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JARRETT RODRIGUEZ, APPELLANT, V. SAMANTHA PHELPS, APPELLEE.

___ N.W.3d ___

Filed November 3, 2026. No. A-25-687.

1. **Child Custody.** Questions concerning relocation and custody are initially entrusted to the discretion of the trial court.
2. **Child Custody: Appeal and Error.** Although reviewed de novo on the record, the trial court's answer to questions concerning relocation and custody will ordinarily be affirmed absent an abuse of discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **Motions for New Trial.** A motion for new trial is addressed to the discretion of the trial court.
5. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, an appellate court will affirm the trial court's decision absent an abuse of discretion.
6. **Attorney Fees: Appeal and Error.** A trial court's decision awarding or denying attorney fees will be upheld on appeal absent an abuse of discretion.
7. **Child Custody.** Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
8. **Child Custody: Proof.** Under the two-part framework that trial courts should use to evaluate whether to grant a request for removal to another jurisdiction, the custodial parent proposing to move the child 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 after the proposed move. While both of these prongs must be shown to support a removal request, the second prong is of paramount concern.

9. **Trial: Evidence: Appeal and Error.** Witness credibility and the weight to be given to testimony is within the province of the trial court. An appellate court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor while testifying, and will give great weight to the trial court's judgment as to credibility.
10. **Child Custody: Visitation.** To determine whether removal to another jurisdiction is in the child's best interests, a trial court should consider (1) each parent's motive 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 noncustodial parent when viewed in the light of reasonable visitation.
11. **Child Custody.** There are nine components that may be involved in a trial court's consideration as to whether removal to another jurisdiction would enhance the quality of life of the child and custodial parent: (1) the emotional, physical, and developmental needs of the child; (2) the child's opinion or preference as to where to live; (3) the extent to which the custodial parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the child and each parent; (7) the strength of the child's ties to the present community and extended family there; (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parents; and (9) 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.
12. **Motions for New Trial.** Evidence of facts occurring after a trial ordinarily cannot be made the basis for a motion for new trial on the ground of newly discovered evidence.
13. **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.
14. **Modification of Decree: Child Support.** Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to

pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent.

15. **Modification of Decree: Child Support: Proof.** The party seeking the modification has the burden to produce sufficient proof that a material change of circumstances has occurred that warrants a modification and that the best interests of the child are served thereby.
16. **Modification of Decree: Child Support.** The paramount concern in child support cases, whether in the original proceeding or subsequent modification, remains the best interests of the child.
17. **Child Support: Taxation: Equity: Rules of the Supreme Court.** Income for the purposes of calculating child support is not necessarily synonymous with taxable income. A flexible approach is taken in determining a person's income for purposes of child support, because child support proceedings are, despite the child support guidelines, equitable in nature.
18. **Child Support: Evidence.** Generally, earning capacity should be used to determine a child support obligation only when there is evidence that the parent can realize that capacity through reasonable efforts.
19. **Child Support.** In determining child support, a court's findings regarding an individual's level of income should not be based on the inclusion of income that is entirely speculative in nature.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed in part as modified, and in part vacated.

Liam K. Meehan and Matthew Stuart Higgins, of Higgins Law, for appellant.

Edith T. Peebles and Mariah E. Shaffer, of Brodkey, Cuddigan, Peebles, Belmont & Line, L.L.P., for appellee.

RIEDMANN, Chief Judge, and PIRTLE and PICCOLO, Judges.

RIEDMANN, Chief Judge.

I. INTRODUCTION

Jarrett Rodriguez (Jarrett) appeals the order of the district court for Sarpy County denying his request to remove the minor child he shares with Samantha Phelps (Samantha) from

Nebraska to Texas and modifying his child support obligation. Following our review, we affirm in part as modified, and in part vacate the district court's order.

II. BACKGROUND

Jarrett and Samantha are the parents of a daughter, born in December 2017. A stipulated decree of paternity, custody, and child support was entered in December 2018. The parties share joint legal and physical custody of their minor child and utilize a week-on-week-off parenting schedule. Jarrett was ordered to pay child support in the amount of $101 per month.

