . . . subjects another person under twelve years of age to sexual penetration and the actor is at least nineteen years of age or older." Neb. Rev. Stat. § 28-319.01(1)(a) (Cum. Supp. 2014). In contrast to first degree sexual assault of a child, second and third degree sexual assault of a child require only that the actor subject the child to "sexual contact," not penetration. See Neb. Rev. Stat. § 28-320 (Reissue 2008).

[5] Because both first degree sexual assault of a child and incest require penetration, attempted first degree sexual assault of a child and attempted incest require proof of attempted penetration. That is, in order to support Cruz' convictions for attempted first degree sexual assault of a child and attempted incest, Cruz' conduct must be strongly corroborative of his intent to penetrate G.C. See *Babbitt, supra*. See, also, § 28-201.

G.C. testified that Cruz touched his "bottom parts" to her "bottom parts." G.C. identified Cruz' bottom parts as an area including his penis and her bottom parts as an area encompassing her hip, thighs, and vagina. When called as a witness for the State, G.C. testified that "the last time" had been 1 to 2 weeks before her interview. When called as a witness for Cruz, G.C. testified that the most recent incident had occurred 2 to 3 weeks before she was removed from the home when Cruz had removed G.C.'s pants and touched her on some part of her body. Viewed in the light most favorable to the State, G.C.'s statements could be interpreted as meaning that during the most recent incident, Cruz touched his penis to her vagina.

In other cases of attempted first degree sexual assault, the defendant's intention to penetrate the victim can be inferred from the circumstances which prevented the defendant from completing the crime. For example, in *State v. Swoopes*, 223 Neb. 914, 395 N.W.2d 500 (1986), *overruled on other grounds, State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987), the defendant entered the victim's house, put a knife to her throat, and attempted to drag her upstairs. The victim struggled while the defendant reached down the victim's shirt and fondled her breast. *Id.* The victim eventually succeeded in pulling loose from the defendant and ran away, at which point the defendant fled. *Id.* In *Swoopes*, the fact finder could infer that the defendant had the intent to subject the victim to sexual penetration but had been unable to do so because the victim interrupted the sexual assault by struggling and fleeing. The fact that the victim's struggle—not the defendant's voluntary choice—ended the encounter supports an inference that the defendant intended his actions to culminate in a different act: penetration. See *id.* See, also, *State v. Jameson*, 239 Neb. 109, 474 N.W.2d 475 (1991) (finding sufficient evidence to support defendant's conviction of attempted first degree sexual assault where defendant entered victim's house, crawled into victim's bed, and placed his hand and penis in her vaginal area before victim freed herself and called police); *State v. Luff*, 18 Neb. App. 422, 783 N.W.2d 625 (2010) (upholding defendant's conviction for attempted first degree sexual assault of child where defendant touched victim's vagina with his finger and penis before victim got off bed where assault was occurring); *State v. Schmidt*, 5 Neb. App. 653, 562 N.W.2d 859 (1997) (finding sufficient evidence to support defendant's attempted first degree sexual assault conviction where defendant had transported victim to isolated spot, hit her on head, and removed her shirt and bra before victim halted assault by struggling, running, and screaming).

These cases are in contrast to the facts of the case at hand. Construing the evidence in the light most favorable to the State as we are required to do, the evidence shows that Cruz touched G.C.'s vagina with his penis, but it does not demonstrate that Cruz did so with the intent that his actions culminate in a different act, such as penetration. After eliciting G.C.'s testimony that her father had touched his "bottom parts" to her "bottom parts," the State did not ask G.C. any additional questions, such as why Cruz stopped touching her, or any other questions that would allow us to draw the inference that he intended to penetrate her at that time. Unlike in the cases discussed above, the State adduced no evidence that Cruz was interrupted or otherwise prevented from penetrating G.C. Because of this deficiency in evidence, we must therefore conclude that Cruz' actions are not strongly corroborative of his intention to penetrate G.C. Cf. *State v. Babbitt*, 277 Neb. 327, 762 N.W.2d 58 (2009). While the evidence may have supported a finding that Cruz subjected G.C. to sexual contact as required for second or third degree sexual assault, the State failed to adduce evidence of Cruz' intent to penetrate G.C. as required to convict him of attempted first degree sexual assault.

We conclude that there was insufficient evidence to support Cruz' convictions for attempted first degree sexual assault of a child and attempted incest. Because we conclude the evidence was insufficient to support Cruz' convictions, we need not address his alternative argument regarding the timing of the offenses.

[6] The Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient. *State v. Welch*, 275 Neb. 517, 747 N.W.2d 613 (2008). Because we find the evidence legally insufficient, Cruz cannot be retried on the charges of attempted sexual assault of a child in the first degree and attempted incest. We reverse Cruz' convictions for attempted first degree sexual assault

of a child and attempted incest and vacate his sentences for those charges.

### 2. Exclusion of Evidence of V.C.'s Prior Claim of Sexual Abuse

Cruz alleges that the district court erred by excluding evidence at trial that V.C. had "previously made false accusations relating to a purported sexual assault against V.C. by another individual." Brief for appellant at 26. Cruz argues that the evidence should have been admitted because it was relevant to V.C.'s credibility. Cruz also asserts that the trial court improperly analyzed the evidence's admissibility under Neb. Rev. Stat. § 27-412 (Cum. Supp. 2014). As we understand Cruz' argument, he asks us to reverse his convictions for all the charges involving V.C. because the court erroneously excluded evidence of her credibility, but he does not argue that there was insufficient evidence to support his convictions for the charges involving V.C. We note that Cruz did not make an offer of proof relating to V.C.'s prior claim of sexual abuse. Without an offer of proof, we do not know the substance of the evidence, who the witness would be to provide the evidence, or what is the falsehood. Because the alleged error was not properly preserved for appellate review, we cannot determine the merits of Cruz' second assignment of error.

[7,8] Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked. *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004). An offer of proof must demonstrate to the court that questions put to a witness call for competent evidence. *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997).

At various hearings before and during the trial, the State and Cruz' attorney discussed an incident from 2010 in which V.C. reported that she had been sexually abused by a person other

than Cruz. The first discussion of the prior incident occurred at a hearing on Cruz' motion in limine to exclude evidence that Cruz and V.C. had both tested positive for chlamydia. The court inquired whether Cruz was the only person V.C. was alleged to have had sexual contact with. The State reported that V.C. had not had sexual intercourse with anyone other than Cruz. Cruz' attorney disagreed, stating that "there was another report that was taken [and t]hey alleged a sexual assault on her." The attorneys and the trial court judge then had the following dialog regarding the details of the prior incident:

> [Court]: And the child said she had sexual intercourse?
>
> [Cruz' counsel]: No, Your Honor. I don't believe she — She made some statements that — that something happened. There was some statements that didn't seem to be possibly true, so not exactly certain what happened, Your Honor, fully.
>
> [Court]: Well, but what did she say happened?
>
> [Cruz' counsel]: She said that she was tied up and that a — a person had touched her . . . . If I could have a moment, maybe I can find the report and I can just — or if [the prosecutor] has it handy, I can —
>
> . . . .
>
> [The State]: The child states that the — Let's see. Put me on the bed, tied some strings around her legs, said don't go away. She states that strings were tied to the bed and she couldn't move.
>
> She says that this person tried to kiss her, but she kept going like this, and demonstrated moving her hands back and forth. She said she was going to call her sister and she woke up. . . .
>
> [The State]: The incident narrative that was given to us, Your Honor, states that during the interview [V.C.] stated that [the man] attempts to kiss her but was unsuccessful in doing so, denied that [the man] touched her in any place that made her feel uncomfortable.
>
> [Court]: Okay.

> [The State]: And then said placed her in a bed and tied her — tied string around her ankles and wrists and secured her to the bed. And then when asked how she got away, she stated the police came into the locked room and cut the strings off of her.
>
> . . . .
>
> [Cruz' counsel]: Your Honor, and what we know from this report is that part of that couldn't possibly have been true, that no officer did come and cut her free. And so if — if she may have been mistaken or — Well, not may have, that she was just wrong in some of what she was saying, I think there could be [a] possibility that maybe more things happened, maybe there was some other contact. . . .
>
> . . . .
>
> . . . [I]f there are other ways or possibilities that — that [V.C.] could have caught these diseases, then I think that has to be explored . . . .

The court eventually denied Cruz' motion to exclude evidence that V.C. and Cruz had both tested positive for chlamydia.

The second discussion regarding V.C.'s prior allegation of sexual abuse occurred at a hearing on the State's motion in limine asking the court to exclude all evidence of V.C.'s prior sexual behavior pursuant to § 27-412. Section 27-412 provides that evidence of a victim's other sexual behavior or sexual predisposition is not admissible in cases involving sexual misconduct. The statute goes on to provide exceptions to the prohibition against using a victim's sexual behavior, including when the evidence is used to prove that a person other than the accused was the source of semen, injury, or other physical evidence. See § 27-412(2)(a)(i).

Cruz opposed the State's motion in limine to exclude evidence of V.C.'s prior sexual behavior pursuant to § 27-412. Cruz' attorney argued that he should be permitted to ask V.C. to elaborate about her prior claim of sexual abuse. In

addition to wanting to ask V.C. for more details about the alleged sexual abuse, Cruz' attorney stated he also wanted to ask her questions about the incident because it was relevant to her credibility:

> Now, there may be other questions related to her contact with this individual, but those would be toward her veracity involving statements that — that might or might not have been true. And so I may want to ask questions of her about that incident.
>
> And not necessarily involving any sexual aspect to it, but just as to the facts and circumstances surrounding the incident and — what she may have told people versus what other people were able to observe.
>
> And so it would be more toward her credibility, Your Honor, and not necessarily as to any sexual behavior beyond what I've just spoke to the Court about.

The court then asked Cruz' attorney to clarify which subsection of § 27-412 permitted it to admit the evidence in question. Cruz' attorney responded that the evidence would be offered to prove that a person other than the defendant was the source of semen, injury, or other physical evidence. The State argued that the man from the prior incident could not be the source of semen, injury, or physical evidence because there was no evidence that the prior incident had involved penetration:

> What we have, Your Honor, is [V.C.] going to a CAC[ (Child Advocacy Center)]. When she's interviewed at the CAC she talks about, well, he was trying to kiss me.
>
> Even at the CAC interview initially there was no indication of any type of vaginal penetration, vaginal whatever. Nothing was dealing with the vaginal area, which he's trying to say this is relevant to show injuries contained within the vaginal vault.
>
> Later on, I believe, at the CAC interview that occurred [in this case] in February of 2014, just as an aside, toward

> the end of the interview [V.C.] indicated that there was some touching and licking down there. And that was the extent of it.
>
> It wasn't explored as to what kind of touching, if it was penetration, if it was anything else. It [was] just that there was touching and there was licking.
>
> . . . .
>
> And then we have a situation where last week she's talking to the officer, she says she remembers telling something about some sexual conduct — or contact with this man.
>
> . . . [S]exual contact certainly is — you know, what is that? That could be touching, that could be licking. For a child of that age it could be — You just don't know what it is.

In response to the parties' arguments on the motion in limine, the court noted that § 27-412 requires the accused to provide 15 days' notice that he or she intends to present evidence of a victim's sexual history and that Cruz had not provided such notice. The court further stated that because Cruz had not provided the required notice, the court had been unable to hold a hearing to evaluate the evidence. The court granted the State's motion to exclude evidence of V.C.'s sexual history.

The third discussion of V.C.'s allegation of prior sexual abuse occurred at a hearing on Cruz' motion to admit evidence under § 27-412. On the second day of trial, Cruz filed a motion requesting that the court allow him to admit evidence of V.C.'s prior claim of sexual assault. Cruz' motion stated in part, "Th[e] evidence will show that the alleged victim, V.C., has made false and/or misleading statements [to] officials regarding her sexual behavior." At the hearing, the trial court asked Cruz whether showing a victim made false or misleading statements was a basis for admissibility under § 27-412. Cruz' attorney stated, "[I]t kind of goes to the — to the whole package of her interaction with the officers." When the court

inquired what Cruz would ask V.C. about the prior incident, Cruz' attorney stated, "I want to ask her what happened." The trial court overruled Cruz' motion, stating that Cruz had not provided timely notice pursuant to § 27-412 and that the evidence did not fall under any of the exceptions listed in the statute. Cruz' attorney did not ask V.C. any questions about the prior incident during the trial, nor did he make an offer of proof.

The details regarding V.C.'s prior allegation of sexual abuse are unclear. Cruz' attorney asserted at the hearing on the motion in limine regarding V.C.'s and Cruz' chlamydia diagnoses that V.C.'s prior allegation "couldn't possibly have been true [because] no officer did come and cut her free" from the bed where she was tied up. However, Cruz' attorney did not elaborate on this alleged lie or offer the testimony of an officer or anyone else to support Cruz' attorney's assertion that V.C. was not freed by the police. Additionally, Cruz' attorney did not expand upon the claim that V.C.'s prior allegation was false when Cruz later opposed the State's motion in limine to exclude evidence of V.C.'s sexual history. Cruz' motion to admit evidence under § 27-412 stated that the "evidence will show that the alleged victim, V.C., has made false and/or misleading statements [to] officials regarding her sexual behavior." Cruz did not adduce any evidence proving that V.C.'s prior claim was false or misleading. Cruz' attorney's unsupported allegations that V.C. made false statements are not an adequate offer of proof by which we can judge the competence of the evidence that Cruz claims was improperly excluded.

[9] In a similar case, the Nebraska Supreme Court excluded evidence of a victim's allegedly false prior claims of sexual assault. See *State v. Welch*, 241 Neb. 699, 490 N.W.2d 216 (1992). The court concluded the evidence was properly excluded because "the defendant made no showing at any time that any claim the victim had made concerning prior sexual assaults and familial sexual abuse was false." *Id.* at 707, 490

N.W.2d at 221. As in *Welch*, Cruz wanted to introduce evidence of an allegedly untrue prior claim of sexual abuse, but made no showing that the prior claim was, in fact, false.

We are unable to determine from the record and the context of the various hearings the substance of the evidence, who the witness would be to provide the evidence, and what was the falsehood. We cannot determine whether the exclusion of the evidence affected Cruz' substantial rights. See *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004). There was no offer of proof to overcome these deficiencies and allow us to determine whether the evidence was competent. See *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997). Because Cruz failed to preserve this alleged error for our review, we express no opinion on whether the trial court correctly employed § 27-412 to exclude the alleged evidence of V.C.'s credibility.

### 3. Ineffective Assistance of Counsel

[10,11] In order to prevail on a claim for ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that he or she was prejudiced by such deficiency. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011). The two prongs of the ineffective assistance test, deficient performance and prejudice, may be addressed in either order. *State v. Poe*, 284 Neb. 750, 822 N.W.2d 831 (2012).

[12] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013). Rather, the determining factor is whether the record is sufficient to adequately review the question. *Id.*

Cruz asserts that his trial counsel was ineffective in four respects: (1) for failing to request a limiting instruction to prevent the jury from using evidence relating to V.C. in resolving the charges involving G.C. and vice versa, (2) for failing to move to sever the charges relating to G.C. from those relating

to V.C., (3) for failing to inquire into V.C.'s sexual history, and (4) for failing to object at the sentencing hearing based on a violation of Cruz' Fifth Amendment rights. We will address each of Cruz' allegations of ineffectiveness in turn.

(a) Limiting Instruction

Cruz alleges his trial counsel was ineffective for failing "to request a limiting instruction that the jury could not consider the evidence of Cruz's alleged crimes against V.C. to prove the charges involving G.C., and vice versa." Brief for appellant at 34. Cruz argues that evidence of the crimes as to one victim would constitute inadmissible prior bad acts evidence as to the crimes against the other victim in violation of Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2014). The record does not reveal trial counsel's reasoning for failing to request a limiting instruction. Accordingly, the record is inadequate to allow us to address this assignment of error on direct appeal. See *McGuire, supra*.

(b) Motion to Sever

Cruz argues that his trial counsel was ineffective for failing to move to sever the charges relating to V.C. from the charges relating to G.C. Cruz argues that "[t]he alleged crimes toward G.C. occurred separately and apart from the alleged crimes toward V.C." and joinder of the two was therefore improper. Brief for appellant at 42. This assignment of error is without merit.

[13-15] The standard for joinder of offenses is set forth in Neb. Rev. Stat. § 29-2002 (Reissue 2008). Offenses are properly joinable under § 29-2002(1) if they are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. *State v. Rocha*, 286 Neb. 256, 836 N.W.2d 774 (2013). Whether offenses are properly joined involves a two-stage analysis in which it is determined first whether the offenses are related

and properly joinable and second whether an otherwise proper joinder was prejudicial to the defendant. *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010).

The first question is whether the charges were properly joined. See *id.* A recent case from the Nebraska Supreme Court is illustrative. In *State v. Knutson*, 288 Neb. 823, 852 N.W.2d 307 (2014), the defendant was charged with five counts of sexual assault and child abuse for separate incidents involving four minor girls. *Id.* The defendant had taught, tutored, or coached each of the victims. *Id.* The defendant was convicted of the charges involving one of the children, but acquitted of the charges relating to the other three girls. *Id.* He alleged on appeal that the charges should have been severed. *Id.* The court disagreed, concluding that the offenses were properly joined under § 29-2002(1) because they were of the same or similar character. *Knutson, supra*. The court noted that the facts of the underlying crimes were similar in that each of the children attended the school where the defendant taught, each of the girls was around the same age when the misconduct occurred, and the defendant occupied a position of trust with respect to each of the alleged victims. *Id.*

In the case at hand, we similarly conclude that the charges involving G.C. and V.C. were of the same or similar character. As in *Knutson, supra*, the victims both had the same relationship with Cruz (father-daughter), both were of a similar age when the misconduct occurred, and with respect to both alleged victims, Cruz abused his position of trust as their father. See *id.* We conclude the charges were properly joined under § 29-2002(1).

[16,17] The next question is whether the otherwise proper joinder prejudiced Cruz. See, *Schroeder, supra*. See, also, § 29-2002(3). A defendant opposing joinder has the burden of proving prejudice. See *Knutson, supra*. The Nebraska Supreme Court has previously noted that "prejudice usually does not occur from joined charges if the evidence is sufficiently simple and distinct for the jury to easily separate

evidence of the charges during deliberations." *Id.* at 833, 852 N.W.2d at 318.

In the case at hand, the evidence for each charge was simple and distinct from the evidence of the other offenses. Moreover, the trial court specifically instructed the jury that it was to reach a separate decision with respect to each charge. Cruz has not shown that he was prejudiced by the joinder, and we therefore need not address his claim that his trial counsel's performance was deficient. See *State v. Poe*, 284 Neb. 750, 822 N.W.2d 831 (2012). His assertion that his trial counsel was ineffective for failing to move to sever the charges is without merit.

### (c) Investigation into V.C.'s Sexual History

Cruz next asserts that his trial counsel was ineffective for failing to investigate V.C.'s sexual history. Cruz concedes that the record is not adequate to resolve this assignment of error on direct appeal. See *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013). We agree.

### (d) Fifth Amendment Objection at Sentencing

Cruz alleges that his trial counsel was ineffective for failing to object to a violation of Cruz' Fifth Amendment rights at the sentencing hearing. Cruz argues the trial court improperly based its sentences on Cruz' silence at sentencing. We find no merit to this assignment of error.

[18,19] A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed. *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004). When attempting to determine at sentencing whether the defendant is a proper candidate for probation and rehabilitation, the court, of necessity, must consider whether the defendant acknowledges his or her guilt. See *State v. Winsley*, 223 Neb. 788, 393 N.W.2d 723 (1986).

[20,21] Nebraska courts have previously held that a defendant's lack of remorse is a proper consideration in sentencing. See *State v. Moore*, 235 Neb. 955, 458 N.W.2d 232 (1990) (holding that trial court properly considered defendant's lack of remorse in determining appropriate sentence where defendant's only comment at sentencing was to deny that she had committed crime). Recently, in *State v. Cobos*, 22 Neb. App. 887, 895, 863 N.W.2d 833, 840 (2015), this court determined that "[a] defendant's failure to take responsibility for his actions is a proper factor to consider in imposing a sentence." The defendant in *Cobos* had refused to provide a statement to the probation office in conjunction with the presentence investigation. *Id.* At the sentencing, the court noted it had considered the defendant's attitude and failure to accept responsibility, among other factors, in determining the appropriate sentence. *Id.* We found no abuse of discretion. *Id.*

In this case, Cruz and his attorney both declined to speak at the sentencing hearing:

> [Court:] [D]o you have any comments you'd like to make?
>
> [Cruz' counsel]: Your Honor, . . . Cruz has asked that I not make any comment and so I would submit it to the Court, Your Honor.
>
> [Court]: . . . Cruz, is that correct, that you've asked your attorney not to make any comments?
>
> [Cruz]: That's correct.
>
> . . . .
>
> [Court]: Okay. All right then.
>
> . . . Cruz, do you have any comments that you would like to make before the Court imposes a sentence?
>
> [Cruz]: No.

Although Cruz declined to speak at the sentencing hearing, he did write a lengthy statement included in the presentence report. In the statement, Cruz denied any wrongdoing and implied that V.C. had lied about the sexual abuse:

> I told [the police] it [was] not the first time [V.C.] lies, that we caught her stealing from stores, church, and has also been in trouble with the cops, that she would also come home late at night. . . .
>
> . . . [The prosecutors] knew she had a boyfriend before the inc[i]dent, they knew she got in trouble with the cops, that she has lied in the past, they knew she[']s been out late at night.

After Cruz declined to speak at the sentencing hearing, the court proceeded to impose the sentences on Cruz. In support of its sentencing decision, the court noted that it had reviewed the presentence report. The court stated:

> The report also reflects that you have denied all the allegations against you and you have not accepted any responsibility for the crimes. You place blame upon the victims and you show lack of remorse and your inability to accept any responsibility for these crimes in the Court's opinion makes you an extreme danger for continued exposure in our community.

We conclude Cruz' trial counsel was not ineffective for failing to object based on a violation of Cruz' Fifth Amendment rights. The record reveals that the court did not base its sentences on Cruz' silence at the sentencing hearing, but on his statements in the presentence report. Furthermore, the court did not abuse its discretion in considering Cruz' lack of remorse and refusal to accept responsibility as relevant factors in determining the appropriate sentences. See, *State v. Moore*, 235 Neb. 955, 458 N.W.2d 232 (1990); *State v. Cobos*, 22 Neb. App. 887, 863 N.W.2d 833 (2015). Because we conclude that Cruz' attorney did not perform deficiently, we need not reach the issue of prejudice. See *State v. Poe*, 284 Neb. 750, 822 N.W.2d 831 (2012). We find no merit to Cruz' assertion that his attorney was ineffective for failing to object based on a violation of Cruz' Fifth Amendment rights at the sentencing.

### 4. Excessive Sentences

Cruz contends he received excessive sentences for his convictions. Cruz' brief argues that "[t]he circumstances of Cruz's offenses . . . are rife with residual doubt." Brief for appellant at 49. Cruz further argues that his prior convictions are relatively minor in comparison to the charges in the present case. We conclude Cruz' sentences were not excessive.

[22,23] When imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education and experience, social and cultural background, past criminal record, 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. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011). Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004).

First degree sexual assault of a child is a Class IB felony. § 28-319.01(2). The penalty for a Class IB felony is 20 years' to life imprisonment. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014). Incest and possession of a visual depiction of sexually explicit conduct with a child as a participant are Class III felonies. § 28-703; Neb. Rev. Stat. § 28-813.01(2)(b) (Cum. Supp. 2014). The penalty for a Class III felony is 1 to 20 years' imprisonment, a $25,000 fine, or both. § 28-105. Manufacturing a visual depiction of sexually explicit conduct with a child as a participant is a Class ID felony. Neb. Rev. Stat. § 28-1463.04 (Cum. Supp. 2014). A Class ID felony is punishable by 3 to 50 years' imprisonment. § 28-105. Child abuse is a Class IIIA felony. Neb. Rev. Stat. § 28-707(4) (Cum. Supp. 2014). The penalty for a Class IIIA felony is 0 to 5 years' imprisonment, a $10,000 fine, or both. § 28-105. The sentences imposed were within these statutorily provided penalty ranges.

The trial court considered the information contained in the presentence report. The report revealed that Cruz had previous convictions for numerous traffic offenses and two alcohol-related offenses. The court noted that Cruz was 30 years old and that the victims were his own children. Although Cruz' criminal history may have been less serious than the charges in the present case, the court determined that a lengthy prison term was nevertheless appropriate due to the nature of the crimes, Cruz' lack of remorse, and the extreme danger Cruz posed to the community. In light of these factors, we cannot conclude that the court's sentences constituted an abuse of discretion. This assigned error is meritless.

## V. CONCLUSION

Upon our review, we find that there was insufficient evidence to support Cruz' convictions for attempted sexual assault of a child in the first degree and attempted incest. We reverse Cruz' convictions for attempted first degree sexual assault of a child and attempted incest and vacate his sentences for those charges. We find no merit to Cruz' other assertions on appeal. Accordingly, we affirm Cruz' convictions and sentences on the other eight charges.

Affirmed in part, and in part reversed and vacated.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Ryan M. Laflin, appellant.

875 N.W.2d 919

Filed March 22, 2016. No. A-15-505.

1. **Criminal Law: Trial.** In criminal prosecutions, the withdrawal of a rest in a trial on the merits is within the discretion of the trial court.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Trial: Proof: Courts.** Withdrawal of rest to fill in gaps in proof is proper, as long as the court does not advocate for or advise the State to withdraw its rest.
4. **Trial: Proof: Evidence: Courts.** Where the trial court alerts the State to an absence of proof and invites the State to withdraw its rest in order to present additional evidence, the trial court has abused its discretion and abandoned its role as a neutral fact finder.
5. **Venue: Proof.** The State must prove proper venue beyond a reasonable doubt in criminal cases.
6. **Judgments: Trial: Evidence: Proof: Appeal and Error.** In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed.
7. **Venue: Proof.** Evidence that a defendant is arrested by police officers employed by a particular city and at an intersection of certain streets is insufficient proof of venue.
8. **Courts: Appeal and Error.** Unpublished decisions of the Nebraska Court of Appeals do not carry precedential weight.
9. **Motions to Suppress: Trial: Pretrial Procedure: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on

renewed objection, an appellate court considers all the evidence, both from the trial and from the hearings on the motion to suppress.

10. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** Upon a finding of reversible error, the Double Jeopardy Clause does not forbid a retrial so long as the sum of the evidence admitted by a trial court would have been sufficient to sustain a guilty verdict.
11. **Evidence: New Trial: Appeal and Error.** When considering the sufficiency of the evidence in determining whether to remand for a new trial or to dismiss, an appellate court must consider all the evidence presented by the State and admitted by the trial court irrespective of the correctness of that admission.
12. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
13. **Constitutional Law: Search and Seizure.** The Fourth Amendment guarantees the right to be free of unreasonable searches and seizures.
14. **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, the 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 the appellate court reviews independently of the trial court's determination.
15. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** A tier-one police-citizen encounter involves the voluntary cooperation of the citizen elicited through noncoercive questioning and does not involve any restraint of the liberty of the citizen.

Appeal from the District Court for Gage County, Paul W. Korslund, Judge, on appeal thereto from the County Court for Gage County, Steven B. Timm, Judge. Judgment of District Court reversed, and cause remanded with directions.

Lee Timan and Kyle Manley, of Clark & Timan, P.C., for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

Irwin, Pirtle, and Riedmann, Judges.

Irwin, Judge.

## I. INTRODUCTION

Ryan M. Laflin appeals his conviction for first-offense driving during revocation. On appeal, Laflin argues that the trial court abused its discretion by bringing the insufficiency of the evidence demonstrating venue to the State's attention and inviting the State to withdraw its rest in order to present additional evidence. Additionally, Laflin argues that the arresting sergeant's testimony should have been suppressed as a result of an unlawful seizure.

Upon our review, we find that the trial court abused its discretion by bringing the insufficiency of the evidence to the State's attention and permitting the State to withdraw its rest. We further conclude that the remaining evidence is insufficient to sustain Laflin's conviction. Accordingly, we reverse, and remand.

## II. BACKGROUND

Laflin was charged in the county court for Gage County with driving during revocation, first offense. Before trial, Laflin filed a motion to suppress. In the motion, Laflin argued that he had been unlawfully seized by police and that as a result, the statements and evidence obtained subsequently to his arrest should be suppressed. The court held a hearing on the motion to suppress.

At the suppression hearing, Sgt. Brian Carver of the Beatrice Police Department testified that on October 18, 2014, he was parked "just north of Court Street on 4th Street" in Gage County, writing a parking ticket, when he observed a blue pickup truck drive by and park one car in front of him. Sergeant Carver testified that he knew the blue truck belonged to Laflin. Sergeant Carver testified that he was familiar with Laflin from prior contacts and knew that Laflin's license was on suspended status during the preceding weeks. Sergeant Carver had not confirmed the status of Laflin's license on October 18 when he saw the truck drive past him. Sergeant

Carver testified that he observed Laflin to be the driver of the blue truck and that after Laflin had parked and exited the vehicle, Sergeant Carver approached him on foot. According to Sergeant Carver, he did not activate his patrol car's overhead lights or place Laflin under arrest, but, rather, asked to see Laflin's driver's license. Sergeant Carver testified that Laflin was defensive and asked how Sergeant Carver knew his identity. Sergeant Carver replied that he knew the man was Laflin and that he believed Laflin's license was suspended. Laflin produced a state identification card, but not a driver's license. Sergeant Carver testified that he confirmed with police dispatch that Laflin did not have a valid driver's license and then arrested Laflin. The county court denied the motion to suppress, holding that Laflin had not been seized during his interaction with Sergeant Carver, because the encounter was a tier-one citizen-police encounter.

A bench trial was held before the county court on February 10, 2015. At the trial, the State again presented the testimony of Sergeant Carver. Laflin objected to Sergeant Carver's testimony on the same basis as his motion to suppress. The trial court overruled Laflin's objection and allowed Sergeant Carver to testify. Sergeant Carver testified in accordance with his prior testimony at the suppression hearing that he had arrested Laflin on October 18, 2014, after observing him driving a blue truck and after speaking with him. Sergeant Carver stated that he was "parked in the 100 block of North 4th Street writing a parking ticket" when he observed Laflin driving. However, unlike the suppression hearing, the State never asked Sergeant Carver what city or county he was in when he made contact with Laflin. Lastly, the State introduced into evidence a certified copy of Laflin's driving record indicating that Laflin's license was revoked at the time of his arrest. The State then rested its case.

Following the State's rest, Laflin indicated he did not wish to present any evidence. The State waived its closing argument, and Laflin's attorney made a brief closing argument.

The court then stated it was satisfied that Laflin had driven at a time when his license was revoked. The court said, however, that it did not recall any evidence of venue being presented and asked the State whether it had proven venue. The State argued it had presented evidence of venue because Sergeant Carver had testified that he was in the 100 block of North 4th Street when he observed Laflin driving. The court reviewed the record and determined that there was insufficient evidence of venue because Sergeant Carver had not testified to which city or county he was in when he saw Laflin driving. The court then asked the State whether it wished to withdraw its rest and present additional evidence of venue. The State responded that it did. Laflin objected. The court permitted the State to withdraw its rest and recall Sergeant Carver. After being recalled, Sergeant Carver testified that the events to which he had previously testified occurred in Beatrice, Gage County, Nebraska.

The county court found Laflin guilty of first-offense driving during revocation and sentenced him to 60 days in jail with credit for 9 days already served.

Laflin appealed to the district court, arguing that the county court erred in overruling his motion to suppress, allowing Sergeant Carver to testify at trial, allowing the State to reopen the factual record, finding Laflin guilty beyond a reasonable doubt, and imposing an excessive sentence. We surmise from the district court's order that Laflin argued the trial judge abused his discretion by initiating the dialog with the State about venue. Following a hearing on Laflin's appeal, the district court affirmed the county court's conviction and sentence. The district court determined that the county court had properly classified Sergeant Carver's interaction with Laflin as a noncoercive police-citizen encounter, meaning Fourth Amendment protections did not apply. The district court also held that the county court had not abused its discretion in allowing the State to withdraw its rest and present additional evidence, but found that even without the additional

evidence, the record was sufficient to support a finding of venue. Finally, the district court determined that Laflin had not received an excessive sentence.

Laflin appeals from the district court's order upholding his conviction.

## III. ASSIGNMENTS OF ERROR

Laflin assigns numerous errors on appeal. Restated and renumbered, his assigned errors are that (1) the trial court erred in bringing the insufficiency of the evidence regarding venue to the State's attention and inviting the State to withdraw its rest in order to present additional evidence, (2) there was insufficient evidence of venue submitted, and (3) the trial court erred in failing to suppress Sergeant Carver's testimony as a result of an unlawful seizure.

## IV. ANALYSIS

### 1. Withdrawal of State's Rest

Laflin argues that the trial court erred when it brought the insufficiency of the evidence regarding venue to the State's attention and invited the State to withdraw its rest in order to present additional evidence. Laflin argues that the trial court abandoned its role as a neutral fact finder when it brought the sufficiency of the evidence regarding venue to the State's attention and asked the State whether it wished to withdraw its rest. We agree that the trial court's actions constituted an abuse of discretion.

[1,2] In criminal prosecutions, the withdrawal of a rest in a trial on the merits is within the discretion of the trial court. *State v. Bol*, 288 Neb. 144, 846 N.W.2d 241 (2014). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *State v. Gray*, 8 Neb. App. 973, 606 N.W.2d 478 (2000), *overruled on other grounds, State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001).

Nebraska courts have previously addressed when a trial court abuses its discretion in permitting the State to withdraw its rest in a criminal case. In *State v. Thomas*, 236 Neb. 84, 459 N.W.2d 204 (1990), *disapproved on other grounds, State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999), the defendant was charged with failure to appear. After the State had rested, the defendant moved for a directed verdict, contending that the prosecution was barred by the statute of limitations. *Thomas, supra*. The State then moved to withdraw its rest to present evidence that the defendant fell within an exception to the statute of limitations for being a person fleeing from justice. *Id.* The trial court permitted the State to withdraw its rest. *Id.* The Supreme Court affirmed, finding no abuse of discretion. *Id.*

[3] In *Bol, supra*, the Supreme Court also affirmed the trial court's decision permitting the State to withdraw its rest and present additional evidence. The State realized after resting its case that it had forgotten to admit a stipulation that proved one of the charges. *Id.* The court stated that *Thomas* "makes it clear that withdrawal of rest to fill in gaps in proof is proper, as long as the court does not advocate for or advise the State to withdraw its rest." *Bol*, 288 Neb. at 153, 846 N.W.2d at 251. Because the State, rather than the trial court, had realized the lack of proof, the Supreme Court determined the trial court did not abdicate its role as a neutral fact finder and did not abuse its discretion in permitting the State to withdraw its rest to put on additional evidence. *Id.* Accord *State v. McKay*, 15 Neb. App. 169, 723 N.W.2d 644 (2006) (affirming trial court's decision to permit State to withdraw its rest because State was alerted to omission in proof by defendant's motion, not by court).

In contrast, in *State v. Gray*, 8 Neb. App. 973, 606 N.W.2d 478 (2000), we determined the court abused its discretion in allowing the State to withdraw its rest. The State presented evidence of the defendant's no contest pleas in prior cases for the purpose of enhancing the punishment for the

current charge. See *id.* After the State had rested and during a break in the proceedings, the trial judge sent a letter notifying both parties that he was concerned that the State had not demonstrated that the defendant had knowingly and intelligently waived his right to counsel in the prior pleas. *Id.* Subsequently, the court permitted the State to withdraw its rest and adduce additional evidence. *Id.* We determined that the court's actions were an abuse of discretion because by informing the State of the insufficiency of its evidence, the judge "departed from his role as neutral fact finder." *Id.* at 992, 606 N.W.2d at 495.

[4] Here, as in *Gray*, it was the court that alerted the State to the possible deficiency in proof. After both parties had rested, Laflin had given his closing argument, and the State had waived closing, the court questioned whether the State had presented sufficient evidence of venue. The State argued that it had, but the county court determined the State had not presented evidence of venue, because it had demonstrated only the street names where Laflin was stopped, not the city or county in which he was stopped. The court asked the State whether it wanted to withdraw its rest to present additional evidence, at which point the State asked to withdraw its rest. This case is therefore more aligned with *Gray*, where the trial court brought the issue of insufficient proof to the State's attention, rather than the other cases in which the State or the defendant raised the issue that required reopening the record. In so doing, the county court abandoned its role as a neutral fact finder. See *id.* We therefore conclude that it was an abuse of discretion for the county court to allow the State to withdraw its rest.

### 2. Sufficiency of Evidence to Prove Venue

Laflin argues that there was insufficient evidence to support his conviction because the State did not present enough evidence of venue absent the evidence improperly admitted

following the withdrawal of the State's rest. The evidence the State offered to prove venue was the arresting sergeant's affiliation with the Beatrice Police Department and the street names at which he apprehended Laflin. We agree that there was insufficient proof of venue.

[5] The State must prove proper venue beyond a reasonable doubt in criminal cases. See *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992).

[6] In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed. *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002), *modified on denial of rehearing*, 264 Neb. 654, 650 N.W.2d 481.

[7] The Nebraska Supreme Court has previously determined that evidence that a defendant is arrested by police officers employed by a particular city and at an intersection of certain streets is insufficient proof of venue. See *State v. Bouwens*, 167 Neb. 244, 92 N.W.2d 564 (1958). The *Bouwens* court noted that multiple cities often contain streets with the same name, meaning that a reference to street names alone does not demonstrate venue. The court also noted that police of one jurisdiction are sometimes permitted to make arrests outside the territorial limits of the city that employs them, so the fact that an officer is employed by a particular body also does not establish venue. *Id.* Accord *State v. Vejvoda*, 231 Neb. 668, 674, 438 N.W.2d 461, 467 (1989) (stating that testimony that Grand Island police officer observed defendant driving at "'7th and Vine Streets'" was insufficient proof of venue to support conviction for driving under influence in Hall County).

In the case before us, Sergeant Carver testified that he was employed by the Beatrice Police Department and had apprehended Laflin while writing parking tickets "in the 100 block

of North 4th Street." Per the rule set forth in *Vejvoda* and *Bouwens*, Sergeant Carver's employment with the Beatrice Police Department and the street names of the location of the arrest are insufficient to demonstrate venue. Importantly, the State did not ask Sergeant Carver what city or county he was in at the time he apprehended Laflin. This evidence is insufficient to establish venue.

[8] The State asks us to find a recent unpublished Court of Appeals case controlling. See *State v. Pittman*, No. A-14-520, 2015 WL 153812 (Neb. App. Jan. 13, 2015) (selected for posting to court Web site). Unpublished decisions of this court do not carry precedential weight. See *State v. James*, 6 Neb. App. 444, 573 N.W.2d 816 (1998), *disapproved on other grounds, State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000). Furthermore, we find the facts in *Pittman* inapposite to the case at hand. We conclude that this case falls under the rule set forth by the published cases discussed above holding that street names of the location of the crime coupled with the arresting officer's employment with a given law enforcement body are insufficient to establish venue. See, *Vejvoda, supra*; *Bouwens, supra*.

Alternatively, the State argues that we should consider Sergeant Carver's testimony from the suppression hearing in finding that the State established venue at trial. At the suppression hearing, Sergeant Carver testified that he "was parked just north of Court Street on 4th Street writing a parking ticket" when he observed Laflin driving. The State then asked Sergeant Carver, "Is that location in Gage County, Nebraska?" to which Sergeant Carver replied, "Yes, it is." No information regarding the city or county where Laflin was arrested was adduced at trial.

[9] The State directs us to previous cases stating that when a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from the trial and from the hearings on the motion to suppress. *State v. Ball*, 271 Neb. 140, 710 N.W.2d

592 (2006). However, the cases employing this proposition have done so in order to determine the correctness of the ruling excluding or admitting evidence that was the subject of the suppression hearing, not to allow the State to meet its burden of proof at trial. See, e.g., *id.* See, also, *State v. Tyler*, 291 Neb. 920, 870 N.W.2d 119 (2015); *State v. Bromm*, 285 Neb. 193, 826 N.W.2d 270 (2013). The State asks us to read this rule in reverse and consider evidence admitted at the suppression hearing as evidence to prove an essential aspect of the crime that was otherwise absent at trial—namely, venue. The State does not direct us to any authority permitting us to invert and expand the stated rule in this way, and we decline to do so.

[10,11] Upon a finding of reversible error, the Double Jeopardy Clause does not forbid a retrial so long as the sum of the evidence admitted by a trial court would have been sufficient to sustain a guilty verdict. See *State v. Edwards*, 286 Neb. 404, 837 N.W.2d 81 (2013). When considering the sufficiency of the evidence in determining whether to remand for a new trial or to dismiss, an appellate court must consider all the evidence presented by the State and admitted by the trial court irrespective of the correctness of that admission. *State v. Delgado*, 269 Neb. 141, 690 N.W.2d 787 (2005). Here, after the State was permitted to withdraw its rest, Sergeant Carver testified that he observed Laflin driving and apprehended him in Beatrice, Gage County, Nebraska. This evidence is sufficient to demonstrate venue. As such, Laflin is not entitled to dismissal of the charges against him and can be retried on remand. See *id.*

### 3. Motion to Suppress

[12] Although we find the foregoing analysis dispositive of this case on appeal, we nevertheless address Laflin's argument regarding his motion to suppress, because we believe it is an issue that is likely to recur during further proceedings. See *Edwards, supra*. Laflin argues that Sergeant Carver

unlawfully seized him, because Laflin did not consent to being detained, a reasonable person would not have felt free to terminate the encounter, and Sergeant Carver lacked reasonable suspicion when he approached Laflin regarding his license. Laflin argues that because his seizure violated the Fourth Amendment, the evidence flowing therefrom, including Sergeant Carver's testimony at trial, should have been suppressed. The interaction between Sergeant Carver and Laflin was not a seizure within the meaning of the Fourth Amendment. Laflin's assignment of error is therefore without merit.

[13,14] The Fourth Amendment guarantees the right to be free of unreasonable searches and seizures. *State v. Garcia*, 281 Neb. 1, 792 N.W.2d 882 (2011). 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. *State v. Howell*, 284 Neb. 559, 822 N.W.2d 391 (2012). Regarding historical facts, the appellate court reviews the trial court's findings for clear error. *Id.* But whether those facts trigger or violate Fourth Amendment protections is a question of law that the appellate court reviews independently of the trial court's determination. *Id.*

[15] A tier-one police-citizen encounter involves the voluntary cooperation of the citizen elicited through noncoercive questioning and does not involve any restraint of the liberty of the citizen. *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015). For example, the Nebraska Supreme Court found a tier-one police-citizen encounter in *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991). In *Twohig*, officers responded to a car accident and found an abandoned car that had struck a power pole and ended up in a ditch. An officer determined that the vehicle belonged to a Michael Twohig. *Id.* A short while later, an officer observed a man limping along a street about 2 miles from the scene of the accident. *Id.* The officer stopped his cruiser and engaged in a conversation with the man. *Id.* The officer asked the man who he was and where

he had come from and learned the man was Twohig. *Id.* The Supreme Court determined that this initial encounter was not a stop within the meaning of the Fourth Amendment, because it occurred in a public place and involved noncoercive questions by the officer. *Id.* The court noted that the officer did not activate his vehicle's overhead lights or direct Twohig not to leave. *Id.*

We similarly found a first-tier police-citizen encounter in *State v. Hisey*, 15 Neb. App. 100, 723 N.W.2d 99 (2006). In *Hisey*, an officer observed Richard Hisey drive by her patrol car and park in front of Hisey's house. The officer suspected that Hisey's license was still impounded, so she called dispatch and then pulled up next to Hisey before she confirmed the status of his license. *Id.* The officer asked Hisey if he had his license back. *Id.* The officer did not activate the emergency lights on her patrol car. *Id.* Hisey indicated he had his license back, but shortly thereafter, dispatch called the officer back and confirmed that Hisey's license was still impounded. *Id.* We determined that the initial encounter was a tier-one police-citizen encounter, because the officer was not intense or threatening and a reasonable person in Hisey's position would have felt free to leave. *Id.*

The initial encounter between Sergeant Carver and Laflin resembles those in *Twohig, supra*, and *Hisey, supra*. As did the police with respect to the defendants in *Twohig* and *Hisey*, Sergeant Carver approached Laflin in a public place and did not activate the lights on his patrol car. Additionally, Sergeant Carver approached Laflin on foot, rather than in his patrol car. Furthermore, Sergeant Carver engaged in conversation with Laflin and asked for his license, much like the officer in *Twohig* asked the man limping on the side of the road who he was and like the officer in *Hisey* asked whether Hisey had received his license back. Nothing about the encounter was threatening, and Sergeant Carver did not instruct Laflin not to leave. Cf. *Hisey, supra*. We conclude that the encounter between Sergeant Carver and Laflin was

a noncoercive, tier-one police-citizen encounter that did not trigger the protections of the Fourth Amendment. Because we conclude that Laflin was not seized within the meaning of the Fourth Amendment, we need not address Laflin's contention that Sergeant Carver lacked reasonable suspicion when he approached Laflin. Laflin's assignment of error is without merit.

## V. CONCLUSION

The trial court erred in allowing the State to withdraw its rest in order to present additional evidence of venue. Without considering this erroneously admitted evidence, there was insufficient proof of venue to sustain Laflin's conviction. We reverse the district court's decision and remand the matter with directions to reverse Laflin's conviction and sentence for first-offense driving during revocation and to remand the matter to the county court for a new trial.

Reversed and remanded with directions.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# In re Interest of Giavonna G., a child under 18 years of age. State of Nebraska, appellee, v. Mario G., appellant.

876 N.W.2d 422

Filed March 29, 2016. No. A-15-470.

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: 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. 2014), the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground.
3. **Parental Rights.** Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.
4. **Parental Rights: Words and Phrases.** A termination of parental rights is a final and complete severance of the child from the parent and removes the entire bundle of parental rights; therefore, with such severe and final consequences, parental rights should be terminated only in the absence of any reasonable alternative and as the last resort.
5. **Parental Rights: Parent and Child.** In considering a motion to terminate parental rights, 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 Separate Juvenile Court of Douglas County: Vernon Daniels, Judge. Reversed and remanded for further proceedings.

Anne E. Troia, P.C., L.L.O., for appellant.

Donald W. Kleine, Douglas County Attorney, Jennifer C. Clark, and Jocelyn Brasher, Senior Certified Law Student, for appellee.

Pirtle, Riedmann, and Bishop, Judges.

Pirtle, Judge.

## INTRODUCTION

Mario G. appeals the order of the separate juvenile court of Douglas County wherein the court found by clear and convincing evidence that it is in the best interests, safety, and welfare of the minor child, Giavonna G., to terminate Mario's parental rights. For the reasons that follow, we reverse, and remand for further proceedings.

## BACKGROUND

Heather F. is the mother of Tobias K., Ciela W., and Giavonna. This case began as an educational neglect case involving Tobias, Heather, and Tobias' father. A second amended petition was filed on February 14, 2013, adding allegations related to Giavonna. The petition alleged Giavonna came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) because a caseworker had observed the family home "to be in a filthy, unwholesome manner, in that the basement was littered with cat feces, placing the children at risk for harm." Giavonna's father, Mario, did not live in the same residence as the children when they were removed. The caseworker's affidavit in support of removal reported that Mario had been charged with physically abusing Tobias on March 27, 2012.

On April 26, 2013, the juvenile court filed an order for immediate custody, finding that placement and detention was a matter of immediate and urgent necessity for the protection of the children. The order stated that placement shall exclude the homes of Heather, Ciela's father, and Mario. On the same

day, the State of Nebraska filed a third amended petition alleging Giavonna came within the meaning of § 43-247(3)(a) due to lack of proper parental care by reason of the faults or habits of her father, Mario. The petition alleged that Mario failed to provide safe, stable, and/or appropriate housing; that Mario failed to provide proper parental care, support, and supervision; and that Giavonna was at risk for harm.

Both Heather and Mario denied the allegations in the petition. On May 13, 2013, the court found that it was in Giavonna's best interests to remain in the care, custody, and control of the Nebraska Department of Health and Human Services (DHHS), to exclude the home of Mario. The court ordered that Mario have reasonable rights of supervised visitation and ordered him to provide certain medical history and information to DHHS, pay child support, and make reasonable efforts on his own to bring about rehabilitation.

On July 11, 2013, a fourth amended petition was filed alleging that Giavonna came within the meaning of § 43-247(3)(a) due to lack of proper parental care by reason of the faults or habits of Mario in that Mario failed to provide safe, stable, and/or appropriate housing for the child; that Mario failed to provide proper parental care, support, and supervision; and that due to the above allegations, Giavonna was at risk for harm.

In July 2013, an adjudication hearing with respect to the fourth amended petition was held. As of June 25, Mario was in arrears on his child support obligation for Giavonna in the amount of $1,327.92. The court ordered Mario to obtain safe, stable, and adequate housing; obtain a legal, stable source of income; have reasonable rights of supervised visitation as arranged by DHHS; and notify the court of any services he deemed necessary to assist with the return of Giavonna to the parental home.

At a hearing on September 10, 2013, Tara Kirkland, a family permanency specialist at Nebraska Families Collaborative (NFC), testified that Mario participated in visits, maintained

housing and employment, and expressed a desire to have placement of Giavonna. She also testified that Mario did not want to participate in chemical dependency evaluations or urinalysis. The court ordered Mario to continue working on the objectives previously ordered in July and ordered him to complete a psychological evaluation as arranged by DHHS. The stated permanency objective for Giavonna was reunification with either parent.

A disposition hearing was held on November 5, 2013, and Mario's psychological evaluation was offered into evidence. The evaluation noted no significant concerns were present regarding Mario's parenting or parent-child interactions, but that he may benefit from interventions designed to assist him with developing skills to effectively cope with challenges and stressors presented in life. The evaluator also noted Mario was defensive throughout the evaluation process, and it was suggested that he may benefit from participating in parenting classes to strengthen his skills and prevent daily stressors from impacting his ability to successfully parent. The court's order noted the permanency objective for Giavonna was reunification with either parent, and Mario was ordered to participate in therapy and submit to baseline urinalysis. If the baseline was positive, he was ordered to submit to random urinalysis and undergo a chemical dependency evaluation by December 1. The court also ordered that if Mario fell asleep during visitation, then the visit would be terminated.

A review and permanency planning hearing was scheduled for, and took place on, May 5, 2014. Kirkland recommended that urinalysis be completed by Mario within 4 hours of the hearing, because testing was previously ordered, but not completed. She stated that NFC had "tried with three different agencies to get that service completed." The court ordered that the primary permanency objective for Giavonna be reunification with Mario, with a concurrent plan of adoption.

On August 4, 2014, the State filed a second motion for termination of parental rights alleging that Giavonna came

within the meaning of Neb. Rev. Stat. § 43-292(2), (6), and (7) (Cum. Supp. 2014) and that termination of Mario's parental rights was in Giavonna's best interests. The petition specifically alleged Mario failed to consistently visit Giavonna; obtain and maintain safe, stable, and appropriate housing; consistently attend individual therapy; consistently submit to urinalysis testing, as requested by DHHS, in a timely manner; and utilize the services offered by NFC or DHHS in order to reunify with Giavonna.

On November 4, 2014, a review and permanency planning hearing was held. Kirkland informed the court that Mario was unsuccessfully discharged from family support, individual therapy, and urinalysis testing and had not completed a chemical dependency evaluation. She also stated that his attendance and visitation was less than 100 percent each month and that typically, he participated in only one of the two scheduled visits per week.

A hearing on the State's motion for termination was held on January 12, March 13, and April 27, 2015. Sherry Anderson, a program support worker at NFC, testified that she worked with Giavonna and Mario from April or May 2013 to February or March 2014. During that period, supervised visits were scheduled twice per week for a period of 3 hours. Initially, visits took place in the community, at either a restaurant or a park, if the weather permitted. The worker reported that the restaurant was not busy because the visits were held in the morning, that Mario allowed Giavonna to run around and play by herself, and that he sometimes chased her around the restaurant. Starting in January 2014, visits took place primarily in Mario's sister's home. Anderson testified that Giavonna spent a great deal of her time during visits playing with her cousin and that Anderson had to prompt Mario to interact with Giavonna. She stated that she had to prompt Mario to feed Giavonna and had to give reminders about taking Giavonna to the bathroom. The worker also reported that when Giavonna ate, she got messy, and that Mario did not

wipe Giavonna's hands or face until he was prompted to do so by the worker.

In December 2013, Mario canceled three of his nine scheduled visits, and in January 2014, he canceled another two visits. Anderson did not have any safety concerns during visits, and she said it was clear that Giavonna and Mario cared for one another. In February, Mario requested a change in his visitation schedule so his older children could be present, and Anderson was transferred from the case because of her unavailability to handle the amended visitation schedule. In March, two visits were terminated early due to Mario's lack of supervision and general lack of attention to Giavonna.

Tamera F., Giavonna's maternal grandmother and foster mother, testified that Giavonna was placed in her home in April 2013. Giavonna did not return to the home of either parent at any time during this case. Tamera testified that initially Mario's visits were to occur three times per week for 4 hours, but the time and frequency were reduced to 2 days per week for 4 hours.

Tamera testified that she began potty training Giavonna 2 to 3 months after she came into her home and that Mario was unhappy with that decision because he had not given permission to begin potty training. Tamera testified that Mario would put diapers back on Giavonna and that it would set back Giavonna's progress. Tamera testified that she provided "pull-'em-ups" (diapers), wipes, shoes, socks, and change of clothes for Giavonna for visits, though she was told that the parent was supposed to provide items for the child's care and well-being. Tamera testified that on several occasions Giavonna would return from visits with Mario in someone else's clothing and that her underwear and jeans had feces on them. Tamera testified that on numerous occasions, Giavonna returned from visits with feces in her underwear, and that occasionally, it would be on her back, inside of her shirt, or inside of her jeans. These concerns were not reported by any of the workers who supervised visitation.