The parties have continued to engage in litigation since the December 2018 order, and we briefly recount that history. In 2019, Samantha filed a contempt application, which she later withdrew; Jarrett filed a complaint to modify; and Samantha filed a complaint to modify in which she sought permission to relocate with the minor child to Utah. In 2020, Jarrett filed a contempt application. In 2021, the court denied each party's complaint to modify. In 2022, Jarrett filed a complaint to modify and application to show cause. In 2023, Samantha filed a counterclaim seeking to modify custody. Eventually, the parenting plan was modified to provide, among other things, that in the event of a dispute over major decisions, Samantha had final decisionmaking authority.

In July 2024, Jarrett filed the complaint to modify that is at issue in this appeal, requesting permission to remove the minor child to Texas. He alleged a material change in circumstances, including a job offer in Texas at a higher rate of pay, a gift of a home located next to his family in Texas, and his desire to provide care for his ailing mother. Samantha requested the district court dismiss Jarrett's complaint. She filed a counterclaim alleging a material change in circumstances related to child support and requested the district court recalculate the child support based on the parties' current incomes. We summarize the evidence presented at trial as necessary to resolve this appeal.

Jarrett is from Texas but moved to Omaha, Nebraska, in 2018. He works for his father's company located in Texas, has done so since the age of 16, and is paid a weekly salary of $805. Jarrett has numerous relatives that live in Texas, including his parents and siblings. Jarrett's mother developed dementia, and his father needed help to care for her and run the company. Jarrett's father offered Jarrett a new job within the company, with an annual salary of $115,000. Jarrett would move into a management position and have the potential to eventually become a part owner. The job would require Jarrett to move to Texas, where he would live next to his parents at no cost in a home valued at over $500,000. The minor child has her own bedroom in Jarrett's Omaha home, and she would continue to have her own bedroom in Texas. Jarrett would also be involved in caring for his mother.

Samantha opposed the removal. Since the entry of the 2018 order, Samantha had married and had a son. Samantha's mother and stepfather lived near Samantha, and the minor child spent time with them. Samantha believed there would be hardship on the minor child in leaving her family if Jarrett and the child relocated to Texas. She also had concerns about whether Jarrett would proactively meet the minor child's medical and emotional needs.

The minor child attended therapy. Jarrett was willing to have her continue in therapy but had not researched options in Texas, nor had he identified a pediatrician. The minor child's therapist opined that if the minor child's routine was disrupted by a move, she could "return to her previous anxious state," become depressed, and "withdraw." The minor child had an "IEP," worked with multiple teachers, and had been diagnosed with "ADHD." Jarrett knew the name of the school he anticipated the minor child would attend in Texas, but he had not discussed the minor child's education plan with anyone in that school system.

In support of her counterclaim, Samantha provided an updated child support worksheet. It attributed a much higher

income to Jarrett and resulted in Jarrett's owing a monthly child support payment of $417. Samantha adduced evidence that Jarrett's father bought the home in which Jarrett currently resides, provided the vehicle that Jarrett currently drives, and pays for the insurance and any major repairs on that vehicle.

The district court denied Jarrett's request to remove the minor child to Texas. It found that he had not shown a legitimate reason to relocate, but that even if he had, relocating was not in the minor child's best interests. The district court found that Jarrett's income was underreported and that he received significant in-kind income. It adopted Samantha's proposed child support worksheet and modified Jarrett's child support obligation to $417 per month. Jarrett filed a motion for new trial, which was denied following a hearing.

Additional facts will be discussed below as necessary.

III. ASSIGNMENTS OF ERROR

Jarrett assigns, reordered and restated, that the district court erred in (1) finding that he had not shown a legitimate reason to relocate; (2) finding that removal was not in the best interests of the minor child; (3) denying his motion for new trial; (4) utilizing a child support calculation that included "impermissible income averaging," included fringe benefits that did not have foundation and that were not the result of a material change in circumstances, and included a credit for Samantha's afterborn child, even though she was not the obligor; and (4) awarding Samantha attorney fees.