Tamera testified that she was concerned with the lack of supervision during visits with Mario. Giavonna returned from visits on occasion with food or candy on her, and on one occasion, with gum in her hair. Tamera testified that on another occasion, Giavonna came home with ink on her from her ankle to her trunk area. When asked, Giavonna stated that she had been in her cousin's room and had drawn on herself with a pen.

Kirkland, the family permanency specialist for NFC, testified that she became involved in this case in April 2013, prior to adjudication. Mario was initially allowed one visit per week, and he requested more frequent visits. Visits were increased to three times per week, and then adjusted down to two visits to accommodate Mario's work schedule. Kirkland testified that after visits were reduced from three times per week to two, Mario consistently attended until about February 2014. She said that from May 2014 to September 2014, Mario did not attend 100 percent of his scheduled visits in any month and was asked to "call and confirm" he would attend before each visit. Kirkland testified that during the period from May to September, he canceled one visit for a family graduation, one for a family emergency, "at least a handful" for work, and some because he failed to call to confirm the visit. At the time of trial, Mario was still receiving two fully supervised visits per week.

Kirkland testified that Mario participated in therapy, but his participation was not continuous. Kirkland received notice in November 2014 that Mario was not actively participating at that time, and he resumed therapy in February 2015. It was recommended that Mario participate in individual therapy, family therapy, and visits. No recommendations were made for Mario regarding chemical dependency treatment, because the evaluator did not have any accompanying urinalysis results to show what substances, if any, Mario was using at the time.

Kirkland testified that Mario was ordered to do a baseline urinalysis in November 2013 but it was not actually completed until June 17, 2014. The initial urinalysis testing was to be performed by a family services company, but the company was not able to obtain a sample and its services were discontinued in December 2013. Another company also attempted to obtain a baseline and discontinued its services when they were unsuccessful. A third company actually obtained the baseline in June 2014, but was unable to obtain any further urinalyses and discontinued its services. A laboratory report in July confirmed the presence of marijuana in Mario's sample, and he was ordered to submit to two urinalyses per month, but only one sample was given, in February 2015. The sample in February was also positive for marijuana.

Kirkland testified that when she began working with Mario, he did not have his own residence. Mario lived with his aunt and uncle, and he obtained independent housing in December 2014. Kirkland testified that she did not believe Mario made progress throughout this case. He consistently stated that he did not know why he was a part of this case, that the services did not make sense, and that anyone who thought he needed therapy also needed therapy. Kirkland testified that Mario told her he did not have time to participate in services because he needed to work to pay child support for Giavonna and his two other children.

Kirkland testified that support workers raised concerns regarding Mario's level of supervision during visits, lack of preparation with supplies, and choice of foods to provide for Giavonna during visits. She testified that in her opinion, based on her work with the family and her training and experience, it was in Giavonna's best interests to terminate Mario's parental rights. She also based her opinion on his unwillingness to follow through with completion of services and the fact that "visits have not always been completely positive." She stated Giavonna was not getting the kind of consistency she needed because visits were frequently canceled.

She testified that Mario was able to provide for Giavonna's physical needs, but her concern was providing for Giavonna's emotional needs.

Stephanie Gorman, a family advocate, testified that her duties include supervising visits, ensuring the safety of the child, and making sure the child is fed and his or her interests are met. The child's interests include parental engagement and participation in activities that are appropriate for the child's age. She supervised visits between Giavonna and Mario, and she testified that during the four visits she attended between October and December 2014, the majority of Giavonna's interactions during visits were with her cousins. She observed that Mario has a large, extended family and that Giavonna is close with her family members. She estimated Giavonna's cousins interacted with her approximately 70 percent of the time, and Mario was often on the couch in the family room, watching television. Gorman testified that Mario fell asleep twice during visits and that she woke him to remind him this behavior was not appropriate. Gorman also observed that Mario loved Giavonna and kissed and hugged her often.

Steve Wendell is a licensed mental health practitioner in Nebraska. Giavonna and Mario were referred to him in February 2015 to aid in reunification. Mario told Wendell that he was looking for support for Giavonna for emotional issues related to separation and foster placement. Wendell testified that he planned to have weekly therapy with Giavonna and Mario utilizing "Parent Child Interaction Therapy" (PCIT). Wendell said PCIT is used to teach parents effective ways of interacting with a child to have a better relationship and to enforce compliance with parents' rules and representations. Wendell testified that Mario expressed reservations about participating in this type of treatment. He said Mario was respectful and cooperative, and showed up on time, but he talked to Wendell in great length about why he did not feel he needed this type of training, because he was already raising two other children. Wendell testified that he was not optimistic that

Mario would make improvements in parenting if he continued to resist the therapeutic techniques. He said that improvement was within Mario's control and that he had the ability to do quite well if he made the necessary changes.

Shane Powers, Kim Minadeo, and Amanda Garver each provided family support as employees of a counseling and consulting company. As coverage workers, they each supervised a limited number of visits between Giavonna and Mario. Powers testified that during the two visits he supervised, Giavonna and Mario appeared to be affectionate toward one another and he did not observe any safety concerns. Minadeo testified that she supervised one visit, at Mario's home, in February 2015. She said Giavonna and Mario appeared excited to see one another, the home was clean, and there were no safety concerns. Garver testified that she served as the coverage worker for two visits between Giavonna and Mario. Garver testified that the home appeared appropriate, Giavonna and Mario interacted appropriately, and there were no safety concerns.

Krystal Frost is a family support worker for the same counseling and consulting company. She began working with Giavonna and Mario as a temporary worker in February 2015, and she eventually became the permanent visitation worker. She testified that on Mondays, Giavonna was picked up at 11 a.m. and dropped off after the visit at 2 p.m., so visits lasted from approximately 11:30 a.m. to 1:30 p.m. She testified that on more than one occasion, a visit was canceled because Giavonna did not want to go, even though she was encouraged to attend by her foster mother. Frost testified that it was her understanding Mario was to implement PCIT techniques during visits, but that she believed he was not doing so. She testified that she questioned Mario on this issue and that he responded he was not going to do it.

The guardian ad litem involved in this case stated that she did not believe the evidence presented supported continued contact. She expressed concern for the length of time

Giavonna had been in out-of-home placement, the inconsistency of visits, and Giavonna's resistance to attending some visits.

In its order filed May 8, 2015, the juvenile court terminated Mario's parental rights pursuant to § 43-292(2), (6), and (7) and found that termination was in Giavonna's best interests. The court sustained Mario's motion for continued visitation with Giavonna pending any appeals in this matter.

## ASSIGNMENTS OF ERROR

Mario asserts the juvenile court erred in finding that the State proved by clear and convincing evidence that there were statutory grounds to terminate Mario's parental rights under § 43-292(2) and that termination was in Giavonna's best interests.

## 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 Chloe C.*, 20 Neb. App. 787, 835 N.W.2d 758 (2013).

## ANALYSIS

*Statutory Grounds for Termination.*

In the 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 Mario's parental rights to Giavonna, the juvenile court found that Mario substantially and continuously neglected to give the child necessary parental care and protection (§ 43-292(2)), that reasonable efforts failed to correct the condition which led to the adjudication (§ 43-292(6)),

and that the child had been in an out-of-home placement for 15 or more of the most recent 22 months (§ 43-292(7)).

Mario does not contest the juvenile court's finding that grounds for terminating his parental rights existed under subsections (6) and (7) of § 43-292; he asserts only that the State failed to prove by clear and convincing evidence that he substantially and repeatedly neglected and refused to give Giavonna necessary parental care and protection, as required by subsection (2).

[2] 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 Chloe C., supra*.

Giavonna was removed from parental care in April 2013. She was placed in foster care, and she was not returned to either Heather's or Mario's care at any time prior to the filing of the State's motion for termination of Mario's parental rights on August 4, 2014. Our review of the record clearly and convincingly shows that Giavonna had been in an out-of-home placement for 15 of the most recent 22 months and that grounds for termination of Mario's rights under § 43-292(7) were proved by sufficient evidence. This court need not review the statutory grounds for termination under § 43-292(2) or (6). Once a statutory basis for termination has been proved, the next inquiry is whether termination is in the child's best interests.

*Best Interests.*

Mario asserts there was not clear and convincing evidence that termination of his parental rights was in Giavonna's best interests. Specifically, Mario argues that he has maintained monthly contact with the case manager, obtained and maintained safe and appropriate housing, and provided love and support for all of his children, including Giavonna. He also

asserts that he demonstrated an improvement in his parenting skills and that a strong bond exists between him and Giavonna. He asserts that his only fault was in failing to promptly comply with court orders.

[3] Nebraska courts have recognized that children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of Octavio B. et al.*, 290 Neb. 589, 861 N.W.2d 415 (2015). Kirkland, the family permanency specialist involved in this case, testified that she did not believe Mario made progress and that based on her work with the family, and her training and experience, it was her opinion that it was in Giavonna's best interests to terminate Mario's parental rights.

When Giavonna was removed from Heather's home, Mario was not able to take placement of her, because he was not able to provide safe, stable, and appropriate housing. The record is clear that Giavonna was removed from Heather's care in February 2013, and she had been in out-of-home placement for the statutory period defined in § 43-292(7). The State's third amended petition contained allegations related to Mario, but the juvenile court did not find Giavonna to be a child within the meaning of § 43-247(3)(a) insofar as Mario was concerned until July 2013. The time that elapsed between that determination and the State's second motion for termination of Mario's parental rights in August 2014 was slightly over 1 year.

During that year, Mario demonstrated improvement in some areas, but achieved less success in others. In July 2013, Mario did not have his own residence and was living with his aunt and uncle. He obtained independent housing in December 2014, though this was not achieved until after the second motion for termination of parental rights was filed. He maintained a stable job throughout this case and built and maintained an affectionate relationship with Giavonna that was observed by multiple support workers. He also expressed and

demonstrated a desire for Giavonna to develop a bond with her siblings and extended family.

He was unsuccessfully discharged from urinalysis testing for failure to complete the ordered urinalysis testing through multiple testing services. He also participated in PCIT training, but failed to fully incorporate this training into his interactions with Giavonna. Wendell testified that Mario was respectful and cooperative, but that Mario expressed reservations about utilizing PCIT techniques in parenting Giavonna. Wendell testified that Mario had the ability to do quite well if he committed to making the necessary changes, but that he was not optimistic that Mario's parenting would improve if he resisted the therapeutic techniques. We note that Mario's psychological evaluation did not contain any significant concerns regarding his parenting or parent-child interactions; the evaluation merely suggested that he may benefit from interventions designed to assist him with developing skills to cope with challenges and stressors.

The record clearly demonstrates that Mario did not have perfect attendance for visits with Giavonna throughout this case, and Kirkland testified that support workers raised concerns regarding Mario's level of supervision during visits, lack of preparation with supplies, and choice of foods to provide during visits. When Mario first became involved in this case, visits took place in a public place or at his sister's home and his attendance fluctuated. Kirkland testified that he attended consistently between winter 2013 and February 2014. However, she testified that from May to September 2014, he canceled multiple visits due to work commitments, family emergencies or events, and occasionally failure to call to confirm whether he would attend.

Kirkland testified that Mario was able to provide for Giavonna's physical needs, but that her concern was his ability to provide for Giavonna's emotional needs. Gorman supervised four visits between October and December 2014 and reported that Mario appeared to have a big extended family

and that Giavonna was close to her cousins. She observed that Mario loved Giavonna and showed his affection for her often. Powers, Minadeo, Garver, and Frost prepared session notes following supervised visits during the period from February to April 2015. These notes indicate Mario was making progress. The workers indicated that visits were happening regularly and that Mario provided appropriate affection, food, entertainment, and discipline during visits. The session notes did not indicate there were safety concerns in the home during that time period, except on one occasion when Frost noted that she had to redirect a conversation when Giavonna asked Mario about something she had heard about him from her grandmother. Powers, Minadeo, and Garver testified that Giavonna and Mario appeared excited to see each other during visits and were affectionate toward each other.

[4,5] A termination of parental rights is a final and complete severance of the child from the parent and removes the entire bundle of parental rights; therefore, with such severe and final consequences, parental rights should be terminated only in the absence of any reasonable alternative and as the last resort. *In re Interest of Justin H. et al.*, 18 Neb. App. 718, 791 N.W.2d 765 (2010). In considering a motion to terminate parental rights, 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. See *In re Interest of Athina M.*, 21 Neb. App. 624, 842 N.W.2d 159 (2014).

Upon our de novo review, we conclude that while this case is a "close call," Mario's assertions do have merit. We fully recognize that Mario has made improvement but still has work to do before achieving reunification with Giavonna. In particular, we point to the need for Mario to demonstrate the ability to maintain sobriety and stability in visitation, and to comply promptly with any applicable court orders. However, as stated above, we do not require perfection of a parent when deciding whether termination of parental rights is

appropriate. See *In re Interest of Seth K. & Dinah K.*, 22 Neb. App. 349, 853 N.W.2d 217 (2014). We find there was not clear and convincing evidence to demonstrate that terminating Mario's parental rights was in Giavonna's best interests at the time of trial. As such, we reverse the juvenile court's order terminating Mario's parental rights.

## CONCLUSION

We find that the juvenile court erred when it found that the State had proved, by clear and convincing evidence, that terminating Mario's parental rights would be in Giavonna's best interests. Accordingly, we reverse the order of the juvenile court terminating his parental rights and remand the matter for further proceedings.

Reversed and remanded for further proceedings.

**Nebraska Court of Appeals**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# Debra A. Shriner, appellant, v. Friedman Law Offices, P.C., L.L.O., and Daniel H. Friedman, appellees.

877 N.W.2d 272

Filed April 12, 2016. No. A-15-051.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Attorney and Client: Malpractice: Negligence: Proof.** A client who has agreed to the settlement of an action is not barred from recovering against his or her attorney for malpractice if the client can establish that the settlement agreement was the product of the attorney's negligence.
4. **Judgments: Res Judicata.** The doctrine of res judicata, now called claim preclusion, bars litigation of any claim that has been directly addressed or necessarily included in a former adjudication, as long as (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
5. **Res Judicata.** Claim preclusion does not apply to permissive cross-claims that could have been raised in a former action but were not.
6. **Judgments: Collateral Estoppel.** Issue preclusion applies where (1) an identical issue was decided in a prior action, (2) the prior action

resulted in a final judgment on the merits, (3) the party against whom the doctrine is to be applied was a party or was 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.

7. **Malpractice: Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** In a civil action for legal malpractice, a plaintiff alleging professional negligence on the part of an attorney must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client.
8. **Estoppel.** The doctrine of judicial estoppel prohibits one who has successfully and unequivocally asserted a position in a prior proceeding from asserting an inconsistent position in a subsequent proceeding.
9. **Equity: Estoppel.** The elements of equitable estoppel are, as to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts.
10. ____: ____. The elements of equitable estoppel are, as to the party invoking the doctrine, (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.
11. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just.
12. **Malpractice: Testimony.** Where a mediator's testimony is relevant to disproving a claim or complaint of professional misconduct or malpractice filed against a representative of a mediation party based on conduct occurring during a mediation, the testimony falls within an exception to the mediation communications privilege.

Appeal from the District Court for Lancaster County: William B. Zastera, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

James D. Sherrets and Jared C. Olson, of Sherrets, Bruno & Vogt, L.L.C., for appellant.

Shawn D. Renner and Susan K. Sapp, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees.

Moore, Chief Judge, and Inbody and Bishop, Judges.

Bishop, Judge.

## I. INTRODUCTION

Debra A. Shriner filed a legal malpractice action in the district court for Lancaster County, Nebraska, against attorney Daniel H. Friedman and his law firm, Friedman Law Offices, P.C., L.L.O., arising out of Friedman's representation of Shriner in an underlying personal injury action filed in Hall County, Nebraska. The name "Friedman" is used herein to refer to Friedman and to Friedman Law Offices collectively as well as to Friedman individually. In Shriner's legal malpractice action, she alleged that Friedman coerced her into accepting a settlement offer of $45,000 in the underlying action and that he breached the standard of care for an attorney by, among other things, failing to properly value and prosecute her claim and advising her to accept the settlement offer.

After Shriner and Friedman filed motions for summary judgment in the legal malpractice action, the district court entered summary judgment in Friedman's favor. The court determined that Shriner voluntarily agreed to settle the underlying action and, furthermore, that she ratified the settlement agreement by accepting the settlement proceeds. According to the district court, Shriner could not then "claim to have been forced, pressured and/or coerced" into settling the underlying claim. Shriner timely appealed to this court.

As we explain below, we reverse the district court's judgment insofar as it granted Friedman's motion for summary judgment, but we affirm the district court's judgment insofar as it denied Shriner's cross-motion for summary judgment. Because it is likely to arise on remand, we also address Shriner's argument that testimony from the mediator of the settlement in the underlying action was privileged. We determine the testimony fell within an exception to the privilege and was admissible.

## II. BACKGROUND

On December 29, 2006, in Grand Island, Nebraska, a truck driven by Randall Svoboda, an employee of Cloudburst Underground Sprinkler Systems, Inc. (Cloudburst), struck the passenger-side rear quarter panel of Shriner's vehicle as she passed through an intersection. As a result of the collision, Shriner's vehicle spun around, coming to rest facing the opposite direction of travel. According to Shriner, the collision resulted in injuries to her person, damage to her vehicle, ongoing medical expenses, and lost wages.

Following her accident, Shriner had contact with two law firms, Sokolove Law, LLC (Sokolove), and Underhill & Underhill, P.C. (Underhill), before ultimately being referred to Friedman for representation. In April 2010, Shriner retained Friedman to represent her pursuant to a contingent fee arrangement in which Friedman would receive 33⅓ percent of any recovery from Svoboda and Cloudburst. Allegedly unknown to Shriner was a fee-splitting arrangement among Friedman, Sokolove, and Underhill in which the three law firms agreed to share any attorney fees.

On June 14, 2010, Friedman filed suit on Shriner's behalf against Svoboda and Cloudburst in the district court for Hall County, seeking damages arising out of the collision. On July 12, 2012, the parties to the personal injury action attended a mediation with mediator Matthew Miller. During the mediation, Svoboda and Cloudburst's insurer authorized a

settlement offer of $45,000, which Friedman allegedly advised Shriner to accept.

According to Shriner's amended complaint in her legal malpractice action, Friedman told her that if she did not accept the settlement offer, Friedman would no longer advance litigation costs for her case. Specifically, to proceed to trial, Shriner would be required to pay for deposing up to four medical professionals, anticipated to cost $3,000 to $5,000 per witness. According to Shriner, although she was indigent and informed Friedman she desired to take the case to trial, Friedman persisted. As described in her amended complaint, Shriner "relented under the pressure and duress and 'told . . . Friedman, in anger, that if that's all [she] had to get, that's what [she]'d have to get.'" Friedman then accepted the $45,000 settlement offer on Shriner's behalf.

Six days after the mediation, Shriner informed Friedman she would not sign a release or accept the proceeds of the settlement reached during the mediation. Thereafter, Friedman filed a motion to withdraw as Shriner's counsel of record in the personal injury action, and Svoboda and Cloudburst filed a motion to enforce the settlement agreement.

On August 9, 2012, the district court for Hall County heard both motions. At the hearing, Shriner appeared with a new attorney, John Sellers, and testified in opposition to Friedman's motion to withdraw. After hearing Shriner's testimony, the court granted the motion to withdraw; it then turned to the issue of the motion to enforce the settlement agreement. Sellers requested an opportunity either to recall Shriner as a witness or to obtain her written affidavit. The court questioned whether Shriner's testimony was necessary if her prior attorney had apparent authority to accept the settlement offer at the mediation. The court indicated that Sellers could present evidence but cautioned, "I think you're kind of climbing a hill." Sellers submitted no evidence, and the court granted the motion to enforce the settlement agreement.

On October 15, 2012, Svoboda and Cloudburst's insurer filed a complaint for interpleader and declaratory judgment in the district court for Hall County. Named as defendants were Shriner, "Herbert J. Friedman d/b/a Friedman Law Offices," and two companies with alleged claims to portions of the settlement proceeds. The insurer sought to deposit the settlement funds of $45,000 with the court clerk for distribution among the defendants in exchange for an order releasing it and its insureds from liability in connection with Shriner's personal injury claim. The insurer set forth the grounds for the various defendants' claims to the settlement proceeds; in particular, the insurer alleged that Friedman asserted an attorney's lien pursuant to Neb. Rev. Stat. § 7-108 (Reissue 2012).

The district court for Hall County directed the insurer to deposit the settlement proceeds with the court clerk and released Svoboda, Cloudburst, and their insurer from liability. Shortly thereafter, Shriner, who was represented by Sellers in the interpleader action, filed a "Motion to Approve Settlement and Final Order," in which she alleged that the remaining parties to the interpleader action had reached an agreement regarding their claims to the settlement proceeds, which claims the defendants wished to resolve without further litigation. Shriner asked the court to approve disbursement of the settlement proceeds in the following amounts: (1) $6,666.66 to the State of Nebraska, (2) $3,333 to one company with an alleged claim, (3) $10,000 to the other such company, (4) $12,159.49 to Friedman, (5) $1,500 to Sellers, and (6) $11,340.85 to Shriner.

On March 6, 2013, the district court for Hall County entered an order approving the agreement and ordering the settlement proceeds disbursed in the manner Shriner proposed. The court found the agreement was not unconscionable.

On December 31, 2013, Shriner commenced her legal malpractice action in the district court for Lancaster County. In an amended complaint filed on September 2, 2014, Shriner set forth much of the background outlined above and further

alleged that at the time of the mediation in the underlying personal injury action, Cloudburst's liability was "established by the facts." Shriner further alleged that at the time of the mediation, she had incurred medical expenses in excess of $67,000, with more than $100,000 in future medical expenses anticipated, and that two of her treating physicians had opined that her medical treatment was necessary as a result of the collision, her injuries were permanent, and she would require future medical treatment. Shriner alleged that despite these facts, Friedman coerced her into accepting the "grossly inadequate" settlement offer of $45,000.

Shriner's amended complaint contained four counts: (1) professional negligence, (2) breach of contract, (3) breach of implied contract, and (4) fraud. In the professional negligence count, Shriner alleged Friedman breached the standard of care for an attorney by (i) entering into a "multi-stage fee-sharing agreement" with multiple law firms, (ii) failing to properly value and prosecute her claim, (iii) demanding payment of litigation costs as a prerequisite to continued representation, and (iv) advising her to accept the $45,000 settlement offer.

In the counts for breach of contract and breach of implied contract, Shriner alleged she had either an express contract or an implied contract for representation in the underlying personal injury action. She alleged Friedman breached the express or implied contract by (i) failing to competently represent her, (ii) providing her with unreasonable legal advice at the time of the mediation, (iii) refusing to advance the costs necessary to proceed to trial, and (iv) demanding that Shriner advance litigation costs.

In the fraud count, Shriner alleged that Friedman, in order to secure a contract for her representation, told Shriner she would be responsible for costs of litigation only after a settlement or judgment was obtained even though Friedman knew he would demand that Shriner "pay costs of the litigation up front if [Friedman] could not achieve an easy settlement agreement."

Shriner alleged that she relied on Friedman's "false statement" and that she was damaged as a result.

Friedman filed an answer denying the material allegations of the amended complaint. As affirmative defenses, Friedman alleged, in pertinent part, that Shriner's claim was barred under the doctrines of res judicata, collateral estoppel, equitable estoppel, judicial estoppel, waiver, release, and laches. In support, Friedman relied on Shriner's failure to present any evidence in opposition to Svoboda and Cloudburst's motion to enforce the settlement agreement in the underlying personal injury action, as well as Shriner's agreement with the defendants in the interpleader action as to disbursement of the settlement proceeds. Friedman alleged that Shriner accepted the benefits of the settlement and that her position in the legal malpractice action was contrary to the positions she took in the underlying personal injury and interpleader actions.

Shortly after Friedman filed the answer and affirmative defenses to Shriner's amended complaint in the legal malpractice action, Friedman filed a motion for summary judgment, arguing Shriner's claim was barred under the doctrines of res judicata, collateral estoppel, equitable estoppel, judicial estoppel, and waiver. Friedman submitted exhibits in support of the motion, including (1) the deposition of Miller, the mediator of the settlement in the underlying action; (2) the transcript of the hearing on Svoboda and Cloudburst's motion to enforce the settlement in the underlying action; (3) Friedman's affidavit; (4) the retainer agreement executed between Shriner and Friedman; (5) the joint representation agreement executed among Shriner, Friedman, and Underhill; and (6) the court filings and orders from the interpleader action.

Shriner then filed a "Cross-Motion for Summary Judgment." She argued that there was no genuine issue of material fact with respect to any of her claims and that she was entitled to judgment as a matter of law. In support of her motion, Shriner offered the following exhibits: (1) the affidavit of Shane Warner, an expert witness who opined Friedman violated

the applicable standard of care; (2) Shriner's affidavit; (3) Shriner's deposition and written discovery responses in the personal injury action; (4) the depositions of Kathleen Neary and Michael Mullin, Friedman's expert witnesses in the legal malpractice action; (5) the deposition of Svoboda in the personal injury action; and (6) documents summarizing Shriner's medical bills.

In opposition to Shriner's motion for summary judgment, Friedman offered affidavits from Neary and Mullin summarizing their expert opinions on Shriner's legal malpractice action. Both experts opined Friedman's representation of Shriner fell within the applicable standard of care. We discuss additional details of the parties' summary judgment exhibits as necessary in our analysis section below.

Before a hearing was held on the motions for summary judgment, Shriner filed a "Motion in Limine to Exclude Testimony of . . . Miller," in which Shriner sought an order excluding testimony from Miller regarding his role as mediator in the underlying action. She maintained that mediation communications were privileged pursuant to Neb. Rev. Stat. § 25-2933 (Reissue 2008) and that Miller's testimony could not be considered absent an express waiver from all parties to the mediation.

Following a brief hearing on the motions for summary judgment at which the court received the submitted exhibits, the court took the matter under advisement. At the hearing, Shriner renewed her objection to Miller's testimony on the basis that it related privileged mediation communications.

On December 26, 2014, the court entered a written opinion and order granting Friedman's motion for summary judgment and denying Shriner's motion for summary judgment. The court did not expressly address Shriner's motion in limine to exclude Miller's testimony, but in its order, the court referenced Miller's testimony that there was no question in his mind that Shriner had validly authorized acceptance of the settlement.

In addition to relying on Miller's testimony, the court noted that in the interpleader action, Shriner "stipulated that she, [Friedman], and the other parties had reached an agreement regarding their individual claims to the settlement proceeds . . . and wished to resolve the matter without further litigation." The court also noted Shriner had "accepted and retained the monies obtained from the settlement agreement." Based on these considerations, the court concluded Shriner "voluntarily agreed" to the settlement and "ratified" the settlement agreement. The court ruled Shriner could not "claim to have been forced, pressured and/or coerced into settling her claim," and it entered summary judgment in Friedman's favor.

Shriner timely appealed to this court.

## III. ASSIGNMENTS OF ERROR

Shriner assigns, renumbered and restated, that the district court erred in (1) granting Friedman's motion for summary judgment, (2) denying Shriner's motion for summary judgment, (3) relying on Miller's privileged testimony regarding mediation communications, (4) finding Shriner voluntarily settled her underlying personal injury claim, and (5) not finding Friedman breached the standard of care.