IV. STANDARD OF REVIEW

[1-3] Questions concerning relocation and custody are initially entrusted to the discretion of the trial court. *Korth v. Korth*, 309 Neb. 115, 958 N.W.2d 683 (2021). Although reviewed de novo on the record, the trial court's answer to such questions will ordinarily be affirmed absent an abuse of discretion. *Id*. A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly

depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id*.

[4] A motion for new trial is addressed to the discretion of the trial court. See *Sulzle v. Sulzle*, 318 Neb. 194, 14 N.W.3d 532 (2024).

[5] Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, we will affirm the trial court's decision absent an abuse of discretion. *Kingston v. Kingston*, 320 Neb. 981, 32 N.W.3d 221 (2026).

[6] A trial court's decision awarding or denying attorney fees will be upheld on appeal absent an abuse of discretion. *Hawks v. Hawks*, 32 Neb. App. 70, 993 N.W.2d 688 (2023).

V. ANALYSIS

1. Legitimate Reason

[7] Jarrett assigns that the district court erred in finding that he had not shown a legitimate reason to relocate. Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Bird v. Bird*, 22 Neb. App. 334, 853 N.W.2d 16 (2014). The party seeking modification of child custody bears the burden of showing such a change of circumstances. *Id*. Custody cases involving parental relocation are among the most difficult and troubling for courts to decide. *Korth, supra*. Because the parent proposing the move in a parental relocation has constitutional rights to travel between states and to migrate, resettle, find a new job, and start a new life, an award of custody is not and should not be a sentence of immobilization. See *id*. Yet, a custody order should also heed both parents' constitutional rights to the care, custody, and control of their child, as well as the child's need for a stable, healthy environment. *Id*.

[8] To aid in settling parental relocation matters, appellate courts have devised a two-part framework that trial courts

should use to evaluate whether to grant a request for removal. See *id*. Under the two-part framework that trial courts should use to evaluate whether to grant a request for removal to another jurisdiction, the custodial parent proposing to move the child must first satisfy the court that he or she has a legitimate reason for leaving the state. See *id*. 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 after the proposed move. *Id*. While both of these prongs must be shown to support a removal request, the second prong is of paramount concern. *Id*.

Although in a plain error review on a petition for further review, the Nebraska Supreme Court in *Steffy v. Steffy*, 287 Neb. 529, 843 N.W.2d 655 (2014), declined to address whether a father had a legitimate reason to relocate because its holding on best interests was dispositive, as it had previously instructed that the proper approach in a removal case is to first determine whether a legitimate reason for leaving the state exists. See *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000). We therefore proceed to do so.

The district court determined that although Jarrett requested removal of the minor child to Texas for employment reasons and to care for his ailing mother, he lacked credibility because he knew little regarding his employment responsibilities and his duties related to caring for his mother. The court interpreted Jarrett's testimony that he would remain in Nebraska if removal was denied as evidence that his job offer was not legitimate, stating, "[H]ow legitimate is a request if it is not necessary/mandatory?" The court found that although "it is not determinate of whether a reason is legitimate, it certainly has bearing." We pause here to address the district court's implicit determination that in order for an employment opportunity to be a legitimate reason to leave the state, a parent must choose to relocate, even if removal is denied. As argued by Jarrett, this requires a parent to potentially put employment over custody and

should not be a consideration in determining whether a parent has a legitimate reason to remove a minor child from the state. We agree.

In *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002), a father had sole custody of his children. After removing the children to Oregon without the consent of the mother or the district court, he was ordered to return the children to Nebraska. See *id*. He quit the job he had taken in Oregon and returned with the children. The district court found that his job opportunities in Oregon, coupled with his marriage to an Oregon resident, constituted a legitimate reason to leave the State. See *id*. However, it determined that it was not in the best interests of the children to remove them from Nebraska. It granted the mother's request for a change in custody. On appeal, the Supreme Court determined the district court had abused its discretion when modifying custody because it should have ascertained whether the father would relocate to Nebraska to retain custody. See *id*.