## IV. STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *New Tek Mfg. v. Beehner*, 275 Neb. 951, 751 N.W.2d 135 (2008).

## V. ANALYSIS

Before we address the parties' arguments, we note the legal basis of the district court's summary judgment order is less than clear. In the order, after discussing Shriner's conduct in the underlying personal injury and interpleader actions, the court concluded that Shriner "voluntarily agreed" to the settlement and that she "ratified" the settlement agreement. The court then ruled Shriner could not "claim to have been forced, pressured and/or coerced into settling her claim" and entered summary judgment in Friedman's favor. The court cited no legal authority and provided no explanation for why Shriner's acceptance or ratification of the settlement or settlement agreement barred her legal malpractice cause of action against Friedman. As will be discussed next, the law does not bar such a cause simply because a client has entered into a settlement agreement and a court orders it into effect.

[3] The Nebraska Supreme Court has held, "A client who has agreed to the settlement of an action is not barred from recovering against his or her attorney for malpractice if the client can establish that the settlement agreement was the product of the attorney's negligence." *Wolski v. Wandel*, 275 Neb. 266, 271, 746 N.W.2d 143, 148-49 (2008). This is true even where a court has approved the settlement agreement. *Bruning v. Law Offices of Ronald J. Palagi*, 250 Neb. 677, 551 N.W.2d 266 (1996). In *Bruning*, the plaintiff entered into a workers' compensation lump-sum settlement agreement and executed a release of claims. The settlement was approved by the compensation court, as well as a district court. The plaintiff subsequently commenced an action against his workers' compensation lawyers for professional negligence on several different grounds, including obtaining a settlement that was inadequate. The defendants in that case argued they were entitled to judgment as a matter of law because the execution of the settlement and release in the underlying action barred the professional negligence action. The Nebraska Supreme Court disagreed, setting forth the legal principle above that a

client is not barred from bringing a malpractice action simply because he agreed to a settlement. *Id.*

Applying the legal principles set forth above, neither Shriner's settlement of her personal injury claim nor the ruling by the district court for Hall County that the settlement agreement was enforceable bars Shriner's legal malpractice action against Friedman.

However, this case involves an added twist, the interpleader action. If there is a basis to affirm the district court's summary judgment order, it lies somewhere in this procedural wrinkle. In light of this circumstance, we address the parties' arguments in reverse order. We first address Friedman's arguments that Shriner is legally or equitably barred from pursuing her legal malpractice claim. If Friedman is correct, then we may affirm the district court's entry of summary judgment in Friedman's favor, even if its reasoning may have been wrong or unclear. See *Swift v. Dairyland Ins. Co.*, 250 Neb. 31, 35, 547 N.W.2d 147, 150 (1996) ("[a] proper result will not be reversed merely because it was reached for the wrong reasons").

### 1. Friedman's Motion for Summary Judgment

Friedman argues summary judgment in Friedman's favor was proper because Shriner's legal malpractice claim is barred under the doctrines of res judicata, collateral estoppel, judicial estoppel, and equitable estoppel. Although Friedman also raised the issue of waiver in moving for summary judgment in the district court, Friedman has not raised this issue on appeal.

#### (a) Res Judicata or Claim Preclusion

[4] The doctrine of res judicata, now called claim preclusion, bars litigation of any claim that has been directly addressed or necessarily included in a former adjudication, as long as (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final

judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. See *Hara v. Reichert*, 287 Neb. 577, 843 N.W.2d 812 (2014). Claim preclusion bars litigation not only of those matters actually litigated, but also of matters which could have been litigated in the former proceeding. See *id*. Generally, judgments entered by agreement or consent are treated as final judgments on the merits for purposes of claim preclusion. See *Blazek v. City of Omaha*, 232 Neb. 562, 441 N.W.2d 205 (1989).

Friedman contends Shriner's legal malpractice action is barred under the doctrine of claim preclusion because (1) the district court for Hall County had jurisdiction over the interpleader action, (2) Shriner and Friedman were parties to the interpleader action, (3) the parties to the interpleader action agreed to entry of an order that constituted a final judgment on the merits, and (4) "the issues raised by Shriner's professional negligence claims, breach of contract claims, and fraud claims . . . *could have been raised* in the Interpleader Action." Brief for appellees at 26.

Shriner responds that the interpleader action was not the proper forum to litigate her legal malpractice claims. She contends that a party to an action in Nebraska is not required to plead a counterclaim or cross-claim and that therefore, she is not barred from pursuing her legal malpractice action.

Because Shriner and Friedman (actually, "Herbert J. Friedman d/b/a Friedman Law Offices," presumably in privity with Friedman) were codefendants in the interpleader action, if Shriner had raised her legal malpractice claims in the interpleader action, it would have been by cross-claim. Under Neb. Ct. R. Pldg. § 6-1113(g), a cross-claim "may" be filed by one party against a coparty to an action if the cross-claim (1) arises "out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein" or (2) relates "to any property that is the subject matter of the original action."

As the parties' arguments suggest, if Shriner could have filed a cross-claim alleging legal malpractice against Friedman in the interpleader action, then a conflict arises between the permissive cross-claim rule embodied in § 6-1113(g) and the doctrine of claim preclusion. Stated another way, if Shriner could have filed a cross-claim against Friedman in the interpleader action but failed to do so, we must decide whether claim preclusion bars her subsequent legal malpractice action. The first step is to determine whether Shriner could have filed a cross-claim against Friedman in the interpleader action.

The basic purpose of interpleader is to allow adverse claimants to litigate between or among themselves their conflicting rights or claims to property or a fund, without involving the stakeholder, who disclaims any interest in the property or fund. See *Ehlers v. Perry*, 242 Neb. 208, 494 N.W.2d 325 (1993). In the insurer's interpleader action in which Shriner and Friedman were involved, the fund was the $45,000 in settlement proceeds. Friedman's claim to a portion of the proceeds took the form of the attorney's lien Friedman asserted pursuant to § 7-108. To enforce the attorney's lien, Friedman was required to establish the existence and terms of any fee contract, the making of any disclosures to the client required to render a contract enforceable, and the extent and value of Friedman's professional services. See *Hauptman, O'Brien v. Turco*, 273 Neb. 924, 735 N.W.2d 368 (2007). Evidence of the extent and value of an attorney's professional services is necessary for a court to determine the reasonableness of the attorney fees. *Id.* "[A]n attorney fee computed pursuant to a contingent fee agreement is subject to the same standard of reasonableness as any other attorney fee." *Id.* at 931, 735 N.W.2d at 374.

In light of the elements Friedman was required to prove to enforce the attorney's lien, including the extent and value of Friedman's professional services, Shriner could have filed a cross-claim against Friedman alleging legal malpractice. The transaction or occurrence that was the subject matter

of Friedman's attorney's lien was Friedman's provision of professional services to Shriner in the personal injury action. The claims Shriner asserts in her legal malpractice action arose out of that same transaction or occurrence. Although we have not located a Nebraska case involving this procedure, it has been done elsewhere. See *Gilbert v. Montlick & Associates, P.C.*, 248 Ga. App. 535, 546 S.E.2d 895 (2001) (former client filed cross-claim for legal malpractice against former attorney when attorney asserted attorney's lien in interpleader action).

Because we conclude Shriner could have filed a cross-claim against Friedman in the interpleader action, we must now decide whether claim preclusion bars her legal malpractice action. We have not located any Nebraska case addressing this issue; therefore, we look to out-of-state cases for guidance.

Although there is limited contrary authority, see, e.g., *Citizens Exchange Bank of Pearson v. Kirkland*, 256 Ga. 71, 344 S.E.2d 409 (1986), a significant number of states have declined to apply the doctrine of claim preclusion to permissive cross-claims that were not asserted in a prior action. See, *Israel v. Farmers Mut. Ins. Ass'n of Iowa*, 339 N.W.2d 143 (Iowa 1983); *Houlihan v. Fimon*, 454 N.W.2d 633 (Minn. App. 1990); *Hemme v. Bharti*, 183 S.W.3d 593 (Mo. 2006); *Executive Mgmt. v. Ticor Title Ins. Co.*, 963 P.2d 465 (Nev. 1998); *Glover v. Krambeck*, 727 N.W.2d 801 (S.D. 2007); *State and County Mut. Fire Ins. v. Miller*, 52 S.W.3d 693 (Tex. 2001); *Krikava v. Webber*, 43 Wash. App. 217, 716 P.2d 916 (1986); *Wisconsin Public Service v. Arby Const.*, 798 N.W.2d 715 (Wis. App. 2011). Federal courts applying Fed. R. Civ. P. 13(g), which is nearly identical to § 6-1113(g), have likewise held that a party to an action having a claim in the nature of a cross-claim has the option to pursue it in a later action. See, *Peterson v. Watt*, 666 F.2d 361 (9th Cir. 1982); *Augustin v. Mughal*, 521 F.2d 1215 (8th Cir. 1975). See, also, 6 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1431 at 275-76 (3d ed. 2010) ("[a] party

who decides not to bring a claim under Rule 13(g) will not be barred by res judicata, waiver, or estoppel from asserting it in a later action").

[5] We agree with the approach adopted by a number of states and federal courts declining to apply claim preclusion to permissive cross-claims not asserted in a prior action. Part of the rationale for such an approach is that the contrary rule would, in essence, render otherwise "permissive" cross-claims "mandatory." See *Houlihan, supra*. Thus, because a contrary rule would effectively abolish the permissive cross-claim rule embodied in § 6-1113(g), we conclude that claim preclusion does not apply to permissive cross-claims that could have been raised in a former action but were not. Therefore, claim preclusion does not bar Shriner's legal malpractice action.

### (b) Collateral Estoppel or Issue Preclusion

[6] The doctrine of collateral estoppel, now called issue preclusion, bars relitigation of a finally determined issue that a party had a prior opportunity to fully and fairly litigate. *Hara v. Reichert*, 287 Neb. 577, 843 N.W.2d 812 (2014). Issue preclusion applies where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom the doctrine is to be applied was a party or was 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. *Id*. Issue preclusion applies only to issues actually litigated. *Id*.

The only pertinent issues actually litigated in the underlying personal injury and interpleader actions were (1) the enforceability of the settlement agreement among Shriner, Svoboda, and Cloudburst and (2) the enforceability of Friedman's attorney's lien against a portion of the settlement proceeds. Because Shriner was a party to the personal injury and interpleader actions and had the opportunity to fully and fairly litigate these two issues, the doctrine of issue preclusion bars her from

relitigating them. Thus, Shriner cannot now argue that the settlement agreement reached in the mediation was unenforceable or that Friedman was not entitled to the attorney fees received as part of the judgment in the interpleader action.

[7] Otherwise, however, the issues Shriner raises in her legal malpractice claims were not litigated in either the personal injury action or the interpleader action. In a civil action for legal malpractice, a plaintiff alleging professional negligence on the part of an attorney must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client. *Gallner v. Larson*, 291 Neb. 205, 865 N.W.2d 95 (2015). With the possible exception of Friedman's employment as Shriner's attorney, which is undisputed, the district court in the underlying actions was not called upon to address any of these issues.

Friedman's reliance on *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001), is misplaced. In *Woodward*, during a prior divorce proceeding, a husband and wife entered into a property settlement agreement that, among other things, distributed the shares in a closely held corporation between the parties. The parties also executed a shareholder agreement, which was incorporated into the divorce decree, providing that the wife was not indebted to the corporation and that the corporation had no claims against her. After the divorce decree became final, the husband sued his former wife for an accounting, a return of funds to the corporation, and dissolution of the corporation. The district court determined that res judicata or collateral estoppel barred the husband from asserting claims based on actions taken by the wife prior to the divorce, and the Nebraska Supreme Court affirmed. *Id*.

Relying on the doctrine of collateral estoppel, the Nebraska Supreme Court reasoned that the corporation had been marital property and that "[in] order to equitably distribute the property, a necessary determination involved the value of the corporation." *Id*. at 988, 627 N.W.2d at 749. The court

reasoned that "[a]ny claim that [the husband] or the corporation had against [the wife] at the time of the divorce would affect the valuation of the corporation, bringing directly into issue whether [the wife] improperly withdrew money from the corporation." *Id*. at 988, 627 N.W.2d at 749-50. Based on this reasoning, the court concluded the husband was collaterally estopped from relitigating issues concerning the wife's withdrawals from the corporation prior to the divorce. *Id*.

In the present case, no issue in the underlying personal injury or interpleader actions required the court to address, as a "necessary determination," the issues material to Shriner's legal malpractice action. See *id.* at 988, 627 N.W.2d at 749. Therefore, the doctrine of issue preclusion does not apply to Shriner's legal malpractice action, with the exception of the two issues noted above: (1) the enforceability of the settlement agreement in the personal injury action and (2) Friedman's entitlement to the fees obtained as part of the judgment in the interpleader action.

We must clarify, however, that simply because Shriner is precluded from relitigating the enforceability of the settlement agreement, it does not mean she is precluded from arguing Friedman breached the standard of care for an attorney by advising her to accept, or by pressuring her into accepting, the $45,000 settlement offer. See *Wolski v. Wandel*, 275 Neb. 266, 271, 746 N.W.2d 143, 148-49 (2008) ("[a] client who has agreed to the settlement of an action is not barred from recovering against his or her attorney for malpractice if the client can establish that the settlement agreement was the product of the attorney's negligence").

(c) Judicial Estoppel

[8] The doctrine of judicial estoppel prohibits one who has successfully and unequivocally asserted a position in a prior proceeding from asserting an inconsistent position in a subsequent proceeding. See *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007). The intent behind the doctrine is to

prevent parties from gaining an advantage by taking one position in a proceeding and then switching to a different position when convenient in a later proceeding. *Cleaver-Brooks, Inc. v. Twin City Fire Ins. Co.*, 291 Neb. 278, 865 N.W.2d 105 (2015). For the doctrine to apply, the court in the prior proceeding must have accepted the inconsistent position; otherwise, no risk of inconsistent results exists. *Burns, supra*. The doctrine is to be applied with caution so as to avoid impinging on the truth-seeking function of the court, because the doctrine precludes a contradictory position without examining the truth of either statement. *Cleaver-Brooks, Inc., supra*.

Friedman maintains that the doctrine of judicial estoppel applies because Shriner took positions in the underlying personal injury and interpleader actions that are inconsistent with the position she is taking in her legal malpractice action. Friedman identifies the prior inconsistent positions as follows: (1) Shriner offered no evidence in opposition to Svoboda and Cloudburst's motion to enforce the settlement agreement, (2) Shriner did not deny the allegations of the insurer's complaint in the interpleader action, (3) Shriner did not oppose the insurer's request for a broad release of it and its insureds from liability arising from the accident, and (4) Shriner stipulated to a disbursement of the settlement proceeds.

Friedman has not persuaded us that judicial estoppel applies under these circumstances. Regarding Shriner's failure to offer evidence in opposition to the motion to enforce the settlement agreement, we note that Shriner's attorney at the time requested an opportunity to present evidence but was discouraged by the district court from doing so. This conduct did not qualify as "successfully and unequivocally" asserting a position in a prior proceeding. See *Burns*, 273 Neb. at 734, 732 N.W.2d at 650. The same is true with respect to Shriner's failure to deny the insurer's allegations in the interpleader action and her failure to object to the insurer's request for a release of liability; a failure to object does not qualify as "successfully and unequivocally" asserting a position. See *id.* Accord

*Melcher v. Bank of Madison*, 248 Neb. 793, 539 N.W.2d 837 (1995) (declining to apply judicial estoppel to party's failure to object to his son's listing of tractor as one of his assets in prior bankruptcy proceeding).

Similarly, Shriner's stipulation to the disbursement of the settlement proceeds in the interpleader action does not warrant invoking judicial estoppel. In *Vowers & Sons, Inc. v. Strasheim*, 254 Neb. 506, 576 N.W.2d 817 (1998), the Nebraska Supreme Court held that judicial estoppel did not apply to a party who settled a negligence action against his former real estate broker and subsequently pursued an action against a buyer for breach of a contract to purchase real estate. Although the negligence action required the party to prove the unenforceability of the purchase contract, while the breach of contract action required the party to prove its enforceability, the Nebraska Supreme Court held that the settlement of the negligence action did not result in "judicial acceptance of the claim that [the real estate broker] was negligent . . . or that the court made any adjudication on the merits of such claim." *Id.* at 514, 576 N.W.2d at 824.

Like the settlement of the negligence action in *Vowers & Sons*, 254 Neb. at 514, 576 N.W.2d at 824, Shriner's agreement in the interpleader action as to how the settlement proceeds should be disbursed did not result in "judicial acceptance" of any position that is inconsistent with her position in the present action. In approving the agreement in the interpleader action, the district court for Hall County simply found it was not unconscionable; the court did not make any finding regarding the quality of Friedman's representation of Shriner in the personal injury action. Thus, judicial estoppel does not bar Shriner's legal malpractice action.

(d) Equitable Estoppel

[9] The elements of equitable estoppel are, as to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated

to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. *Farmington Woods Homeowners Assn. v. Wolf*, 284 Neb. 280, 817 N.W.2d 758 (2012).

[10] As to the other party, the elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice. *Id*.

In support of Friedman's position that equitable estoppel applies to Shriner's legal malpractice action, Friedman contends Shriner's "silence" in the underlying personal injury and interpleader actions "precluded [Friedman] from having a chance to address [Shriner's] claims at a times [sic] they were ripe." Brief for appellees at 35. Friedman contends:

> If Shriner had testified that she had not voluntarily accepted the settlement offer, claimed that Friedman settled her claims without her valid authority, claimed that Friedman pressured, forced, or coerced her into settling her claims, claimed that [Friedman] had committed professional negligence, breach of contract, or fraud, or claimed that [Friedman] had otherwise acted improperly in any way, then [Friedman] would have vigorously disputed such claims in the Interpleader Action.

*Id*. at 36. Friedman claims prejudice insofar as Friedman is "now forced to defend this professional malpractice action in which Shriner is taking positions contrary to the positions she took" in the underlying actions. *Id*.

We disagree that equitable estoppel applies under these circumstances. With regard to Shriner's failure to present evidence at the hearing on the motion to enforce the settlement

agreement in the personal injury action, we noted above that the district court discouraged Shriner from doing so. Regardless, moments before the hearing on the motion to enforce the settlement agreement, Shriner testified at the hearing on Friedman's motion to withdraw as her attorney. Shriner testified that during the mediation, she "told . . . Friedman, in anger, that if that's all [she] had to get, that's what [she]'d have to get. Because he was forcing [her] into taking the claim [sic]." Shriner further testified that Friedman told her "at least twice that he had to have extra money to go ahead and take [her case] to court." In response, Friedman argued that he sought to withdraw because he could not ethically present to the court Shriner's argument that "there wasn't a mediated settlement."

Given Shriner's testimony at the hearing on Friedman's motion to withdraw, and Friedman's reasons for withdrawing as Shriner's attorney, Friedman's claim now that he was unaware of Shriner's belief that he pressured or coerced her into settling the personal injury action is not persuasive. Thus, the requirement that the party claiming equitable estoppel lack knowledge of the true facts is not present.

With respect to Shriner's conduct in the interpleader action, as we discussed above, Shriner was not required to file a cross-claim against Friedman in that action. That Shriner chose not to file a cross-claim was not "a false representation or concealment of material facts." See *Farmington Woods Homeowners Assn. v. Wolf*, 284 Neb. 280, 287, 817 N.W.2d 758, 766 (2012). In addition, that Friedman must defend against the present legal malpractice action instead of defending against a cross-claim in the interpleader action does not qualify as a change of position to Friedman's injury, detriment, or prejudice.

### (e) Conclusion as to Summary Judgment in Friedman's Favor

Because we have determined that Shriner's legal malpractice action is not barred under the doctrines of claim preclusion,

issue preclusion, judicial estoppel, or equitable estoppel, we conclude that summary judgment in Friedman's favor was improper. We reverse the district court's judgment insofar as it granted Friedman's motion for summary judgment.

We note Friedman further argues that summary judgment in Friedman's favor was proper because (1) Nebraska law prohibits a legal malpractice plaintiff from maintaining separate claims for breach of contract, breach of implied contract, and fraud; (2) the existence of an express contract bars Shriner's claim for breach of implied contract; and (3) Shriner failed to present any evidence to support her fraud claim. However, the record before us does not reflect that Friedman raised any of these issues before the district court, so we decline to address them. See *First Express Servs. Group v. Easter*, 286 Neb. 912, 923, 840 N.W.2d 465, 473 (2013) ("[w]hen a party raises an issue for the first time on appeal, we will disregard it because a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition").

### 2. Shriner's Motion for Summary Judgment

[11] Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just. *Vowers & Sons, Inc. v. Strasheim*, 254 Neb. 506, 576 N.W.2d 817 (1998). Thus, we have jurisdiction to review the judgment of the district court in its entirety. *Id.*

In Shriner's argument that the district court erred in not granting her motion for summary judgment, she contends the evidence shows "beyond any question of material fact" that Friedman breached the standard of care for an attorney.

Brief for appellant at 19. She identifies the breaches as (1) Friedman's failure to adequately investigate her personal injury claim, (2) Friedman's negligence in advising her to accept the inadequate settlement offer without properly advising her of the alternatives, (3) Friedman's execution of the unethical fee-sharing agreement with Sokolove and Underhill, and (4) Friedman's coercion of Shriner into accepting the settlement offer. Shriner further contends Friedman's refusal to continue advancing litigation costs constituted a breach of contract, a breach of implied contract, or a fraudulent misrepresentation.

We need not engage in a detailed recitation of the evidence to reject Shriner's contention that she is entitled to summary judgment on these issues. Each of the issues is a factual one on which the parties presented conflicting expert opinions. See *Guinn v. Murray*, 286 Neb. 584, 608-09, 837 N.W.2d 805, 824 (2013) ("the question of what an attorney's specific conduct should be in a particular case and whether an attorney's conduct fell below that specific standard is a question of fact"). Generally, a conflict of expert testimony regarding an issue of fact establishes a genuine issue of material fact which precludes summary judgment. *Guinn, supra*.

We need only briefly summarize the experts' affidavits to establish the existence of a genuine issue of material fact. In support of her motion for summary judgment, Shriner submitted Warner's affidavit in which he opined that Friedman breached the applicable standard of care by failing to properly value Shriner's claim, failing to conduct adequate discovery and investigation, demanding that Shriner pay the costs of litigation if she rejected the settlement offer, failing to advise Shriner of a potential conflict of interest, and advising her to accept the settlement offer "seemingly because he had not appropriately prepared her case for trial."

In opposition to Shriner's motion for summary judgment, Friedman submitted the affidavits of Neary and Mullin, both of whom opined that Friedman did not breach the applicable

standard of care. In Mullin's affidavit, he noted that Shriner executed a joint representation agreement acknowledging the involvement of all three law firms and the cost-sharing arrangement among them; that in the retainer agreement Shriner executed with Friedman, she agreed to "'pay all necessary costs and expenses incident'" to Friedman's representation of her; and that at the time of the mediation, there were a number of weaknesses in Shriner's personal injury suit, including her preexisting injuries from a prior car accident and an independent medical examiner's inability to make objective findings to substantiate her complaints of pain. In Neary's affidavit, she opined that Friedman properly disclosed the fee-sharing arrangement to Shriner, properly investigated Shriner's personal injury claim, properly advised Shriner during the mediation, and reasonably and appropriately decided to cease advancing litigation costs following the mediation.

In light of the conflicting expert opinions on the material issues raised in Shriner's legal malpractice action, we conclude the district court properly denied Shriner's motion for summary judgment. Accordingly, we affirm the district court's judgment insofar as it denied Shriner's motion.

### 3. Application of Mediation Communications Privilege

Although we have determined that summary judgment was not proper and this cause must be remanded for further proceedings, we next address the applicability of the mediation communications privilege, because the issue is likely to arise on remand. See *Combined Insurance v. Shurter*, 258 Neb. 958, 607 N.W.2d 492 (2000). Shriner contends the testimony of mediator Miller was privileged pursuant to § 25-2933 because it recounted mediation communications.

The Uniform Mediation Act, Neb. Rev. Stat. § 25-2930 et seq. (Reissue 2008), establishes a privilege for mediation communications, which generally are not subject to discovery

or admissible in evidence in a proceeding. See § 25-2933. Under the act, mediation communications are privileged unless an exception applies, § 25-2935; the privilege is waived, § 25-2934(a); or a person is precluded from asserting the privilege, § 25-2934(b) or (c). Shriner and Friedman do not dispute that Miller's deposition testimony recounted "[m]ediation communication[s]" as defined by the act, see § 25-2931(2), or that this action qualifies as a "[p]roceeding" as defined by the act, see § 25-2931(7). Likewise, there is no dispute that Shriner, as a mediation party, is permitted to prevent any other person from disclosing a mediation communication. See § 25-2933(b)(1).

In response to Shriner's contention that Miller's testimony is privileged, Friedman argues the testimony falls within the exception contained in § 25-2935(a), which provides:

> There is no privilege under section 25-2933 for a mediation communication that is:
>
> . . . .
>
> (6) except as otherwise provided in subsection (c) of this section, sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation[.]

Subsection (c) of § 25-2935 provides that "[a] mediator may not be compelled to provide evidence of a mediation communication referred to in subdivision (a)(6) . . . of this section." Shriner does not specifically address the applicability of the exception contained in § 25-2935(a)(6) in her reply brief.

We agree with Friedman that Miller's deposition testimony falls within the exception contained in § 25-2935(a)(6). In her amended complaint, Shriner alleged that during the mediation, Friedman advised her to accept the $45,000 settlement offer. She further alleged Friedman told her that if she did not accept the settlement offer, Friedman would no longer advance litigation costs for her case. According to Shriner, although

she was indigent and informed Friedman that she desired to take the case to trial, Friedman persisted, demanding that she either accept the offer or pay the costs necessary to proceed to trial. Shriner alleged that she "relented under the pressure and duress and 'told . . . Friedman, in anger, that if that's all [she] had to get, that's what [she]'d have to get.'" Based upon these allegations, Shriner alleged that Friedman breached the applicable standard of care by demanding that she pay litigation costs to proceed to trial and by advising her to accept the settlement offer.

Miller's deposition testimony consisted primarily of a description of his interaction with Shriner and Friedman during the mediation with respect to the $45,000 settlement offer. Miller observed that Shriner and Friedman were both disappointed with the offer. Miller recalled that Friedman advised Shriner "there was a real chance that they could get less than [$45,000] if they tried the case" and recalled that it was Friedman's opinion Shriner should accept the offer. Miller also recalled that Friedman told Shriner she would have to pay the costs of the physicians' depositions if she wished to proceed to trial. Miller testified that Shriner left the conference room and made a telephone call, then returned and said she would accept the offer. According to Miller, she was not happy but affirmatively agreed to accept the settlement offer.

[12] Miller's testimony is relevant to disproving "a claim or complaint of professional misconduct or malpractice filed against a . . . representative of a party based on conduct occurring during a mediation." See § 25-2935(a)(6). Specifically, Friedman seeks to use Miller's testimony to disprove Shriner's allegations that Friedman committed legal malpractice by coercing her into accepting the settlement offer and by improperly advising her during the mediation. Therefore, Miller's testimony falls within the exception contained in § 25-2935(a)(6). If Miller's testimony is offered on remand, caution will be required, since only the portion of a

mediation communication necessary for the application of the exception may be admitted. See § 25-2935(d).

Shriner further argues that Miller's testimony lacked foundation and was prejudicial. The applicability of these evidentiary objections will depend upon Miller's specific testimony on remand, so we decline to address them.

## VI. CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court for Lancaster County insofar as it entered summary judgment in Friedman's favor; we affirm the judgment insofar as it denied Shriner's motion for summary judgment; and we remand the cause for further proceedings.

Affirmed in part, and in part reversed and remanded for further proceedings.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Paul J. Turner, appellant.

880 N.W.2d 403

Filed April 12, 2016. No. A-15-472.

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. **Constitutional Law: Search and Seizure.** It is well settled under the Fourth Amendment that warrantless searches and seizures are per se unreasonable, subject to a few specifically established and well-delineated exceptions.
3. ____: ____. A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.
4. **Police Officers and Sheriffs: Search and Seizure.** In addition to situations where an officer directly tells a suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.
5. **Search and Seizure: Duress.** Consent to search must be voluntarily given and not the result of duress or coercion, whether express, implied, physical, or psychological.
6. ____: ____. In examining all the surrounding circumstances to determine if in fact a consent to search was coerced, account must be taken

of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.

7. **Search and Seizure.** Where both occupants of a jointly occupied premises are physically present, the consent of one occupant to a search is insufficient when the other occupant objects to the search.
8. ____. The determination of whether consent to search is voluntarily given is a question of fact to be determined from the totality of the circumstances.
9. **Search and Seizure: Proof.** The burden is upon the government to prove that a consent to search was voluntarily given.

Appeal from the District Court for Hall County: William T. Wright, Judge. Affirmed.

Charles R. Maser for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

Moore, Chief Judge, and Inbody and Bishop, Judges.

Bishop, Judge.

Following a bench trial in the district court for Hall County, Paul J. Turner was convicted of possession of a controlled substance (methamphetamine), a Class IV felony, see Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 2014); possession of drug paraphernalia, an infraction, see Neb. Rev. Stat. § 28-441 (Reissue 2008); and possession of marijuana of 1 ounce or less, an infraction, see § 28-416(13)(a). He appeals, contending the district court erred in overruling his pretrial motion to suppress evidence seized during an allegedly unconstitutional search of his apartment. He further argues that without the evidence resulting from the search, there was insufficient evidence to establish his guilt. We affirm.

## BACKGROUND

On January 21, 2014, Turner was charged by information in the district court for Hall County with possession of a

methamphetamine (count I), possession of drug paraphernalia (count II), and possession of 1 ounce or less of marijuana (count III). In a separate information filed in the district court for Hall County on the same date, Turner's girlfriend, Shannon K. Bond, was charged with possession of methamphetamine. Turner's and Bond's offenses allegedly occurred on December 3, 2013, in Hall County, Nebraska.

On May 14, 2014, Turner filed a motion to suppress evidence seized during an allegedly unconstitutional search of his apartment on December 3, 2013. He further requested that any statements he made be suppressed, alleging the statements were not freely and voluntarily made. On May 28, 2014, Bond filed a nearly identical motion to suppress in her case.

Turner and Bond, both of whom were represented by counsel, agreed to a consolidated evidentiary hearing on their motions to suppress; the hearing was held on July 17, 2014. Investigator Sarah Mann of the Grand Island Police Department testified as follows: On December 2, 2013, she went to an address on North Walnut Street in Grand Island, Nebraska, in response to a child abuse hotline intake indicating possible drug use in front of minor children at the address. Upon arriving, she knocked on the door and heard no response. She returned around 1 p.m. the next day, December 3, with Chelsea Willden, an employee of the Nebraska Department of Health and Human Services (DHHS). Investigator Mann realized the door on which she had knocked the prior day led to a staircase, and she opened the door and ascended the stairs. At the top of the stairs was the door to an apartment. She knocked on the door and heard a male voice say, "Come in." She continued knocking, and Turner opened the door.

According to Investigator Mann, she identified herself and Willden, explained they had received a complaint, and asked if they could "come in and chat with him about it." Turner said yes and invited them inside. Mann and Willden talked to Turner about the allegations, and then Bond exited a bedroom

and joined the conversation. Mann and Willden explained the allegations to Bond. At some point during this interaction, Investigator Mann saw an individual whom she identified as Dennis Castro sitting in the living room; she learned that Castro had a warrant for his arrest and requested a patrol unit to transport Castro to the jail. Waiting for the patrol unit "took up some time."

After Castro was transported away, Royal Kottwitz, another investigator with the Grand Island Police Department, noticed a backpack on the living room floor. (On cross-examination, Mann clarified that Investigator Kottwitz was with her and Willden when they arrived at the apartment on December 3, 2013.) Neither Turner nor Bond knew who owned the backpack, and both agreed it could be searched. Upon opening the backpack, Investigator Mann located among other items a hypodermic needle, a small baggie of what appeared to be marijuana, and a glass pipe with white residue. Based on her training and experience, Investigator Mann believed the glass pipe was a "meth pipe."

Investigator Mann explained that after finding the items in the backpack, there was a discussion about consent to search the apartment. Bond wanted to give consent, but Turner did not. There was a discussion "amongst officers" about whether to seek a search warrant. Bond then asked if she could go to the bathroom and asked Investigator Mann to accompany her. In the bathroom, Bond "was pretty worked up" and told Investigator Mann she would give up "everything" and "wanted to know if that would kind of make all this go away." Investigator Mann told Bond she could not answer that question because she did not know what Bond had. The two women left the bathroom, and Bond led Investigator Mann into the bedroom, where Bond pulled two pipes and a baggie out of her purse. Bond handed the pipes to Investigator Mann and said, "This is my marijuana pipe," and, "This is my meth pipe." The baggie had a white residue that appeared to be methamphetamine.

After Bond handed the items to her, Investigator Mann told Bond she still wanted to search the apartment. They returned to the living room, and Bond conversed with Turner. According to Investigator Mann, Turner and Bond could not agree whether to give consent and "kind of went back and forth." Every now and then, Investigator Mann would tell them "time's ticking" and ask for a decision. Eventually, Investigator Mann informed Turner and Bond she was leaving to apply for a search warrant, but Bond asked her to wait. After Turner and Bond still could not reach a decision, Investigator Mann said "time's up" and left to seek a search warrant. Prior to leaving, she patted Turner down for weapons, but located none.

Investigator Mann testified that Officer Wesley Tjaden arrived to "stand by to make sure no evidence was destroyed" while she sought a search warrant. Investigator Mann returned to the police department and had nearly completed her warrant application when Officer Tjaden called to inform her that Turner and Bond had decided to consent to the search. Investigator Mann, who had not completed the warrant application, returned to the apartment, and Turner and Bond verbally consented to a search and signed consent-to-search forms. The forms were received into evidence; Bond signed her form at 4:05 p.m., and Turner signed his form at 4:10 p.m.

During the subsequent search of the apartment, Investigator Mann located a makeup or cosmetic bag containing drug paraphernalia and what she believed to be methamphetamine. The bag was located in a magazine rack in the master bedroom, on the side of the bed that Bond indicated was hers. In the nightstand on the other side of the bed, Investigator Kottwitz located a glass marijuana pipe, a marijuana grinder, two broken glass pipes, and a "blue pencil torch." Other drug-related items were located in other places in the master bedroom, including a baggie containing a white crystalline substance on the desk and folded up tinfoil with white residue in the trash can.

Investigator Mann testified that after locating the items during the search, she gave Turner warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and that he signed a form waiving his rights. The form was received into evidence and indicated Turner signed the form at 5:15 p.m. When Investigator Mann then asked Turner if the items in the magazine rack were his, Bond spoke up and said they were hers. Investigator Mann placed Turner and Bond under arrest.

Upon further questioning, Investigator Mann testified that when she returned to the apartment after leaving to prepare the search warrant application, Officer Tjaden told her Turner had been "manipulating something in his pocket" the entire time she was gone. Investigator Mann asked for consent to search Turner's person, and he denied consent. Later, either before or after Turner signed the consent-to-search form (Investigator Mann believed it was after but she was not sure), Turner "stuck his hands in his pocket real quick," and the investigators asked him to remove his hands. At that point, Turner said he was going to empty his pockets, which he did. Turner pulled out a black bag with two glass pipes with white residue, two metal "pen pipes," seven baggies with white residue, a baggie with a white crystalline substance, and two cell phones.

On cross-examination, Investigator Mann testified that prior to going to Turner and Bond's apartment, she and Willden interviewed Turner's 10- and 11-year-old sons at their schools. Neither boy reported witnessing drug use at home. Investigator Mann also spoke with the boys' mother (who was not Bond), and the mother expressed concern that Turner and Bond were "currently using." The mother, who had custody of the boys, did not know what occurred during the boys' visits with Turner.

Also on cross-examination, Investigator Mann explained that the door on which she knocked on December 2, 2013, was "an outside door off the sidewalk of the business district" in Grand Island. Although she did not recall there being a doorbell, she

was shown her police report in which she reported that she rang a doorbell next to the outside door. When she returned on December 3, she realized that because the apartment was in a business district, the door must lead to a staircase to the upstairs apartment. When she opened the door, she saw an enclosed staircase leading to another door. The stairs did not appear to be the interior of someone's home. She did not recall seeing any personal belongings on the stairs.

Investigator Mann also explained that when she discussed the allegations of the hotline report with Turner and Bond, they showed her the children's sleeping area and Turner and Bond's food supply in the kitchen. Nothing Investigator Mann saw caused her concern over the children's care.

Still on cross-examination, Investigator Mann estimated that when Turner and Bond were discussing whether to consent to a search of the apartment, she inquired three to four times as to whether they had made a decision.

Officer Tjaden testified that on December 3, 2013, he was called to an apartment on North Walnut Street in Grand Island to arrest Castro and transport him to jail. After he transported Castro, he returned to the apartment to "stand at the residence" while Investigator Mann obtained a search warrant. After Investigator Mann left, the only persons in the apartment were Officer Tjaden, Turner, and Bond. Officer Tjaden stood in the doorway of the living room, and Turner and Bond sat on the couch in the living room. Neither Turner nor Bond asked or attempted to leave, and the officer did not tell them they were not free to do so. Officer Tjaden observed Bond "begging and pleading" with Turner to give consent to search the apartment. The officer never discussed the subject of consent to search with them. At some point, Turner and Bond told the officer they had decided to give consent to search. He radioed Investigator Mann to return to the apartment. Officer Tjaden estimated he was at the apartment for 45 minutes to 1 hour during the time Investigator Mann was preparing her search warrant application.

On cross-examination, Officer Tjaden recalled seeing "stuff lined up on either side of the stairwell," but he did not remember what it was. He also testified he was 6 feet 3 inches tall and weighed close to 260 pounds. While in the apartment, he was in full uniform with his service weapon displayed on his person.

The State rested, and Turner and Bond called Willden as their first witness. Willden's testimony concerning the events of December 2 and 3, 2013, was largely consistent with Investigator Mann's testimony. However, she testified that Bond answered the apartment door, not Turner as Investigator Mann testified. Willden testified that following the visit to the apartment, DHHS closed the investigation into the hotline report as "unfounded."

Turner and Bond next called Investigator Kottwitz. He testified that when he arrived at the apartment with Investigator Mann and Willden on December 3, 2013, they were unsure whether the street-level door "led to the residence or led to multiple apartments on the second level." Investigator Kottwitz testified he opened the unlocked door and saw a stairway leading to a second door. He recalled seeing "minimal property" on the stairs. The remainder of his testimony was consistent with Investigator Mann's testimony.

On August 14, 2014, the court entered a written order overruling Turner's and Bond's motions to suppress. The court found that when the investigators and Willden approached the apartment for purposes of inquiring about the hotline report, they were engaging in a "'knock and talk'" and did not require a warrant. The court further found that while one might argue the stairway was part of the "'curtilage'" of the apartment, there was no indication Turner and Bond had a reasonable expectation of privacy in the stairway, and the evidence suggested it was expected for a visitor to climb the stairway and knock on the upstairs door. The court noted Turner's lack of surprise when Investigator Mann knocked on the upstairs door, given that Turner's response was "'come in.'"

Turning to the issue of consent to search, the court found that either Turner or Bond consented to the initial entry into the apartment. The court then found that Turner and Bond consented to the search of the backpack and that Bond invited Investigator Mann to the bathroom and bedroom, where Bond gave Investigator Mann drug paraphernalia and items with drug residue on them. Even though Turner had not consented to a search of the apartment at that time, the court noted that Turner was not the target of a search when Investigator Mann accompanied Bond to these areas and that Bond had "'common authority'" over the apartment.

Addressing the ultimate search of the entire apartment, the court found it to be the only "potentially problematic" search. The court noted Turner and Bond did not sign the consent-to-search forms until law enforcement officials had been in and out of the apartment for approximately 3 hours. This time period was prolonged due to Castro's arrest, the discussion between Turner and Bond regarding consenting to the search, and Investigator Mann's departure to seek a search warrant. The court found that "the vast majority of the time officers spent in the residence was the result of Bond's efforts to secure Turner's consent." Furthermore, the court found that "[i]f anyone overbore Turner's will, it was Bond, not the officers in question." The court upheld the consensual search of the apartment.

The court also found no constitutional violations in Turner's act of voluntarily emptying his pockets. In addition, the court found that any statements made by Turner and Bond either were volunteered without custodial inquiry or followed the voluntary waiver of rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

At Turner and Bond's request, the matter proceeded to a consolidated bench trial on December 22, 2014. Investigators Mann and Kottwitz testified consistently with their testimony at the suppression hearing. In addition, a forensic scientist from the Nebraska State Patrol crime laboratory testified concerning

her testing of the suspected drugs seized from the apartment, which tested positive for marijuana and methamphetamine. After an evidence technician provided testimony concerning the chain of custody, the drugs and drug paraphernalia seized from the apartment were received into evidence.

The court found Turner guilty of possession of methamphetamine (count I), possession of drug paraphernalia (count II), and possession of 1 ounce or less of marijuana (count III). After the court sentenced Turner to 20 to 60 months' imprisonment on count I, and fines of $100 each on counts II and III, Turner timely appealed to this court.

## ASSIGNMENTS OF ERROR

Turner assigns (1) that "[t]here was insufficient evidence to sustain the conviction," (2) that his motion to suppress "should have been sustained," and (3) "[a]ny other improper evidentiary rulings that took place during the Trial." Because Turner offers no argument in support of his third assignment of error, we do not consider it. See *State v. Huston*, 291 Neb. 708, 868 N.W.2d 766 (2015) (to be considered by appellate court, alleged error must be specifically assigned and argued). Furthermore, Turner's only argument in support of his first assignment of error is that without the evidence challenged in his motion to suppress, there was no evidence to prove his guilt of the offenses charged; he does not contend that the evidence, if properly admitted, was insufficient. Therefore, the success of Turner's appeal hinges on his second assignment of error.

## 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, we apply a two-part standard of review. *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015). Regarding historical facts, we review the trial court's findings for clear error. *Id*. But whether those facts trigger or violate Fourth Amendment protections

is a question of law that we review independently of the trial court's determination. *Id*.

## ANALYSIS

Turner challenges the search of his and Bond's apartment on a number of grounds. He contends that after Investigator Mann and Willden interviewed Turner's sons, they should have ceased their investigation into the hotline report of possible drug use in front of the children; he maintains law enforcement did not have probable cause to continue the investigation beyond that point. He further argues the investigators "without authorization entered what should be considered a porch area wherein they should not have entered without invitation." Brief for appellant at 16. He contends the 3-hour period during which law enforcement was in the apartment prior to obtaining consents to search was an unreasonable and "excessively long seizure and detention." *Id.* Turner asserts his and Bond's wills were overborne, resulting in coerced consents.

[2] It is well settled under the Fourth Amendment that warrantless searches and seizures are per se unreasonable, subject to a few specifically established and well-delineated exceptions. *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001). One well-recognized exception is a search undertaken with consent. *Wells, supra*. To be effective under the Fourth Amendment, consent must be voluntary; in other words, it must be a free and unconstrained choice, not the result of a will overborne. See *Tucker, supra*. In addition, where a consensual search follows an illegal entry, as Turner alleges occurred here, a court must determine whether the consent was an exploitation of the prior illegality. See *State v. Gorup*, 279 Neb. 841, 782 N.W.2d 16 (2010). The search will be upheld only if the State has shown a sufficient attenuation, or break in the causal connection, between the illegal conduct and the consent to search. See *id*. Because any illegality in the investigators' entry into the stairway or apartment will require

us to address the issue of attenuation, we address the legality of the entries before addressing the voluntariness of the consents to search.

We begin with the entry into the stairway leading to the upstairs apartment door. The Nebraska Supreme Court has explained that the degree of privacy society is willing to accord an apartment hallway depends on the facts, such as whether there is an outer door locked to the street which limits access, the number of residents using the hallway, the number of units in the apartment complex, and the presence or absence of no trespassing signage. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999). In this case, the upstairs apartment was located in a business district and the street-level door was unlocked. However, the street-level door led to one apartment only; thus, the stairway was not shared among multiple tenants. Turner suggests the enclosed stairway "should be considered a porch area" in which he and Bond had an expectation of privacy, brief for appellant at 16, and we see no reason not to accept his invitation to treat it as such for purposes of argument.

"The front porch is the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.'" *Florida v. Jardines*, 569 U.S. 1, 7, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013), quoting *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984). Although a front porch is therefore a constitutionally protected area, a police officer does not engage in an "unlicensed physical intrusion" by entering that area to knock on the front door. *Jardines*, 569 U.S. at 7. See, also, *Kentucky v. King*, 563 U.S. 452, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011) (law enforcement officers not armed with warrant may knock on door, because they do no more than any private citizen might do). This is because a visitor, including a police officer, has an implicit license to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Jardines*, 569 U.S. at 8.

It is only when an officer exceeds the scope of that license, such as by using a trained police dog to search the front porch for incriminating evidence, that a Fourth Amendment violation occurs. See *Jardines, supra*.

When the investigators and Willden ascended the stairs and knocked on the apartment door with the hopes of speaking to Turner and Bond about the hotline report, they did nothing to exceed the scope of their implicit license to approach the door and knock. Any doubt about this conclusion is resolved when one considers that Turner's reaction to the knocking was to say, "Come in," which suggests Turner was not alarmed to have visitors knocking on the upstairs door. Thus, even assuming arguendo the enclosed stairway was the equivalent of a porch area, as Turner suggests, no constitutional violation occurred. See *State v. Breuer*, 577 N.W.2d 41 (Iowa 1998) (holding that law enforcement officer without warrant did not unreasonably invade suspect's legitimate expectation of privacy by opening unlocked outer door of apartment building and proceeding up stairway to apartment door). Although Turner argues law enforcement did not have probable cause to investigate him and Bond after an interview of Turner's sons did not substantiate the hotline report, no probable cause is required for a "knock and talk" like the one that occurred here. See *King, supra* (when law enforcement officers not armed with warrant knock on door, they do no more than any private citizen might do; no Fourth Amendment violation occurs).

We next address the entry into the apartment itself. Generally, absent exigent circumstances, a law enforcement officer must have a warrant or consent to enter a person's home. *State v. Resler*, 209 Neb. 249, 306 N.W.2d 918 (1981). As stated, consent must be a free and unconstrained choice, not the result of a will overborne. See *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001). Investigator Mann testified that after she knocked on the upstairs door and Turner opened it, she identified herself and Willden, explained they had received a complaint, and asked if they could "come in and chat with him

about it." Turner said yes and invited them inside. Investigator Kottwitz' testimony was consistent; however, Willden testified it was Bond who invited them inside. Regardless of who extended the invitation, there was no evidence that the entry into the apartment was anything but consensual; therefore, the entry into the apartment was lawful.

We have concluded that the investigators' entries into the stairway and apartment were lawful; however, before we can turn to the voluntariness of the consents to search, we must address the legality of law enforcement's presence in the apartment for approximately 3 hours prior to obtaining the consents to search. If law enforcement's presence in the apartment for this period constituted an unreasonable and "excessively long seizure and detention," as Turner contends, brief for appellant at 16, we will be required to determine whether there was a sufficient attenuation between the illegal seizure and the consents to search. See *State v. Gorup*, 279 Neb. 841, 782 N.W.2d 16 (2010) (where consensual search follows illegal police conduct, court must determine whether consent was exploitation of prior illegality).

[3,4] Generally, a seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009). A seizure may occur where an officer directly tells a suspect that he or she is not free to go; in addition, "circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 815, 765 N.W.2d at 479.

At a minimum, no Fourth Amendment seizure occurred during Turner and Bond's initial interaction with the investigators and Willden. The interaction consisted of a lawful entry into the apartment, noncoercive questioning regarding the hotline

report, and observation of the children's sleeping area and Turner and Bond's food supply. No reasonable person would have believed he or she was not free to leave during this consensual encounter.

Likewise, no Fourth Amendment seizure of Turner and Bond occurred when Investigator Mann learned Castro had a warrant for his arrest and requested a patrol unit to transport Castro to jail. According to Investigator Mann, this process "took up some time"; however, Turner and Bond had no reason to believe they were not free to leave merely because Castro was being arrested on a warrant unrelated to the hotline report investigation.

It was only after Castro was removed from the apartment that the tenor of Turner and Bond's interaction with the investigators changed. After Castro was removed, Investigator Kottwitz observed a backpack, of which neither Turner nor Bond claimed ownership; inside the backpack, which Turner and Bond agreed could be searched, Investigator Mann found drug paraphernalia and suspected methamphetamine. There was then a discussion about consent to search the apartment and a discussion "amongst officers" about whether to seek a search warrant. Bond, who unlike Turner wanted to consent to a search of the apartment, requested that Investigator Mann accompany her to the bathroom. In the bathroom, Bond told Investigator Mann she would give up "everything" and "wanted to know if that would kind of make all this go away." After Investigator Mann told Bond she could not answer because she did not know what Bond had, Bond led her to the bedroom, where she handed the investigator a marijuana pipe, a methamphetamine pipe, and a baggie with suspected methamphetamine. Investigator Mann told Bond she still wanted to search the apartment, and the two returned to the living room, where Bond discussed with Turner whether to give consent. Turner and Bond could not agree, and Investigator Mann interrupted three or four times to tell them "time's ticking" and asked for a decision. Eventually, Investigator Mann said

"time's up" and left to seek a search warrant while Officer Tjaden stood by in the apartment "to make sure no evidence was destroyed."

Even assuming a seizure occurred during the prolonged interaction that culminated with Officer Tjaden standing by while Investigator Mann left to seek a search warrant, no Fourth Amendment violation occurred. In *Illinois v. McArthur*, 531 U.S. 326, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001), the U.S. Supreme Court held that police officers did not violate the Fourth Amendment when they detained a man outside his trailer home for approximately 2 hours while other officers obtained a search warrant. In that case, police had probable cause to believe the man's home contained drugs; they had good reason to fear that, unless restrained, the man would destroy the drugs before they returned with a warrant; they neither searched the trailer home nor arrested the man before obtaining a warrant; and they restrained the man for a "limited period of time" of 2 hours. *Id.*, 531 U.S. at 332. The Court explained that it had "upheld temporary restraints where needed to preserve evidence until police could obtain a warrant," *id.*, 531 U.S. at 334, and noted it had found no case in which it had "held unlawful a temporary seizure that was supported by probable cause and was designed to prevent the loss of evidence while the police diligently obtained a warrant in a reasonable period of time," *id.*

In the present case, unlike in *McArthur, supra*, police did not restrain Turner and Bond outside of their apartment while another officer obtained a warrant; instead, after the investigators lawfully entered the apartment with the consent of Turner and/or Bond, Officer Tjaden stood inside the residence observing Turner and Bond while Investigator Mann left to obtain a warrant. However, we see no reason to treat the alleged seizure of Turner and Bond inside their apartment differently than the seizure that occurred outside the trailer home in *McArthur*. As in *McArthur*, when Investigator Mann left to obtain a search warrant, the investigators had probable

cause to believe the apartment contained drugs. Further, it was reasonable for Investigator Mann to believe that if she left Turner and Bond unsupervised in the apartment while she obtained a warrant, the two would destroy any remaining evidence of drugs. Additionally, although Turner characterizes the alleged detention as "excessively long," brief for appellant at 16, it was approximately the same length as, if not shorter than, the detention in *McArthur*. Considering the totality of the circumstances, we conclude the investigators' conduct, assuming it constituted a Fourth Amendment seizure, was reasonable.

Because we have concluded the investigators' conduct prior to obtaining consents to search was not illegal, we need not address the issue of attenuation. Accordingly, we turn to the issue of the voluntariness of the consents to search.

[5-7] Consent to search must be voluntarily given and not the result of duress or coercion, whether express, implied, physical, or psychological. See *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001). In examining all the surrounding circumstances to determine if in fact a consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990). Mere submission to authority is insufficient. *Tucker, supra*. Where, as here, both occupants of a jointly occupied premises are physically present, the consent of one occupant to a search is insufficient when the other occupant objects to the search. *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006). See, also, *Fernandez v. California*, 571 U.S. 292, 134 S. Ct. 1126, 188 L. Ed. 2d 25 (2014) (declining to extend *Randolph, supra*, to situation where objecting occupant is absent when another occupant consents).

[8,9] The determination of whether consent to search is voluntarily given is a question of fact to be determined from the totality of the circumstances. *State v. Ready*, 252 Neb.

816, 565 N.W.2d 728 (1997). The burden is upon the government to prove that a consent to search was voluntarily given. *Prahin, supra*.

The district court's finding that Bond voluntarily consented to the search of the apartment was not clearly erroneous. From the moment the issue of consent to search the apartment arose, Bond wanted to consent to the search; it was only Turner who was reluctant. There is no evidence that police pressured or coerced Bond to consent to a search. Rather, the evidence clearly established that Bond was eager to cooperate with the investigators and even voluntarily handed Investigator Mann her marijuana pipe, her methamphetamine pipe, and a baggie with suspected methamphetamine. Bond's consent to the search was voluntary.

Regarding Turner's consent to the search, the district court found that "[i]f anyone overbore Turner's will, it was Bond, not the officers in question"; this finding was not clearly erroneous. There was little to no evidence that the investigators or Officer Tjaden pressured Turner into consenting to a search of the apartment. At most, the investigators discussed the issue of consent to search with Turner and Bond and told them they were leaving to obtain a search warrant after the two could not agree on whether to consent. In *Tucker, supra*, the Nebraska Supreme Court held that consent was not coerced where officers repeatedly asked a suspect for permission to enter his apartment to look for illegal items and threatened to get a search warrant, eventually leading the suspect to step back from the door with his arms raised and his hands upward and outward. Here, there was much less evidence of police pressure; in fact, when Turner ultimately agreed to consent to a search, the only law enforcement officer present in the apartment was Officer Tjaden, who was standing by and never discussed the issue of consents to search with the two suspects. Turner consented after Bond begged and pleaded with him, not upon the prompting of any police officer. The district court properly upheld the consensual search of the apartment.

Turner also raises some miscellaneous issues we must address. He contends that Investigator Mann searched his person on two occasions—once by patting him down for weapons prior to leaving to obtain a search warrant and once after she returned to the apartment. He contends "[t]hese searches are the fruits of the illegal entry and anything resulting from those searches is inadmissible." Brief for appellant at 24. However, the evidence at the suppression hearing was that Investigator Mann's first pat down of Turner revealed nothing. Investigator Mann further testified that after she returned to the apartment, Turner "stuck his hands in his pocket real quick," and the investigators asked him to remove his hands. At that point, Turner said he was going to empty his pockets, which he did, revealing suspected drugs and drug paraphernalia. As the district court determined, Turner's voluntary emptying of his pockets was not a Fourth Amendment search.

Turner also asserts that all statements he made prior to receiving warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), resulted from custodial interrogation and should be suppressed (he does not identify any specific statements). Having reviewed the record, we conclude the district court properly determined that Turner did not make any statements resulting from custodial interrogation prior to the time he received warnings pursuant to *Miranda, supra*.

## CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court for Hall County.

Affirmed.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Shannon K. Bond, appellant.

877 N.W.2d 254

Filed April 12, 2016. No. A-15-478.

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. **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.
3. **Constitutional Law: Search and Seizure.** It is well settled under the Fourth Amendment that warrantless searches and seizures are per se unreasonable, subject to a few specifically established and well-delineated exceptions.
4. ____: ____. A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.
5. **Police Officers and Sheriffs: Search and Seizure.** In addition to situations where an officer directly tells a suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.
6. **Search and Seizure: Duress.** Consent to search must be voluntarily given and not the result of duress or coercion, whether express, implied, physical, or psychological.

7. ____: ____. In examining all the surrounding circumstances to determine if in fact a consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.
8. **Search and Seizure.** Where both occupants of a jointly occupied premises are physically present, the consent of one occupant to a search is insufficient when the other occupant objects to the search.
9. ____. The determination of whether consent to search is voluntarily given is a question of fact to be determined from the totality of the circumstances.
10. **Search and Seizure: Proof.** The burden is upon the government to prove that a consent to search was voluntarily given.
11. **Sentences: Probation and Parole.** When a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute.

Appeal from the District Court for Hall County: William T. Wright, Judge. Affirmed.

Vicky A. Kenney and Matthew A. Works, Deputy Hall County Public Defenders, for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Moore, Chief Judge, and Inbody and Bishop, Judges.

Bishop, Judge.

Following a bench trial in the district court for Hall County, Shannon K. Bond was convicted of possession of a controlled substance (methamphetamine), a Class IV felony, see Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 2014), and sentenced to 4 years' probation. She appeals, contending the district court erred in failing to suppress evidence seized during an allegedly unconstitutional search of her apartment. She argues that without the evidence, there was insufficient evidence to establish her guilt. She also contends the district court improperly imposed a term of probation prohibiting her from having any contact with her boyfriend, Paul J. Turner, who was convicted

of drug-related offenses in a consolidated trial with Bond. We affirm.

## BACKGROUND

On January 21, 2014, Bond was charged by information in the district court for Hall County with possession of methamphetamine. In a separate information filed in the district court for Hall County on the same date, Turner was charged with possession of methamphetamine, possession of drug paraphernalia, and possession of 1 ounce or less of marijuana. Bond's and Turner's offenses allegedly occurred on December 3, 2013, in Hall County, Nebraska.

On May 28, 2014, Bond filed a motion to suppress evidence seized during an allegedly unconstitutional search of the apartment she shared with Turner. She further requested that any statements she made be suppressed, alleging the statements were not freely and voluntarily made. On May 14, Turner had filed a nearly identical motion to suppress in his case.

Bond and Turner, both of whom were represented by counsel, agreed to a consolidated evidentiary hearing on their motions to suppress; the hearing was held on July 17, 2014. Investigator Sarah Mann of the Grand Island Police Department testified as follows: On December 2, 2013, she went to an address on North Walnut Street in Grand Island, Nebraska, in response to a child abuse hotline intake indicating possible drug use in front of minor children at the address. Upon arriving, she knocked on the door and heard no response. She returned around 1 p.m. the next day, December 3, with Chelsea Willden, an employee of the Nebraska Department of Health and Human Services (DHHS). Investigator Mann realized the door on which she had knocked the prior day led to a staircase, and she opened the door and ascended the stairs. At the top of the stairs was the door to an apartment. She knocked on the door and heard a male voice say, "Come in." She continued knocking, and Turner opened the door.

According to Investigator Mann, she identified herself and Willden, explained they had received a complaint, and asked if they could "come in and chat with him about it." Turner said yes and invited them inside. Mann and Willden talked to Turner about the allegations, and then Bond exited a bedroom and joined the conversation. Mann and Willden explained the allegations to Bond. At some point during this interaction, Investigator Mann saw an individual whom she identified as Dennis Castro sitting in the living room; she learned that Castro had a warrant for his arrest and requested a patrol unit to transport Castro to the jail. Waiting for the patrol unit "took up some time."

After Castro was transported away, Royal Kottwitz, another investigator with the Grand Island Police Department, noticed a backpack on the living room floor. (On cross-examination, Mann clarified that Investigator Kottwitz was with her and Willden when they arrived at the apartment on December 3, 2013.) Neither Bond nor Turner knew who owned the backpack, and both agreed it could be searched. Upon opening the backpack, Investigator Mann located among other items a hypodermic needle, a small baggie of what appeared to be marijuana, and a glass pipe with white residue. Based on her training and experience, Investigator Mann believed the glass pipe was a "meth pipe."

Investigator Mann explained that after finding the items in the backpack, there was a discussion about consent to search the apartment. Bond wanted to give consent, but Turner did not. There was a discussion "amongst officers" about whether to seek a search warrant. Bond then asked if she could go to the bathroom and asked Investigator Mann to accompany her. In the bathroom, Bond "was pretty worked up" and told Investigator Mann she would give up "everything" and "wanted to know if that would kind of make all this go away." Investigator Mann told Bond she could not answer that question because she did not know what Bond had. The two women left the bathroom, and Bond led Investigator Mann into the

bedroom, where Bond pulled two pipes and a baggie out of her purse. Bond handed the pipes to Investigator Mann and said, "This is my marijuana pipe," and, "This is my meth pipe." The baggie had a white residue that appeared to be methamphetamine.

After Bond handed the items to her, Investigator Mann told Bond she still wanted to search the apartment. They returned to the living room, and Bond conversed with Turner. According to Investigator Mann, Bond and Turner could not agree whether to give consent and "kind of went back and forth." Every now and then, Investigator Mann would tell them "time's ticking" and ask for a decision. Eventually, Investigator Mann informed Bond and Turner she was leaving to apply for a search warrant, but Bond asked her to wait. After Bond and Turner still could not reach a decision, Investigator Mann said "time's up" and left to seek a search warrant.

Investigator Mann testified that Officer Wesley Tjaden arrived to "stand by to make sure no evidence was destroyed" while she sought a search warrant. Investigator Mann returned to the police department and had nearly completed her warrant application when Officer Tjaden called to inform her Bond and Turner had decided to consent to the search. Investigator Mann, who had not completed the warrant application, returned to the apartment, and Bond and Turner verbally consented to a search and signed consent-to-search forms. The forms were received into evidence; Bond signed her form at 4:05 p.m., and Turner signed his form at 4:10 p.m.

During the subsequent search of the apartment, Investigator Mann located a makeup or cosmetic bag containing drug paraphernalia and what she believed to be methamphetamine. The bag was located in a magazine rack in the master bedroom, on the side of the bed that Bond indicated was hers. In the nightstand on the other side of the bed, Investigator Kottwitz located a glass marijuana pipe, a marijuana grinder, two broken glass pipes, and a "blue pencil torch." Other drug-related items were located in other places in the master bedroom,

including a baggie containing a white crystalline substance on the desk and folded up tinfoil with white residue in the trash can.

Investigator Mann testified that after locating the items during the search, she gave Turner warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and that he signed a form waiving his rights. The form was received into evidence and indicated Turner signed the form at 5:15 p.m. When Investigator Mann then asked Turner if the items in the magazine rack were his, Bond spoke up and said they were hers. Investigator Mann placed Bond and Turner under arrest.

On cross-examination, Investigator Mann testified that prior to going to Bond and Turner's apartment, she and Willden interviewed Turner's 10- and 11-year-old sons at their schools. Neither boy reported witnessing drug use at home. Investigator Mann also spoke with the boys' mother (who was not Bond), and the mother expressed concern that Bond and Turner were "currently using." The mother, who had custody of the boys, did not know what occurred during the boys' visits with Turner.

Also on cross-examination, Investigator Mann explained that the door on which she knocked on December 2, 2013, was "an outside door off the sidewalk of the business district" in Grand Island. Although she did not recall there being a doorbell, she was shown her police report in which she reported that she rang a doorbell next to the outside door. When she returned on December 3, she realized that because the apartment was in a business district, the door must lead to a staircase to the upstairs apartment. When she opened the door, she saw an enclosed staircase leading to another door. The stairs did not appear to be the interior of someone's home. She did not recall seeing any personal belongings on the stairs.

Investigator Mann also explained that when she discussed the allegations of the hotline report with Bond and Turner, they showed her the children's sleeping area and Bond and Turner's

food supply in the kitchen. Nothing Investigator Mann saw caused her concern over the children's care.

Still on cross-examination, Investigator Mann estimated that when Bond and Turner were discussing whether to consent to a search of the apartment, she inquired three to four times as to whether they had made a decision.

Officer Tjaden testified that on December 3, 2013, he was called to an apartment on North Walnut Street in Grand Island to arrest Castro and transport him to jail. After he transported Castro, he returned to the apartment to "stand at the residence" while Investigator Mann obtained a search warrant. After Investigator Mann left, the only persons in the apartment were Officer Tjaden, Bond, and Turner. Officer Tjaden stood in the doorway of the living room, and Bond and Turner sat on the couch in the living room. Neither Bond nor Turner asked or attempted to leave, and the officer did not tell them they were not free to do so. Officer Tjaden observed Bond "begging and pleading" with Turner to give consent to search the apartment. The officer never discussed the subject of consent to search with them. At some point, Bond and Turner told the officer they had decided to give consent to search. He radioed Investigator Mann to return to the apartment. Officer Tjaden estimated he was at the apartment for 45 minutes to 1 hour during the time Investigator Mann was preparing her search warrant application.

On cross-examination, Officer Tjaden recalled seeing "stuff lined up on either side of the stairwell," but he did not remember what it was. He also testified he was 6 feet 3 inches tall and weighed close to 260 pounds. While in the apartment, he was in full uniform with his service weapon displayed on his person.

The State rested, and Bond and Turner called Willden as their first witness. Willden's testimony concerning the events of December 2 and 3, 2013, was largely consistent with Investigator Mann's testimony. However, she testified that Bond answered the apartment door, not Turner as Investigator

Mann testified. Willden testified that following the visit to the apartment, DHHS closed the investigation into the hotline report as "unfounded."

Bond and Turner next called Investigator Kottwitz. He testified that when he arrived at the apartment with Investigator Mann and Willden on December 3, 2013, they were unsure whether the street-level door "led to the residence or led to multiple apartments on the second level." Investigator Kottwitz testified he opened the unlocked door and saw a stairway leading to a second door. He recalled seeing "minimal property" on the stairs. The remainder of his testimony was consistent with Investigator Mann's testimony.

On August 14, 2014, the court entered a written order overruling Bond's and Turner's motions to suppress. The court found that when the investigators and Willden approached the apartment for purposes of inquiring about the hotline report, they were engaging in a "'knock and talk'" and did not require a warrant. The court further found that while one might argue the stairway was part of the "'curtilage'" of the apartment, there was no indication Bond and Turner had a reasonable expectation of privacy in the stairway, and the evidence suggested it was expected for a visitor to climb the stairway and knock on the upstairs door. The court noted Turner's lack of surprise when Investigator Mann knocked on the upstairs door, given that Turner's response was "'come in.'"

Turning to the issue of consent to search, the court found that either Bond or Turner consented to the initial entry into the apartment. The court then found that Bond and Turner consented to the search of the backpack and that Bond invited Investigator Mann to the bathroom and bedroom, where Bond gave Investigator Mann drug paraphernalia and items with drug residue on them. Even though Turner had not consented to a search of the apartment at that time, the court noted that Turner was not the target of a search when Investigator Mann accompanied Bond to these areas and that Bond had "'common authority'" over the apartment.

Addressing the ultimate search of the entire apartment, the court found it to be the only "potentially problematic" search. The court noted Bond and Turner did not sign the consent-to-search forms until law enforcement officials had been in and out of the apartment for approximately 3 hours. This time period was prolonged due to Castro's arrest, the discussion between Bond and Turner regarding consenting to the search, and Investigator Mann's departure to seek a search warrant. The court found that "the vast majority of the time officers spent in the residence was the result of Bond's efforts to secure Turner's consent." Furthermore, the court found that "[i]f anyone overbore Turner's will, it was Bond, not the officers in question." The court upheld the consensual search of the apartment. The court also found that any statements made by Bond and Turner either were volunteered without custodial inquiry or followed the voluntary waiver of rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

At Bond and Turner's request, the matter proceeded to a consolidated bench trial on December 22, 2014. Investigators Mann and Kottwitz testified consistently with their testimony at the suppression hearing. In addition, a forensic scientist from the Nebraska State Patrol crime laboratory testified concerning her testing of the suspected drugs seized from the apartment, which tested positive for marijuana and methamphetamine. After an evidence technician provided testimony concerning the chain of custody, the drugs and drug paraphernalia seized from the apartment were received into evidence.

The court found Bond guilty of possession of methamphetamine and requested preparation of a presentence investigation report (PSR). At a sentencing hearing on May 6, 2015, the court stated it had reviewed the PSR, which indicated that in August 2008, Bond was convicted of delivery or possession with intent to deliver an exceptionally hazardous drug (drug not specified), a Class II felony, and was sentenced to 4 to 5 years' imprisonment; in 2007, she was convicted of

shoplifting; and in March 2004, she was arrested for possession of a controlled substance (drug not specified), but the charge was dismissed after she completed drug court. The PSR reflected that Bond scored at high risk for recidivism using the "Level of Service/Case Management Inventory"; moderate to high risk for alcohol or drug abuse using the "Simple Screening Instrument"; and in the "problem risk" range on the "Substance Abuse Questionnaire" in the areas of alcohol and drugs. A chemical dependency analysis was attached to the PSR; the counselor who completed the analysis recommended that Bond complete intensive outpatient treatment for substance abuse.

At the sentencing hearing, after Bond's counsel argued in favor of a term of probation, the court offered Bond an opportunity for allocution. After Bond began discussing the "things in this case that aren't right," the court interrupted, stating it was particularly concerned with Bond's substance abuse problem and wanted to know why it should not sentence her to prison. Bond said she would go to prison if the court felt "that's where [she] need[ed] to be." The court then asked some specific questions concerning Bond's substance abuse, including whether she was still living with Turner, who was a long-term drug addict. Bond indicated that Turner had recently moved out. She said she knew "it's what's best for [her]," apparently referring to distancing herself from Turner. She went on to explain that for "probably" the past year, Turner would "come and go" and "he slept in the front room" while Bond slept in the bedroom. Bond said "it was really not a relationship." The court indicated it did not believe Bond "would ever make it on probation" unless she had no contact with Turner. When the court asked Bond if she would be able to comply with a term of probation requiring her to have no contact with Turner, Bond responded, "It would be very hard"; she later said she "would have to" comply with such a provision, although she could not "shut off [her] feelings." The court indicated that the alternative to probation was

to sentence Bond to prison "with the hope" that she would receive treatment.

At the conclusion of the sentencing hearing, the court sentenced Bond to 4 years' probation. One of the terms was that Bond "[n]ot associate with individuals having a known criminal record," except by permission of the probation officer, or "any person in possession of non-prescribed controlled substances to include family and significant others and specifically . . . Turner." Bond's terms of probation also included that she serve 90 days in jail; complete intensive outpatient counseling; not consume alcohol or drugs; submit to chemical drug testing at the probation officer's request; serve an immediate 72-hour jail sanction for any positive drug test, curfew violation, or refusal to test; and complete a variety of classes.

Bond timely appealed to this court.

## ASSIGNMENTS OF ERROR

Bond assigns that (1) there was insufficient evidence to sustain her conviction, (2) the court erred in failing to suppress "prejudicial evidence of Bond's possession of a controlled substance after a prolonged search and seizure of her person and home," and (3) the court erred in prohibiting Bond from having contact with her "long term boyfriend, . . . Turner, during the pendency of her probation" because it is not reasonably related to her offense and is "an unlawful intrusion on her life."

Bond's only argument in support of her first assignment of error is that without the evidence seized during the search of the apartment, there was insufficient evidence to establish her guilt; she does not contend that the evidence, if properly admitted, was insufficient. Therefore, the success of Bond's first assignment of error hinges on her second assignment of error.

## 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,

we apply a two-part standard of review. *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015). Regarding historical facts, we review the trial court's findings for clear error. *Id*. But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination. *Id*.

[2] We will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *State v. Rieger*, 286 Neb. 788, 839 N.W.2d 282 (2013).

## ANALYSIS

### *Evidence Seized During Search of Apartment.*

Bond challenges the search of her and Turner's apartment on a number of grounds. She contends that after Investigator Mann and Willden interviewed Turner's sons, they should have ceased their investigation into the hotline report of possible drug use in front of the children; she maintains law enforcement did not have probable cause to continue the investigation beyond that point. She further argues the investigators "without authorization entered what should be considered a porch area wherein they should not have entered without invitation." Brief for appellant at 16. She contends the 3-hour period during which law enforcement was in the apartment prior to obtaining consents to search was an unreasonable and "excessively long seizure and detention." *Id.* Bond asserts her and Turner's wills were overborne, resulting in coerced consents.

The State responds that Bond failed to preserve her objection to the evidence seized during the search. The State points out that after the district court overruled Bond's motion to

suppress, Bond failed to object to the admission of some of the drug evidence at trial. We note that Bond renewed her motion to suppress at trial and requested a continuing objection based on her motion to suppress. However, the district court would not allow a continuing objection and instructed Bond she needed to object to individual lines of testimony. The record is replete with objections; however, as the State points out, Bond failed to object to every single line of testimony concerning drug evidence seized from the apartment. We need not decide whether this was sufficient to preserve the issue for appeal, because, whether or not Bond preserved the issue, we conclude it was proper not to suppress the evidence seized from the apartment, as we now explain.

[3] It is well settled under the Fourth Amendment that warrantless searches and seizures are per se unreasonable, subject to a few specifically established and well-delineated exceptions. *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001). One well-recognized exception is a search undertaken with consent. *Wells, supra*. To be effective under the Fourth Amendment, consent must be voluntary; in other words, it must be a free and unconstrained choice, not the result of a will overborne. See *Tucker, supra*. In addition, where a consensual search follows an illegal entry, as Bond alleges occurred here, a court must determine whether the consent was an exploitation of the prior illegality. See *State v. Gorup*, 279 Neb. 841, 782 N.W.2d 16 (2010). The search will be upheld only if the State has shown a sufficient attenuation, or break in the causal connection, between the illegal conduct and the consent to search. See *id*. Because any illegality in the investigators' entry into the stairway or apartment will require us to address the issue of attenuation, we address the legality of the entries before addressing the voluntariness of the consents to search.

We begin with the entry into the stairway leading to the upstairs apartment door. The Nebraska Supreme Court has explained that the degree of privacy society is willing to

accord an apartment hallway depends on the facts, such as whether there is an outer door locked to the street which limits access, the number of residents using the hallway, the number of units in the apartment complex, and the presence or absence of no trespassing signage. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999). In this case, the upstairs apartment was located in a business district and the street-level door was unlocked. However, the street-level door led to one apartment only; thus, the stairway was not shared among multiple tenants. Bond suggests the enclosed stairway "should be considered a porch area" in which she and Turner had an expectation of privacy, brief for appellant at 16, and we see no reason not to accept her invitation to treat it as such for purposes of argument.

"The front porch is the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.'" *Florida v. Jardines*, 569 U.S. 1, 7, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013), quoting *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984). Although a front porch is therefore a constitutionally protected area, a police officer does not engage in an "unlicensed physical intrusion" by entering that area to knock on the front door. *Jardines*, 569 U.S. at 7. See, also, *Kentucky v. King*, 563 U.S. 452, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011) (law enforcement officers not armed with warrant may knock on door, because they do no more than any private citizen might do). This is because a visitor, including a police officer, has an implicit license to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Jardines*, 569 U.S. at 8. It is only when an officer exceeds the scope of that license, such as by using a trained police dog to search the front porch for incriminating evidence, that a Fourth Amendment violation occurs. See *Jardines, supra*.

When the investigators and Willden ascended the stairs and knocked on the apartment door with the hopes of speaking to

Bond and Turner about the hotline report, they did nothing to exceed the scope of their implicit license to approach the door and knock. Any doubt about this conclusion is resolved when one considers that Turner's reaction to the knocking was to say, "Come in," which suggests Turner was not alarmed to have visitors knocking on the upstairs door. Thus, even assuming arguendo the enclosed stairway was the equivalent of a porch area, as Bond suggests, no constitutional violation occurred. See *State v. Breuer*, 577 N.W.2d 41 (Iowa 1998) (holding that law enforcement officer without warrant did not unreasonably invade suspect's legitimate expectation of privacy by opening unlocked outer door of apartment building and proceeding up stairway to apartment door). Although Bond argues law enforcement did not have probable cause to investigate her and Turner after an interview of Turner's sons did not substantiate the hotline report, no probable cause is required for a "knock and talk" like the one that occurred here. See *King, supra* (when law enforcement officers not armed with warrant knock on door, they do no more than any private citizen might do; no Fourth Amendment violation occurs).

We next address the entry into the apartment itself. Generally, absent exigent circumstances, a law enforcement officer must have a warrant or consent to enter a person's home. *State v. Resler*, 209 Neb. 249, 306 N.W.2d 918 (1981). As stated, consent must be a free and unconstrained choice, not the result of a will overborne. See *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001). Investigator Mann testified that after she knocked on the upstairs door and Turner opened it, she identified herself and Willden, explained they had received a complaint, and asked if they could "come in and chat with him about it." Turner said yes and invited them inside. Investigator Kottwitz' testimony was consistent; however, Willden testified it was Bond who invited them inside. Regardless of who extended the invitation, there was no evidence that the entry into the apartment was

anything but consensual; therefore, the entry into the apartment was lawful.

We have concluded that the investigators' entries into the stairway and apartment were lawful; however, before we can turn to the voluntariness of the consents to search, we must address the legality of law enforcement's presence in the apartment for approximately 3 hours prior to obtaining the consents to search. If law enforcement's presence in the apartment for this period constituted an unreasonable and "excessively long seizure and detention," as Bond contends, brief for appellant at 16, we will be required to determine whether there was a sufficient attenuation between the illegal seizure and the consents to search. See *State v. Gorup*, 279 Neb. 841, 782 N.W.2d 16 (2010) (where consensual search follows illegal police conduct, court must determine whether consent was exploitation of prior illegality).

[4,5] Generally, a seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009). A seizure may occur where an officer directly tells a suspect that he or she is not free to go; in addition, "circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 815, 765 N.W.2d at 479.

At a minimum, no Fourth Amendment seizure occurred during Bond and Turner's initial interaction with the investigators and Willden. The interaction consisted of a lawful entry into the apartment, noncoercive questioning regarding the hotline report, and observation of the children's sleeping area and Bond and Turner's food supply. No reasonable person would have believed he or she was not free to leave during this consensual encounter.

Likewise, no Fourth Amendment seizure of Bond and Turner occurred when Investigator Mann learned Castro had a warrant for his arrest and requested a patrol unit to transport Castro to jail. According to Investigator Mann, this process "took up some time"; however, Bond and Turner had no reason to believe they were not free to leave merely because Castro was being arrested on a warrant unrelated to the hotline report investigation.

It was only after Castro was removed from the apartment that the tenor of Bond and Turner's interaction with the investigators changed. After Castro was removed, Investigator Kottwitz observed a backpack, of which neither Bond nor Turner claimed ownership; inside the backpack, which Bond and Turner agreed could be searched, Investigator Mann found drug paraphernalia and suspected methamphetamine. There was then a discussion about consent to search the apartment and a discussion "amongst officers" about whether to seek a search warrant. Bond, who unlike Turner wanted to consent to a search of the apartment, requested that Investigator Mann accompany her to the bathroom. In the bathroom, Bond told Investigator Mann she would give up "everything" and "wanted to know if that would kind of make all this go away." After Investigator Mann told Bond she could not answer because she did not know what Bond had, Bond led her to the bedroom, where she handed the investigator a marijuana pipe, a methamphetamine pipe, and a baggie with suspected methamphetamine. Investigator Mann told Bond she still wanted to search the apartment, and the two returned to the living room, where Bond discussed with Turner whether to give consent. Bond and Turner could not agree, and Investigator Mann interrupted three or four times, each time telling them "time's ticking" and asking for a decision. Eventually, Investigator Mann said "time's up" and left to seek a search warrant while Officer Tjaden stood by in the apartment "to make sure no evidence was destroyed."

Even assuming a seizure occurred during the prolonged interaction that culminated with Officer Tjaden standing by while Investigator Mann left to seek a search warrant, no Fourth Amendment violation occurred. In *Illinois v. McArthur*, 531 U.S. 326, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001), the U.S. Supreme Court held that police officers did not violate the Fourth Amendment when they detained a man outside his trailer home for approximately 2 hours while other officers obtained a search warrant. In that case, police had probable cause to believe the man's home contained drugs; they had good reason to fear that, unless restrained, the man would destroy the drugs before they returned with a warrant; they neither searched the trailer home nor arrested the man before obtaining a warrant; and they restrained the man for a "limited period of time" of 2 hours. *Id.*, 531 U.S. at 332. The Court explained that it had "upheld temporary restraints where needed to preserve evidence until police could obtain a warrant," *id.*, 531 U.S. at 334, and noted it had found no case in which it had "held unlawful a temporary seizure that was supported by probable cause and was designed to prevent the loss of evidence while the police diligently obtained a warrant in a reasonable period of time," *id.*

In the present case, unlike in *McArthur, supra*, police did not restrain Bond and Turner outside of their apartment while another officer obtained a warrant; instead, after the investigators lawfully entered the apartment with the consent of Bond and/or Turner, Officer Tjaden stood inside the residence observing Bond and Turner while Investigator Mann left to obtain a warrant. However, we see no reason to treat the alleged seizure of Bond and Turner inside their apartment differently than the seizure that occurred outside the trailer home in *McArthur*. As in *McArthur*, when Investigator Mann left to obtain a search warrant, the investigators had probable cause to believe the apartment contained drugs. Further, it was reasonable for Investigator Mann to believe that if she left Bond and Turner unsupervised in the apartment while

she obtained a warrant, the two would destroy any remaining evidence of drugs. Additionally, although Bond characterizes the alleged detention as "excessively long," brief for appellant at 16, it was approximately the same length as, if not shorter than, the detention in *McArthur*. Considering the totality of the circumstances, we conclude the investigators' conduct, assuming it constituted a Fourth Amendment seizure, was reasonable.

Because we have concluded the investigators' conduct prior to obtaining consents to search was not illegal, we need not address the issue of attenuation. Accordingly, we turn to the issue of the voluntariness of the consents to search.

[6-8] Consent to search must be voluntarily given and not the result of duress or coercion, whether express, implied, physical, or psychological. See *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001). In examining all the surrounding circumstances to determine if in fact a consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990). Mere submission to authority is insufficient. *Tucker, supra*. Where, as here, both occupants of a jointly occupied premises are physically present, the consent of one occupant to a search is insufficient when the other occupant objects to the search. *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006). See, also, *Fernandez v. California*, 571 U.S. 292, 134 S. Ct. 1126, 188 L. Ed. 2d 25 (2014) (declining to extend *Randolph, supra*, to situation where objecting occupant is absent when another occupant consents).

[9,10] The determination of whether consent to search is voluntarily given is a question of fact to be determined from the totality of the circumstances. *State v. Ready*, 252 Neb. 816, 565 N.W.2d 728 (1997). The burden is upon the government to prove that a consent to search was voluntarily given. *Prahin, supra*.

The district court's finding that Bond voluntarily consented to the search of the apartment was not clearly erroneous. From the moment the issue of consent to search the apartment arose, Bond wanted to consent to the search; it was only Turner who was reluctant. There is no evidence that police pressured or coerced Bond to consent to a search. Rather, the evidence clearly established that Bond was eager to cooperate with the investigators and even voluntarily handed Investigator Mann her marijuana pipe, her methamphetamine pipe, and a baggie with suspected methamphetamine. Bond's consent to the search was voluntary.

Regarding Turner's consent to the search, the district court found that "[i]f anyone overbore Turner's will, it was Bond, not the officers in question"; this finding was not clearly erroneous. There was little to no evidence that the investigators or Officer Tjaden pressured Turner into consenting to a search of the apartment. At most, the investigators discussed the issue of consent to search with Bond and Turner and told them they were leaving to obtain a search warrant after the two could not agree on whether to consent. In *Tucker, supra*, the Nebraska Supreme Court held that consent was not coerced where officers repeatedly asked a suspect for permission to enter his apartment to look for illegal items and threatened to get a search warrant, eventually leading the suspect to step back from the door with his arms raised and his hands upward and outward. Here, there was much less evidence of police pressure; in fact, when Turner ultimately agreed to consent to a search, the only law enforcement officer present in the apartment was Officer Tjaden, who was standing by and never discussed the issue of consents to search with the two suspects. Turner consented after Bond begged and pleaded with him, not upon the prompting of any police officer. The district court properly upheld the consensual search of the apartment.

*No Contact Condition of Probation.*

Bond argues the court erred in imposing a condition of probation prohibiting her from having any contact with Turner. She maintains she and Turner have been in a relationship for 8 years and that the PSR did not indicate she and Turner used drugs together. She contends the provision is overbroad and unrelated to her crime.

The State responds that Bond either invited the alleged error or waived the issue. The State points out that Bond told the court she would comply with a no-contact provision if one was imposed and notes she did not object to such a provision at the sentencing hearing. Although we recognize that during allocution, Bond indicated she "would have to" comply with a no-contact term of probation if one was imposed, we also note she stated "[i]t would be very hard" and explained she could not "shut off [her] feelings." We decline to characterize this as inviting the error of which she complains or of waiving the issue for purposes of appeal. Therefore, we address the issue on the merits.

As an initial matter, we note that the language of the no-contact provision is ambiguous. The provision states that Bond shall "[n]ot associate with individuals having a known criminal record, on parole or probation except, by permission of the Probation Officer or any person in possession of non-prescribed controlled substances to include family and significant others and specifically . . . Turner." The provision could be read as an absolute prohibition on contact with Turner; apparently, both Bond and the State have read it this way. However, it could also be read as prohibiting contact with Turner only if he is in possession of nonprescribed controlled substances; under this reading, if Turner is not in possession of nonprescribed controlled substances, then Bond may have contact with him with her probation officer's permission (since Turner has a known criminal record). We need not resolve the ambiguity, however, because even assuming the provision imposes an absolute prohibition on contact

with Turner, we conclude the provision was proper, as we now explain.

[11] In *State v. Rieger*, 286 Neb. 788, 839 N.W.2d 282 (2013), the Nebraska Supreme Court vacated a term of probation that prohibited a defendant from having contact with her husband. The defendant had been convicted of false reporting after telling police she had caused her son's bruising, when in fact her husband had caused it. On appeal, she contended the no-contact provision violated her fundamental rights inherent in the marital relationship and was not reasonably related to her rehabilitation. The court outlined the applicable law as follows:

> When a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute. . . . The applicable statute provides that "[w]hen a court sentences an offender to probation, it shall attach such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law-abiding life." These include requiring the offender to "meet his or her family responsibilities," to "refrain from frequenting unlawful or disreputable places or consorting with disreputable persons," and to "satisfy any other conditions reasonably related to the rehabilitation of the offender." We construe these provisions to authorize a no-contact condition of probation when it is reasonable and necessary to the rehabilitative goals of probation.

*Rieger*, 286 Neb. at 792-93, 839 N.W.2d at 286, quoting Neb. Rev. Stat. § 29-2262 (Cum. Supp. 2012). The court further explained that when a term of probation prohibits or restricts a probationer's contact with a spouse, the term should be narrowly tailored and reasonably related to the rehabilitative process. *Rieger, supra*.

The court in *Rieger, supra*, held that the provision prohibiting the defendant from having contact with her husband did not satisfy these requirements. It determined there was no evidence the provision was necessary to protect the defendant

from her husband, and it was unclear from the record whether the provision was necessary to protect the defendant's children. *Id*. Also, the broad no-contact provision was not narrowly tailored, since less rigorous restrictions could have been imposed to protect the children if necessary. *Id*.

The present case is distinguishable from *Rieger* in key respects. Significantly, Bond is not married to Turner. Furthermore, Bond informed the court at the sentencing hearing that Turner had recently moved out of the apartment and that prior to that, for "probably" the past year, Turner would "come and go" and Bond and Turner would sleep in separate rooms. Bond explained "it was really not a relationship." We do not believe that this "on again, off again" relationship is entitled to the same constitutional protections as the marriage in *Rieger*.

More important, however, the no-contact provision in the present case serves an important rehabilitative purpose, unlike the no-contact provision in *Rieger, supra*. As Bond's PSR revealed, she has a long history of substance abuse and a significant drug-related criminal history. The PSR indicated Bond was at high risk for recidivism and was in need of substance abuse treatment. Although Bond contends the PSR did not indicate she and Turner used drugs together, this is disingenuous; the search of Bond and Turner's apartment revealed drugs and drug paraphernalia in the bedroom they shared at the time of the search. It is difficult to imagine Bond achieving the goal of rehabilitation in such an environment. The no-contact provision, in combination with the other terms of probation that were focused on addressing Bond's substance abuse problem, was reasonably related to the rehabilitative process.

## CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court for Hall County.

Affirmed.

**Nebraska Court of Appeals**
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# SBC, a Nebraska partnership, appellant and cross-appellee, v. William A. Cutler III, Personal Representative of the Estate of William A. Cutler, Jr., appellee and cross-appellant.

879 N.W.2d 45

Filed April 19, 2016. No. A-14-905.

1. **Corporations: Equity: Liability.** Proceedings seeking disregard of corporate entity, that is, piercing the corporate veil to impose liability on a shareholder for a corporation's debt or other obligation, are equitable actions.
2. **Equity: Judgments: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court; however, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision allowing or disallowing attorney fees for frivolous or bad faith litigation will be upheld in the absence of an abuse of discretion.
4. **Corporations: Proof: Fraud.** A plaintiff seeking to pierce the corporate veil must allege and prove that the corporation was under the actual control of the shareholder and that the shareholder exercised such control to commit a fraud or other wrong in contravention of the plaintiff's rights.
5. **Corporations: Liability: Proof: Fraud.** A plaintiff seeking to impose liability for a corporate debt on a shareholder has the burden to show by a preponderance of the evidence that the corporate identity must be disregarded to prevent fraud or injustice to the plaintiff.

6. **Attorney Fees.** Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
7. **Attorney Fees: Costs.** Customarily, attorney fees and costs are awarded only to prevailing parties, or assessed against those who file frivolous suits.
8. **Actions: Attorney Fees.** Neb. Rev. Stat. § 25-824 (Reissue 2008) allows for an award of attorney fees when a party brings a frivolous action that is without rational argument based on law and evidence.
9. **Actions: Attorney Fees: Words and Phrases.** The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.
10. **Actions.** Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved for the party whose legal position is in question.
11. **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: Shelly R. Stratman, Judge. Affirmed in part, and in part reversed.

Jason M. Bruno and Thomas D. Prickett, of Sherrets, Bruno & Vogt, L.L.C., for appellant.

David S. Houghton and Keith A. Harvat, of Houghton, Bradford & Whitted, P.C., L.L.O., for appellee.

Irwin, Riedmann, and Bishop, Judges.

Irwin, Judge.

## I. INTRODUCTION

SBC appeals, and William A. Cutler III, as personal representative of the estate of William A. Cutler, Jr. (the estate), cross-appeals, from an order of the district court for Douglas County, which order denied SBC's request to pierce the corporate veil of Related Investments, Inc., and hold the estate liable for a judgment previously entered against Related Investments. SBC also appeals from the district court's order which awarded the estate approximately $140,000 in attorney

fees. For the reasons set forth herein, we affirm the district court's decision denying SBC's request to pierce the corporate veil of Related Investments. However, we reverse the court's order awarding the estate any attorney fees.

## II. BACKGROUND

### 1. Procedural History

In May 2007, the district court for Douglas County entered a judgment in the amount of $159,822.14 against Related Investments and in favor of SBC. This judgment relates to a promissory note that was signed by H. Michael Cutler (Michael) personally and as vice president of Related Investments. The promissory note provided that Michael owed a little over $150,000 to Sherrets & Boecker LLC. Michael defaulted on timely paying the amount due under the promissory note. Ultimately, Sherrets & Boecker assigned its interest in the promissory note to SBC.

In July 2007, approximately 2 months after the judgment was entered against Related Investments, SBC filed a complaint against Michael and William A. Cutler, Jr. (William). William was Michael's father. The complaint sought to pierce the corporate veil of Related Investments to hold Michael and William personally liable for the May 2007 judgment. The complaint alleged that Michael and William were the "shareholders, principals, and alter egos of" Related Investments.

While the action was pending in district court, both Michael and William died. Subsequent to their deaths, SBC filed a motion to revive the action against the estate, and the district court granted this motion. No action was taken against Michael's estate.

On April 17, 2012, SBC filed an amended complaint against the estate. In the amended complaint, SBC asserted that the court should pierce the corporate veil of Related Investments to hold the estate liable for the May 2007 judgment, because William was a "shareholder, principal, and alter ego" of Related Investments and because William "disregarded corporate

formalities and the corporate form, . . . exercised complete dominion and control over the entity, and [had] interests . . . that . . . were wholly intertwined and one and the same" as Related Investments.

The estate filed an answer to the amended complaint on May 3, 2012. In the answer, the estate raised various affirmative defenses to SBC's claims, including that the claim was barred by the doctrine of unclean hands and by equitable estoppel.

On September 4, 2012, SBC filed a motion for summary judgment, which the district court denied. The case then proceeded to a bench trial in August and September 2013.

### 2. Factual Background

The events which gave rise to this appeal began in 2006, when Michael became involved in litigation involving a certain piece of real property located in Omaha, Nebraska. Sherrets & Boecker represented Michael during this litigation. In fact, Sherrets & Boecker had been Michael's attorneys for an extended period of time and, at the time of the 2006 litigation, Michael owed the firm a little over $100,000 in past-due legal fees.

The 2006 litigation ended when Michael and the other parties involved entered into a settlement agreement. This settlement agreement included a $310,000 payment to Michael and an option to buy certain real property at a reduced price. Related Investments was created and incorporated in conjunction with this settlement agreement for the purpose of acting on the option to purchase the real property. Evidence presented at trial revealed that Michael and William attended a meeting with an accountant in December 2006 concerning the incorporation of Related Investments. After this meeting, articles of incorporation were filed with the Secretary of State, but no other corporate documents were ever signed or finalized. On December 5, the option agreement was signed by William, as president of Related Investments. Of the $310,000

in settlement proceeds received by Michael, $10,000 went toward securing the option to buy the real estate.

After the $10,000 in settlement proceeds was paid to secure the option agreement, Michael had paid Sherrets & Boecker a total of $155,000, or 50 percent of the original proceeds, pursuant to his agreement with the firm. How the remaining $145,000 in settlement proceeds was disbursed was disputed at trial.

SBC presented evidence to demonstrate that Sherrets & Boecker should have received this money as payment for previous legal fees owed by Michael. However, Sherrets & Boecker decided to loan this money to Related Investments so that at least $100,000 could be put into an escrow account to help secure the financing to act on the option agreement. As a part of Sherrets & Boecker's agreement to loan Related Investments the remaining $145,000 in settlement proceeds, Michael agreed to sign the December 2006 promissory note both individually and as the vice president of Related Investments.

The estate, on the other hand, presented evidence to demonstrate that the remaining $145,000 was Michael's share of the settlement proceeds and that Michael assigned his interest in these proceeds to William as repayment for a previous loan made to him. The parties agree that Sherrets & Boecker did issue a check to William for $145,000. And the evidence revealed that $101,000 of these proceeds was placed into a bank account for Related Investments.

Ultimately, Related Investments failed to secure the financing necessary to go forward with the option agreement. Evidence revealed that the $101,000 deposited into Related Investments' bank account was not utilized for business expenditures and was not put into escrow, but was instead used to pay off what appeared to be personal expenses of either Michael or William. Sherrets & Boecker also never received any repayment on the December 2006 promissory note. As we discussed above, SBC received a judgment against Related Investments for the

balance of that note plus interest. SBC's effort to collect on this judgment is the subject of the current appeal.

At trial, SBC presented evidence to demonstrate that William was in control of Related Investments and that he had used this control to fraudulently deprive Sherrets & Boecker of the money it loaned to the corporation. In order to prove William was in control of Related Investments, SBC pointed to the evidence which demonstrated that William attended the meeting with Michael about incorporating Related Investments. In addition, many unsigned corporate documents list William as an officer, board member, and shareholder of Related Investments. William also signed the option agreement as president of Related Investments. And financial documents associated with the bank account of Related Investments bear what appears to be William's signature. An application for an employer identification number from the federal government lists William as the chief financial officer of Related Investments and includes his Social Security number.

To the contrary, the estate presented evidence to demonstrate that William did not have any involvement with, or knowledge of, Related Investments. The estate relied heavily on the deposition testimony of William, which he provided in May 2008. In William's testimony, he specifically stated that he had no knowledge of Related Investments and that he was never an officer, director, or employee of Related Investments. William did testify that he attended a meeting with Michael and an accountant at some point in time, but that his understanding was the meeting was about a problem Michael was having due to a tax lien. In addition to William's testimony about this meeting, the accountant testified and indicated that the meeting was "driven by" Michael. In his deposition testimony, William admitted that he signed the option agreement and that the signature line indicated he was president of Related Investments. However, he indicated that it was a document Michael asked him to sign and that he did so without questioning Michael about it. William also testified

that most of the financial documents associated with Related Investments' bank accounts were not signed by him, but by someone forging his signature. Of the documents that he admitted bore his signature, he indicated that he did not have any knowledge about the documents, but that Michael asked him to sign and he did so. He testified that he did not receive any of the funds from Related Investments' bank account. The personal representative of the estate testified at trial that he was involved in the daily life of his father, William, and that he had no knowledge of William's involvement in Related Investments.

#### 3. Trial Court's Orders

After the trial, the district court entered a lengthy order detailing its factual findings and ultimately declining SBC's request to pierce the corporate veil of Related Investments to hold the estate liable for the May 2007 judgment entered against Related Investments. The court based this decision, in part, on its finding that SBC failed to meet its burden to establish that William was a shareholder or was in actual control of Related Investments. The court found that SBC's evidence that William was an active and controlling member of Related Investments was not credible in light of William's deposition testimony.

After the court entered its order, SBC filed a motion for new trial and a motion to alter or amend the judgment. The court overruled both motions. The court then entered an order awarding the estate $139,799 in attorney fees. The court relied on Neb. Rev. Stat. § 25-824 (Reissue 2008) as the basis for this award.

SBC appeals from the trial court's order denying its request to pierce the corporate veil of Related Investments and its order awarding the estate attorney fees.

## III. ASSIGNMENTS OF ERROR

On appeal, SBC asserts, restated and consolidated, that the district court erred in (1) not piercing the corporate veil of

Related Investments, (2) denying SBC's motion for a directed verdict and its motion to alter or amend the judgment, (3) not admitting into evidence certain admissions made by Michael prior to his death, (4) awarding attorney fees to the estate, and (5) not admitting into evidence an affidavit from its counsel regarding the reasonableness of the estate's attorney fees.

On cross-appeal, the estate asserts that the district court erred in failing to specifically rule on whether its affirmative defenses of unclean hands and equitable estoppel barred any recovery by SBC.

## IV. STANDARD OF REVIEW

[1,2] Proceedings seeking disregard of corporate entity, that is, piercing the corporate veil to impose liability on a shareholder for a corporation's debt or other obligation, are equitable actions. *Christian v. Smith*, 276 Neb. 867, 759 N.W.2d 447 (2008). In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court; however, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *Torres v. Morales*, 287 Neb. 587, 843 N.W.2d 805 (2014).

[3] On appeal, a trial court's decision allowing or disallowing attorney fees for frivolous or bad faith litigation will be upheld in the absence of an abuse of discretion. *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010).

## V. ANALYSIS

### 1. Piercing Corporate Veil of Related Investments

SBC asserts that the district court erred in failing to pierce the corporate veil of Related Investments to hold the estate

liable for the May 2007 judgment entered against Related Investments. In conjunction with this assertion, SBC also argues that the court erred in overruling its motion for directed verdict and its motion to alter or amend the judgment. Essentially, all three of these assigned errors allege that the evidence presented at trial "overwhelmingly justifies piercing the corporate veil of Related [Investments.]" Brief for appellant at 12. Upon our review of the record, we conclude that SBC's assertions do not have merit. We affirm the decision of the district court which declined to pierce the corporate veil of Related Investments.

Generally, a corporation is viewed as a complete and separate entity from its shareholders and officers, who are not, as a rule, liable for the debts and obligations of the corporation. *Christian v. Smith, supra*. A court will disregard a corporation's identity only where the corporation has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another. *Id*. A corporation's identity as a separate legal entity will be preserved, as a general rule, until sufficient reason to the contrary appears. *Id*.

[4,5] A plaintiff seeking to pierce the corporate veil must allege and prove that the corporation was under the actual control of the shareholder and that the shareholder exercised such control to commit a fraud or other wrong in contravention of the plaintiff's rights. *Id*. A plaintiff seeking to impose liability for a corporate debt on a shareholder has the burden to show by a preponderance of the evidence that the corporate identity must be disregarded to prevent fraud or injustice to the plaintiff. *Id*.

In the district court's order, it concluded that the estate could not be liable for the judgment entered against Related Investments because SBC failed to establish that William was a shareholder or was in actual control over Related Investments:

> The evidence establishes that [Michael] exercised control over Related Investments and his father, William . . . ,

> was unaware of all of the agreements, negotiations, disagreements and disputes between his son and Sherrets [&] Boecker regarding the corporation, settlement agreement or option agreement. . . . In addition, there was no evidence offered that it was William . . . who directed funds from [the bank] account of Related Investments to be paid to other people. The Court finds that [SBC] has failed to meet its burden to establish that William . . . was a shareholder or was in actual control of Related Investments.

SBC contests the court's finding that William was not in actual control of Related Investments. SBC points to evidence in the record which demonstrated that William was, in fact, a controlling force behind Related Investments. Such evidence includes William's attendance at a meeting between Michael and an accountant about incorporating Related Investments; unsigned corporate documents listing William as an officer, board member, and shareholder of Related Investments; William's signature as president of Related Investments on the option agreement; William's purported signature on financial documents associated with the bank account of Related Investments; and an application for an employer identification number from the federal government which listed William as the chief financial officer of Related Investments and which included his Social Security number.

We recognize that there was evidence presented which demonstrated that William was in control of Related Investments. However, we also recognize that there was a great deal of conflicting evidence which demonstrated that William had no control over Related Investments. This evidence includes William's deposition testimony that he did not even know Related Investments existed and that he had absolutely no knowledge of its business dealings. William testified that most of the signatures on the financial documents of Related Investments were not his and that those signatures that were his came as a result of Michael's telling William to sign a document.

In the district court's order, it clearly indicated that it found the evidence presented by SBC concerning William's involvement with Related Investments not to be credible. In fact, the court found that Sherrets & Boecker knew, or should have known, that William was not involved with Related Investments. As we explained above, when the evidence is in conflict, we give deference to the trial court's determinations of credibility. See *Torres v. Morales*, 287 Neb. 587, 843 N.W.2d 805 (2014). And when we consider the conflicting evidence about William's involvement with Related Investments, giving deference to the district court's findings of credibility, we cannot say that the district court erred in concluding that William was not in actual control of Related Investments.

Because William was not in actual control of Related Investments, his estate cannot, as a matter of law, be held liable for the judgment entered against Related Investments. The district court did not err in deciding not to pierce the corporate veil of Related Investments.

We note that in SBC's brief on appeal, it asserts that the district court erred in failing to admit into evidence exhibit 85, which was Michael's responses to SBC's requests for admissions. In one of Michael's responses, he indicated that William was a shareholder of Related Investments. Given the district court's finding that William was not in actual control of Related Investments and our affirmance of that finding, we conclude that if the district court erred in excluding this evidence, such error would be harmless.

Even if William was a named shareholder in Related Investments, SBC would still have had to prove that he was in actual control of the corporation. See *Christian v. Smith*, 276 Neb. 867, 759 N.W.2d 447 (2008). As we discussed above, the district court found that SBC failed to prove that William was in actual control of the corporation. As a result, it does not matter whether he was a shareholder. SBC's assertion about the admissibility of this exhibit is without merit.

### 2. Attorney Fees

SBC also asserts that the district court erred in awarding the estate $139,799 in attorney fees. SBC asserts that its claim against the estate was not frivolous and that, as a result, the court did not have any authority to enter an award of attorney fees. SBC also asserts that even if the district court had the authority to enter an award of attorney fees, the amount of the award was not reasonable. In conjunction with this assertion, SBC argues that the district court erred in excluding from evidence an exhibit which was an affidavit concerning the reasonableness of the proposed attorney fees.

Upon our review of the record, we conclude that the district court abused its discretion in awarding the estate any attorney fees. Because there was some evidence to support SBC's claim against the estate, the claim was not frivolous.

[6,7] Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. See *Boamah-Wiafe v. Rashleigh*, 9 Neb. App. 503, 614 N.W.2d 778 (2000). Customarily, attorney fees and costs are awarded only to prevailing parties, or assessed against those who file frivolous suits. *Id*. Here, the district court based its award of attorney fees to the estate on § 25-824. Subsection (2) of § 25-824 provides as follows:

> Except as provided in subsections (5) and (6) of this section, in any civil action commenced or appealed in any court of record in this state, the court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

[8-10] The Nebraska Supreme Court has held that the statutory language in § 25-824 allows for an award of attorney fees when a party brings a frivolous action that is without rational

argument based on law and evidence. *White v. Kohout*, 286 Neb. 700, 839 N.W.2d 252 (2013). The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous. *Id*. Attorney fees for a bad faith action under § 25-824 may also be awarded when the action is filed for purposes of delay or harassment. *White v. Kohout, supra*. The Supreme Court has also held that any doubt about whether a legal position is frivolous or taken in bad faith should be resolved for the party whose legal position is in question. *Id*.

In its order, the district court found that SBC's claim against the estate was frivolous because it knew or should have known prior to the time of trial that William was not involved with or in control of Related Investments. In fact, the court indicated its belief that "[c]ertainly after the deposition of William . . . , all parties were aware William . . . was not a shareholder in [Related Investments]." The court's finding clearly indicates its belief that the testimony presented by the estate, and in particular, the deposition testimony of William, was credible evidence demonstrating William's lack of involvement with Related Investments.

As we discussed more thoroughly above, even though the district court found the estate's evidence to be more credible than SBC's evidence, SBC did, in fact, present conflicting evidence to demonstrate William's purported control of Related Investments. Such evidence included William's attendance at a meeting between Michael and an accountant about incorporating Related Investments; unsigned corporate documents listing William as an officer, board member, and shareholder of Related Investments; William's signature as president of Related Investments on the option agreement; William's purported signature on financial documents associated with the bank account of Related Investments; and an application for an employer identification number from the federal government which listed William as the chief financial officer of Related Investments and which included his Social Security

number. Upon our review of the entire record, we conclude that the evidence presented by SBC is not particularly strong or particularly persuasive in light of the evidence presented by the estate. However, given that SBC did present some evidence to show that William was involved in the operation of Related Investments, we cannot say that SBC's claim was frivolous or "so wholly without merit as to be ridiculous." *White v. Kohout, supra*.

For the sake of completeness, we note that the district court's order awarding attorney fees to the estate pursuant to § 25-824 discusses certain actions taken by Sherrets & Boecker and by SBC. In particular, the court cites to Sherrets & Boecker's failure to preserve certain evidence with regard to its relationship with Michael. The district court concluded that the "evidence supported a finding of intentional spoliation" and that "it was very disturbing" the law firm had not preserved such evidence. To the extent that the district court may have based its attorney fees award on what it may have perceived as potentially unethical or questionable behavior by Sherrets & Boecker, such an award is not proper pursuant to § 25-824, which permits an award of attorney fees only when a claim is frivolous or brought in bad faith.

Because SBC's claim was not frivolous, the district court erred in awarding the estate any attorney fees pursuant to § 25-824. We reverse the district court's award of $139,799 in attorney fees to the estate.

Given our reversal of the award of attorney fees, we need not address SBC's other assigned errors regarding the reasonableness of the amount of the attorney fee award.

### 3. Estate's Cross-Appeal

In the estate's answer to SBC's amended complaint, it asserted multiple affirmative defenses which it argued barred SBC's claim against it, including the doctrines of unclean hands and equitable estoppel. As we discussed above, the district court ultimately found that SBC's request to pierce the

corporate veil of Related Investments to hold the estate liable for a judgment entered against Related Investments failed because SBC did not prove that William was in actual control of Related Investments. As a result of the district court's conclusion, it did not need to specifically rule on the applicability of the affirmative defenses raised by the estate. However, in its February 2014 trial order, the district court noted:

> The [estate] asserts that [SBC] cannot be granted equitable relief because it has unclean hands. The [estate] raised these affirmative defenses in its Answer under the doctrine of unclean hands and equitable estoppel. . . .
>
> . . . .
>
> . . . The Court has declined to pierce the corporate veil [of Related Investments], but even if the Court were to pierce the corporate veil, which it does not, the evidence supports the finding that [SBC's] claim would still fail. However, at this time it is unnecessary to fully analyze this affirmative defense.

In its cross-appeal, the estate argues that the district court erred in failing to specifically decide whether its affirmative defenses of unclean hands and equitable estoppel barred any recovery by SBC. Like the district court, we decline to address the estate's affirmative defenses, given our decision to affirm the district court's decision on the issue of piercing the corporate veil of Related Investments.

[11] In our analysis above, we determined that the district court did not err in failing to pierce the corporate veil of Related Investments to hold the estate responsible for a judgment entered against Related Investments. We also indicated that the district court did not err in dismissing SBC's claim against the estate. Accordingly, because we have already ruled in favor of the estate on this issue, we need not address the affirmative defenses raised by the estate. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Holdsworth v. Greenwood Farmers Coop.*, 286 Neb. 49, 835 N.W.2d 30

(2013); *Kobza v. Bowers, ante* p. 118, 868 N.W.2d 806 (2015).

## VI. CONCLUSION

We affirm the decision of the district court to deny SBC's request to pierce the corporate veil of Related Investments because William was not in actual control of the corporation. However, we reverse the court's order awarding the estate any attorney fees.

Affirmed in part, and in part reversed.

Riedmann, Judge, dissenting.

I concur with the majority that the district court did not err in denying SBC's request to pierce the corporate veil. I disagree, however, that the district court abused its discretion in awarding attorney fees. The majority determines that "[b]ecause there was some evidence to support SBC's claim against the estate, the claim was not frivolous." It then sets forth what it identifies as "conflicting" evidence and concludes that although "not particularly strong or particularly persuasive" "given that SBC did present some evidence to show that William was involved in the operation of Related Investments, we cannot say that SBC's claim was frivolous or 'so wholly without merit as to be ridiculous.' *White v. Kohout*[, 286 Neb. 700, 839 N.W.2d 252 (2013)]."

Following the majority's rationale, no matter how "incredible" evidence may be, as long as there is "some" evidence for the court to weigh, a claim is not frivolous. This disregards the Nebraska Supreme Court's definition of frivolous that includes "a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit." *Lutheran Medical Center v. City of Omaha*, 229 Neb. 802, 814, 429 N.W.2d 347, 354 (1988). Because the determination of frivolous must be determined based on the facts of each case, *Randolph Oldsmobile Co. v. Nichols*, 11 Neb. App. 158, 645 N.W.2d 566 (2002), I would

find no abuse of discretion in the district court's conclusion that SBC's action against William was frivolous.

In *State ex rel. Mooney v. Duer*, 1 Neb. App. 84, 487 N.W.2d 575 (1992), a paternity action, the State appealed the district court's decision which assessed attorney fees against the State on a finding that the lawsuit brought against a putative father was frivolous and without merit. Although we addressed the propriety of attorney fees for frivolous actions under Neb. Rev. Stat. § 43-1412 (Reissue 1988), we used case law interpreting Neb. Rev. Stat. § 25-824 (Reissue 1989) to determine the meaning of the term "frivolous." Because the State had filed the paternity action, we stated that to determine whether the action was frivolous, we had to "look to the legal position of the State, which includes consideration of what the worker and the county attorney knew, when they knew it, what they did with the information they had, and when they did it." *State ex rel. Mooney v. Duer*, 1 Neb. App. at 88, 487 N.W.2d at 577.

Reviewing what the social worker knew and when she knew it—including that the mother could not recall where the intercourse took place, that the mother had named another individual as the father, and that although the putative father, mother, and child all had blood drawn for paternity testing purposes, the results were not yet available—we determined that the filing of the paternity action was frivolous. We stated:

> The tenuous nature of the mother's claim that [the defendant] was the father, coupled with the knowledge of the worker that blood had been drawn from all necessary parties (7 days before suit), with results shortly available, causes us to hold that the institution of the suit against [the defendant] on August 22, 1989, was a legal position wholly without merit.

*Id.* at 89, 487 N.W.2d at 578.

*State ex rel. Mooney v. Duer, supra*, instructs that a party's knowledge of the facts governs the legitimacy of its claim. In the present case, by the time William's deposition was

concluded, Sherrets & Boecker knew that although William attended a meeting with Michael to incorporate Related Investments, William took no active role in the meeting. Although corporate documents were drafted bearing William's name, he never signed them. Financial documents that did contain William's signature were forged, and although William did sign the option agreement as president of Related Investments, he did so at Michael's command and without knowledge of its purpose. While the majority views this as conflicting evidence, the underlying fact that Sherrets & Boecker knew William did not exercise control over Related Investments is well established. Despite Sherrets & Boecker's many years of representing Michael, Sherrets & Boecker met William on only one occasion when William came to pick up the $145,000 check—a check the documentary evidence establishes Sherrets & Boecker knew represented the amount Michael assigned to William from the settlement proceeds as repayment for William's years of providing financial support to Michael. The "Settlement, Release and Option Agreement," drafted by James D. Sherrets himself, acknowledges this assignment. Any claim that this money represented a loan from Sherrets & Boecker is refuted in the documents that Sherrets was "unable" to produce but that Michael retained. The disappearance of the documents, along with the remaining facts of the case, was sufficient for the district court to conclude that "[t]here is no credible evidence that the $145,000 check issued to William . . . was some sort of a loan from Sherrets [&] Boecker." The district court further determined that there was "no credible evidence" that William directed any of the personal payments claimed by Sherrets. Most importantly, the district court determined that the evidence and testimony "clearly establishes that Sherrets [&] Boecker did not consider William . . . to be an active member" of the corporation.

When the evidence "clearly establishes" that a party knew the very basis for bringing an action did not exist, no rational argument in law or fact exists to maintain the action, and to

continue pursuit of it is frivolous. Applying the language of *State ex rel. Mooney v. Duer*, 1 Neb. App. 84, 88, 487 N.W.2d 575, 577 (1992), considering "what [Sherrets] and [SBC] knew, when they knew it, what they did with the information they had, and when they did it," the district court did not abuse its discretion in determining the lawsuit was frivolous. I agree with the principle that where evidence is in conflict, an action is not frivolous; but where no credible evidence can be advanced because a party knows it has no rational basis for its position, attorney fees are warranted.

The standard of review on the district court's determination of a request for sanctions under § 25-824 is whether the district court abused its discretion. *Harrington v. Farmers Union Co-Op. Ins. Co.*, 13 Neb. App. 484, 696 N.W.2d 485 (2005). A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id*. Upon this record, I cannot say the district court abused its discretion in determining the lawsuit was frivolous. I would therefore affirm the award of attorney fees.

Nebraska Court of Appeals
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Richard Qualsett, individually and as attorney in fact for the former shareholders of Oasis Publishing, Inc., appellant, v. David Abrahams, individually and as attorney in fact for the former shareholders of Oasis Publishing, Inc., appellee.

879 N.W.2d 392

Filed April 19, 2016. No. A-15-215.

1. **Equity: Appeal and Error.** A case in equity is reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.
2. **Limitations of Actions: Claims: Recoupment.** Unlike a counterclaim that seeks an affirmative judgment, the defense of recoupment is not barred by a statute of limitations.
3. **Claims: Recoupment.** Recoupment may be used where a defendant has a claim for damages against a plaintiff arising out of the very same transaction from which the plaintiff seeks to recover.
4. **Claims: Recoupment: Proof.** To state an affirmative defense of recoupment, the defendant must prove the elements of his claim and that it occurred in the very same action as the plaintiff's claim against him.
5. **Negligence: Proof.** The breach of a fiduciary duty has been likened to professional malpractice; therefore, to prove the elements of breach of fiduciary duty, the moving party must establish the elements of negligence—duty, breach of duty, causation, and damages.
6. **Actions: Negligence: Recoupment: Equity.** An action for breach of fiduciary duty seeking an equitable recoupment is an equitable action.
7. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the

appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

8. **Negligence: Damages.** It is the duty of the party claiming a breach of fiduciary duty to also establish that he was damaged by such breach.
9. **Trusts: Agency: Equity.** An agent or other fiduciary who deals with the subject matter of the agency so as to make a profit for himself will be held to account in equity as trustee for all profits and advantages acquired by him in such dealings.

Appeal from the District Court for Lancaster County: Stephanie F. Stacy, Judge. Affirmed.

Robert R. Creager, of Anderson, Creager & Wittstruck, P.C., L.L.O., for appellant.

Thomas E. Zimmerman and John C. Hahn, of Jeffrey, Hahn, Hemmerling & Zimmerman, P.C., L.L.O., for appellee.

Irwin, Pirtle and Riedmann, Judges.

Riedmann, Judge.

## INTRODUCTION

Richard Qualsett, in his capacity as attorney in fact for the former shareholders of Oasis Publishing, Inc. (Oasis), filed a complaint against David Abrahams, a former Oasis shareholder, alleging breach of fiduciary duty. Abrahams filed a counterclaim, seeking a declaration that he was entitled to recovery of funds Qualsett was withholding from him. In response to the counterclaim, Qualsett asserted the affirmative defense of recoupment, based upon Abrahams' alleged breach of fiduciary duty. The district court for Lancaster County (1) granted summary judgment to Abrahams on Qualsett's complaint, on the basis that the statute of limitations barred Qualsett's claim against him, and (2) entered judgment for Abrahams on his counterclaim, rejecting Qualsett's claim for recoupment, following a bench trial. Qualsett appeals both orders.

After reviewing the record on appeal, we agree that Qualsett was not entitled to recoupment on Abrahams' counterclaim, because he failed to prove all of the elements of a breach of fiduciary duty claim. Because Qualsett was unsuccessful on his breach of fiduciary duty claim asserted as a defense to Abrahams' counterclaim, we need not determine whether the statute of limitations barred his affirmative claim of breach of fiduciary duty asserted in his complaint. Therefore, we affirm the court's order in favor of Abrahams.

## BACKGROUND

Qualsett, Abrahams, and Craig Smith formed Oasis. Abrahams served as president and managed the day-to-day activities of the company, while Qualsett provided the majority of the company's financial backing and Smith contributed financially and to marketing. Some smaller shareholders also purchased Oasis stock. The business of Oasis involved creating digital, searchable versions of statutes and case law. Through litigation, Oasis obtained a license from West Publishing Company that allowed it to utilize that company's case law pagination.

In April 2001, Oasis shareholders negotiated the sale of all of Oasis' stock to JuriSearch Holdings, LLC (JuriSearch). To effectuate the sale, the Oasis shareholders signed an irrevocable power of attorney naming Qualsett, Abrahams, and Smith as attorneys in fact for Oasis. The stock purchase agreement with JuriSearch involved a cash payment at closing of $1,110,000, largely to retire Oasis' debt, and a promissory note upon which JuriSearch was to make monthly interest payments followed by balloon principal payments in June 2001 and April 2003. The parties also agreed during negotiations that Abrahams would go to work for JuriSearch following the sale to assist with the transition. Although Abrahams began working with JuriSearch immediately after the stock sale, his employment agreement was not signed until later that year. Abrahams ultimately signed two contracts at the same time:

an employment agreement and a noncompetition agreement (the noncompete agreement). Two versions of the employment agreement appear in the record. One version of the employment agreement references the noncompete agreement, which in turn references an employment agreement; the other version makes no reference to the noncompete agreement. Abrahams' employment agreements paid him in membership units or in stock options. His noncompete agreement paid him separately $10,000 per month for 2 years.

In April 2003, JuriSearch's final balloon principal payment came due and the former Oasis shareholders learned that JuriSearch would be unable to pay what it owed. Qualsett, Abrahams, and Smith, operating under their power of attorney, approved a 1-year extension of JuriSearch's principal payment with continued interest payments. In March 2004, former Oasis shareholders again rolled over JuriSearch's principal payment. Annual rollovers of the principal amount due to JuriSearch's inability to pay continued in this manner until the April 2007 principal payments were coming due. Qualsett states that after the 2006 rollover agreement, he learned that Abrahams had been receiving payments on a noncompete agreement as well as an employment agreement from JuriSearch. Qualsett took over negotiations of the 2007 rollover from Abrahams because he was upset that Abrahams was negotiating rollover of JuriSearch's debt to him personally at the same time as he was negotiating rollover of JuriSearch's debt to the former Oasis shareholders and that Abrahams had allegedly not disclosed his personal interests.

JuriSearch and Oasis eventually settled JuriSearch's breach of its promissory note. The settlement allowed JuriSearch to pay its debt in equal installments each month over a period of 42 months. In June 2008, Qualsett obtained permission from the former Oasis shareholders to withhold Abrahams' portion of the payments from JuriSearch's installment payments on the settlement and to further seek judgment against Abrahams for repayment of the moneys he received under his noncompete

agreement. Qualsett submitted at trial that he was presently withholding $39,442 of distributions to Abrahams and that if JuriSearch continued to make all payments, he would be holding $52,234 by the end of the year.

Qualsett, Abrahams, and Smith entered into a voluntary agreement tolling the statute of limitations for certain potential causes of action against one another beginning on April 30, 2010. Qualsett, in his capacity as attorney in fact for the former shareholders of Oasis, filed suit against Abrahams for breach of fiduciary duty stemming from his allegedly undisclosed self-dealing in October 2011. Abrahams counterclaimed for a declaratory judgment that he is entitled to his portion of the payment from JuriSearch's settlement and fifth installment promissory note. To the counterclaim, Qualsett pled the affirmative defense of equitable recoupment.

The district court found on Abrahams' motion for summary judgment that the statute of limitations barred Qualsett's action against Abrahams. After trial on the counterclaim and affirmative defense, the trial court entered judgment in favor of Abrahams in the amount of $52,234. This appeal follows.

## ASSIGNMENTS OF ERROR

Qualsett assigns, restated and renumbered, that the district court erred (1) in denying Qualsett's request for equitable recoupment and entering judgment in favor of Abrahams after trial on Abrahams' counterclaim and (2) in concluding that Qualsett's claim was barred by the statute of limitations on summary judgment.

## STANDARD OF REVIEW

[1] A case in equity is reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, we consider and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another. *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005).

An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Zornes v. Zornes*, 292 Neb. 271, 872 N.W.2d 571 (2015).

## ANALYSIS

### *Trial on Counterclaim and Defense of Equitable Recoupment.*

Although the trial court granted summary judgment to Abrahams on Qualsett's breach of fiduciary claim, determining that it was barred by the statute of limitations prior to the case's proceeding to a bench trial on Abrahams' counterclaim, we address the issues in reverse order. We do so because the analysis of the merits of Qualsett's affirmative defense is dispositive of the appeal.

In his counterclaim, Abrahams initially pled three causes of action: breach of fiduciary duty, declaratory judgment relating to future distributions from JuriSearch, and defamation. At trial, however, Abrahams elected to proceed on only the declaratory judgment claim.

In response to the counterclaim, Qualsett pled the defense of recoupment, claiming that if he were found to be indebted to Abrahams, then Qualsett was entitled to a setoff for the amounts Abrahams received from JuriSearch under the noncompete agreement. The basis for this claim was that Abrahams breached his fiduciary duty to the Oasis shareholders by negotiating and executing an employment agreement and a noncompete agreement without disclosing the agreements to the Oasis shareholders and by negotiating JuriSearch's default on his noncompete agreement at the same time as he was negotiating JuriSearch's default on its promissory note to former Oasis shareholders. Qualsett's allegations supporting his defense of recoupment mirrored those pled in

the original complaint in support of his claim for breach of fiduciary duty.

The district court found in favor of Abrahams on his counterclaim for declaratory judgment, declaring Abrahams to be entitled to payment of his contractual share of the JuriSearch distribution. It found against Qualsett on his affirmative defense of recoupment, concluding that although he proved that Abrahams owed a fiduciary duty to the Oasis shareholders, he failed to prove a breach of that duty, prove that any alleged breach damaged the former shareholders, or prove that the alleged breach arose out of the same transaction as Abrahams' claim for declaratory relief.

On appeal, Qualsett assigns that the district court erred in rejecting his affirmative defense of recoupment and that the district court therefore further erred in entering judgment for Abrahams after trial. Qualsett does not dispute that Abrahams would be entitled to judgment on his counterclaim if the court rejected Qualsett's affirmative defense of recoupment.

[2-4] Unlike a counterclaim that seeks an affirmative judgment, the defense of recoupment is not barred by a statute of limitations. *Ed Miller & Sons, Inc. v. Earl*, 243 Neb. 708, 502 N.W.2d 444 (1993). Recoupment may be used where a defendant has a claim for damages against a plaintiff arising out of the very same transaction from which the plaintiff seeks to recover. See *id.* To state an affirmative defense of recoupment, the defendant must prove the elements of his claim and that it occurred in the very same action as the plaintiff's claim against him. See *id.*

In this case, Qualsett's defense of recoupment is based upon his claim that Abrahams breached his fiduciary duty to the former Oasis shareholders and caused them damages of approximately $199,000. To succeed, then, Qualsett must prove the elements of breach of fiduciary duty and that this breach occurred in the very same transaction as that giving rise to Abrahams' counterclaim. See *id.*

[5] The breach of a fiduciary duty has been likened to professional malpractice. *Community First State Bank v. Olsen*, 255 Neb. 617, 587 N.W.2d 364 (1998); *In re Louise V. Steinhoefel Trust*, 22 Neb. App. 293, 854 N.W.2d 792 (2014). Malpractice is itself an instance of negligence; therefore, to prove the elements of breach of fiduciary duty, the moving party must establish the elements of negligence—duty, breach of duty, causation, and damages. See *In re Louise V. Steinhoefel Trust, supra.*

The district court determined that although Qualsett proved the existence of a fiduciary duty, he failed to prove the remaining elements. To reach this conclusion, the district court made several findings of fact based upon the evidence presented to it. It determined that as early as 2003, when JuriSearch first defaulted on the promissory note, Abrahams told both Qualsett and Smith that JuriSearch was not paying him the money he was owed either. At that time, Abrahams was no longer working for JuriSearch, but neither Qualsett nor Smith inquired why JuriSearch owed Abrahams any money. The court further found that neither Qualsett nor Abrahams was a credible witness and that their testimony was not entitled to much weight. The court determined that Smith, the only other witness to testify at trial, was credible.

[6,7] An action for breach of fiduciary duty seeking an equitable recoupment is an equitable action. In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004).

While the proponent of an equity claim generally must prove the elements of his claim by clear and convincing evidence, we have previously noted that Nebraska law is unclear

as to the burden of proof for an equitable defense brought in response to a claim at law. See *Precision Enterprises v. Duffack Enterprises*, 14 Neb. App. 512, 710 N.W.2d 348 (2006), *overruled in part on other grounds, Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 791 N.W.2d 317 (2010). Without determining which burden of proof applies in this situation, we find that even under the preponderance of the evidence standard applied by the district court, Qualsett has not satisfied the burden of proving he is entitled to equitable recoupment.

There is no disagreement that Abrahams owed a fiduciary duty to the former Oasis shareholders. The issues are whether he breached that duty and, if so, whether that breach caused damage to the former shareholders. Upon our de novo review, we conclude that the evidence is insufficient to support causation.

Qualsett first argues that Abrahams should have disclosed the employment agreement, and particularly the noncompete agreement, when he was initially negotiating the sale of Oasis to JuriSearch. The evidence reveals, however, that neither the employment agreement nor the noncompete agreement existed at the time of those negotiations. According to the evidence, JuriSearch did not provide any contracts to Abrahams until a couple of months after the sale. Abrahams cannot be held liable for failing to disclose that which did not exist.

Qualsett also argues that Abrahams should have disclosed the existence of the agreements when he was negotiating the first rollover of the promissory note in 2003, because he was also negotiating payment on his noncompete agreement. The record discloses that Abrahams received his requisite $10,000 per month through December 2001 under the noncompete agreement. On April 15, 2002, he entered into his first amendment to the noncompete agreement, in which he agreed that payment for the first 4 months of 2002 would be delayed and his monthly payments would be reduced to $2,000, with a lump sum of $135,833.50 to be paid on

March 1, 2003, and interest at 10 percent on any payment delinquent by 10 or more days. When Abrahams negotiated this amendment, JuriSearch was still making monthly interest payments to the former Oasis shareholders and had not yet defaulted on the promissory note; therefore, Abrahams had no duty to disclose.

However, Abrahams continued to negotiate amendments of his noncompete agreement annually through 2006. Beginning in 2003, he also began negotiating the rollovers of the promissory note in favor of the former Oasis shareholders. This was allegedly a breach of Abrahams' fiduciary duty. Once a fiduciary relationship was established and evidence was presented that certain transactions existed that allegedly breached a fiduciary duty, the burden shifted to Abrahams to prove the fairness of the transactions. See *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001). Abrahams failed to produce such evidence. The record contains no evidence of the substance of the negotiations or what efforts Abrahams put forth to secure a favorable result for the shareholders vis-a-vis the result he obtained on his personal negotiations. Accordingly, we determine that Abrahams breached his fiduciary duty to disclose at the time he was performing dual negotiations.

[8] Not every breach of a fiduciary duty results in liability for the fiduciary, however. See *In re Louise V. Steinhoefel Trust*, 22 Neb. App. 293, 854 N.W.2d 792 (2014) (concluding breach of fiduciary duty existed, but no damages resulted). It is the duty of the party claiming a breach of fiduciary duty to also establish that he was damaged by such breach. See *id*. The measure of damages is "the loss which the [principal] suffered as a consequence of the [agent's] breach of fiduciary duties." *Mischke v. Mischke*, 253 Neb. 439, 448, 571 N.W.2d 248, 256 (1997).

Upon our de novo review, we find the record wholly lacking in evidence to support a finding that the negotiation of the promissory note would have resulted in a more favorable outcome for the shareholders had Abrahams disclosed his

agreements. Both Qualsett and Smith testified that Abrahams served as the lead negotiator because of his prior employment with JuriSearch and resultant knowledge of its internal workings. According to the testimony, before the attorneys in fact agreed to each amendment, Qualsett, Abrahams, and Smith met with Oasis' attorney to discuss their options. Each time the parties determined it was better to roll over the note than take back the Oasis stock. They each agreed their options were limited.

In his testimony, Qualsett implies that he was able to obtain more favorable terms when he negotiated the note in 2007. He points out that he was able to obtain a $100,000 principal payment, whereas Abrahams was able only to increase the interest rate. But without information on JuriSearch's financial situation at the time Qualsett negotiated in 2007 as compared to the time periods during which Abrahams negotiated, we are unable to conclude this was a result of a lack of effort on the part of Abrahams. The record discloses that as of late 2001, JuriSearch was considering bankruptcy and had an immediate need for cash. However, we do not know how its financial situation progressed. We can glean from the amendments to Abrahams' noncompete agreement that he was never able to improve the terms of his own agreement; the amendments extended the dates of payments, lowered the amount of the monthly payments, and set the interest rate for delinquent payments at 10 percent, which was lower than the rate included in the original agreement.

We further note that JuriSearch defaulted on Abrahams' noncompete agreement prior to any default on the promissory note. Moreover, it appears that JuriSearch consistently made the monthly interest payments to the former shareholders, even when it had stopped payment on the noncompete agreement. Therefore, there is no evidence that the former Oasis shareholders suffered loss because Abrahams negotiated the rollover of their promissory note without disclosing that he was also negotiating JuriSearch's default on the noncompete

agreement. See *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997).

[9] Qualsett argues that the correct measure of damages is any funds Abrahams obtained from the noncompete agreement. We disagree. Although "'"[a]n agent or other fiduciary who deals with the subject-matter of the agency so as to make a profit for himself will be held to account in equity as trustee for all profits and advantages acquired by him in such dealings,"'" *id.* at 447, 571 N.W.2d at 255-56, this point of law comes from cases in which fiduciaries profit beyond the value of their wrongfully obtained agent property and in which the agent is therefore entitled to the profits. For example, in *ProData Computer Servs. v. Ponec*, 256 Neb. 228, 590 N.W.2d 176 (1999), a company's financial officer converted over $87,000 of company funds and deposited them into personal investment accounts. The Nebraska Supreme Court approved a constructive trust over the investment accounts because the officer owed personal profits from his breach of fiduciary duty to the principal. *Id.* Similarly, in *Mischke v. Mischke, supra*, the Nebraska Supreme Court held that a personal representative of an estate who acquired estate assets at a discount and then sold them at a profit would be liable to the estate for all profits realized from the sale, even those profits beyond the appraised value of the items improperly acquired.

This case is distinguishable because there is no evidence that Abrahams made a profit for himself in negotiating a rollover of his noncompete agreement at the same time as he negotiated the Oasis promissory note rollovers. See *ProData Computer Servs. v. Ponec, supra*. As discussed above, Qualsett did not satisfy his burden to show that Abrahams breached his fiduciary duty by not disclosing his noncompete agreement at the time he entered into it. Rather, we determine that the potential breach of fiduciary duty occurred at the time of the undisclosed simultaneous rollover negotiations. Therefore, the question on the issue of damages is not whether Abrahams profited from the noncompete agreement, but whether he profited from

the renegotiations of his noncompete agreement between 2003 and 2006 when he was also negotiating on behalf of the former Oasis shareholders. Given that Abrahams negotiated a reduction of the interest rates he was owed on the noncompete agreement and an extension of the time period to pay him, there is no evidence that he profited at all during these renegotiations, much less at the former shareholders' expense. This is distinguishable from the constructive trust cases discussed above, where the agent gained profit beyond the value of the improperly converted property such that a constructive trust over the profit was necessary to prevent unjust enrichment of the agent. See *ProData Computer Servs. v. Ponec, supra*. Because there is no evidence of unjust enrichment or evidence that the Oasis shareholders suffered a loss because of Abrahams' negotiations, we find this case distinguishable and Qualsett's theory of damages inapplicable.

We therefore agree with the district court that Qualsett failed to prove that any breach of fiduciary duty by Abrahams resulted in damages to the former Oasis shareholders. As a result, Qualsett's affirmative defense of recoupment must fail.

*Statute of Limitations—Motion for Summary Judgment.*

Qualsett additionally assigns that the district court erred in finding in its order granting Abrahams' motion for summary judgment that the statute of limitations barred his claim against Abrahams. Specifically, Qualsett argues that a genuine issue of material fact exists as to when he discovered Abrahams' alleged fraud for purposes of the discovery rule.

However, Qualsett's complaint and affirmative defense were both based upon a claim of breach of fiduciary duty. The allegations supporting his defense of recoupment mirrored those pled in the original complaint in support of his claim for breach of fiduciary duty. Because we have determined he failed to prove causation on his breach of fiduciary duty claim following a trial involving that issue, it is not necessary to

address whether the trial court erred in finding the claim was barred by the statute of limitations. See *Hara v. Reichert*, 287 Neb. 577, 581, 843 N.W.2d 812, 816 (2014) ("[i]ssue preclusion bars the relitigation of a finally determined issue that a party had a prior opportunity to fully and fairly litigate"). Therefore, we do not reach analysis on the statute of limitations issue and we affirm the judgment of the district court.

## CONCLUSION

Because we find, following a de novo review of the record, that Qualsett failed to prove the former Oasis shareholders were damaged as a result of Abrahams' alleged fraud, we affirm the trial court's order granting Abrahams' counterclaim. Since a judgment in favor of Abrahams on the merits of an alleged breach of fiduciary duty is supported by the record, we need not reach the issue of summary judgment.

Affirmed.

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