We interpret *Tremain* to instruct that the issue of whether a parent will remain in Nebraska is a factor to consider in determining custody of the children, not the legitimacy of the reason for removal. See, also, *Korth v. Korth*, 309 Neb. 115, 958 N.W.2d 683 (2021) (discussing intent to relocate regardless of removal decision in analysis of custody); *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002) (despite testimony mother would stay in Nebraska if removal was denied, legitimate reason for removal existed). We therefore determine that the district court erred by considering Jarrett's intent to remain in Nebraska if removal was denied in its analysis of whether a legitimate reason to leave existed.

The district court also discredited Jarrett's request for removal due to an employment offer because it was not "necessary/mandatory." But Nebraska courts have not required that relocation for employment be "necessary." Rather, a "desire[]" to better a career is a legitimate and compelling

reason. See *Farnsworth v. Farnsworth*, 257 Neb. 242, 253, 597 N.W.2d 592, 600 (1999).

Here, Jarrett offered evidence of a career opportunity that provided both a better salary and a chance of advancement. He also testified he wanted to be closer to his mother, whose health was failing. A desire to relocate to pursue educational and employment opportunities and to be near extended family are legitimate reasons for relocation. See *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000). However, these legitimate reasons can be negated by aggravating circumstances, such as an ulterior motive to frustrate the noncustodial parent's visitation rights. See *id*.

The district court determined that Jarrett's employment opportunity was "suspect" and was an attempt to gain sole custody of the minor child and frustrate Samantha's parental rights. Its decision incorporated credibility findings based upon trial evidence and the court's prior findings.

[9] Witness credibility and the weight to be given to testimony is within the province of the trial court. *Conley v. Conley*, 33 Neb. App. 98, 11 N.W.3d 671 (2024). An appellate court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor while testifying, and will give great weight to the trial court's judgment as to credibility. *Id*. Here, the district court was familiar with the parties, having presided over the applications for contempt and complaints to modify that had been filed since the 2018 decree. As such, we defer to the district court's credibility determinations on this issue. Consequently, we find no abuse of discretion in the district court's determination that Jarrett failed to prove a legitimate reason for leaving the state.

Although failure to meet this threshold issue is determinative, the district court further analyzed whether a move would be in the minor child's best interests. Jarrett assigns error to this finding; therefore, we proceed to address whether a relocation to Texas was in the child's best interests.

2. Best Interests

[10] Jarrett assigns that the district court erred in finding that removal was not in the best interests of the minor child. We disagree. To determine whether removal to another jurisdiction is in the child's best interests, a trial court should consider (1) each parent's motive 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 noncustodial parent when viewed in the light of reasonable visitation. *Korth v. Korth*, 309 Neb. 115, 958 N.W.2d 683 (2021).

These three considerations are not exhaustive, nor will they be present in every case. *Id*. It is the moving party's burden to show, by a combination of these considerations, that removal would be in the child's best interests. *Id*. When the evidence concerning one of these considerations is in conflict, an appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts over another. *Id*.

(a) Motives

The Supreme Court has distinguished between a legitimate reason for relocating and a party's motives for removal. In *Jack v. Clinton*, 259 Neb. 198, 204, 609 N.W.2d 328, 333 (2000), it explained:

> [U]nder *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999)[,] the evidence of job opportunities and presence of extended family go to the reasons for the proposed relocation and whether there is a legitimate reason for leaving the state, rather than the motives for seeking the move which are part of the best interests analysis.

In *Korth*, 309 Neb. at 127, 958 N.W.2d at 695, however, the Supreme Court explained:

> Although the relocating parent's motive is already examined during the threshold prong in a removal analysis,

> we have recognized the wisdom of also weighing the parents' motives in the second prong insofar as they relate to the child's best interests. At this stage of analysis, both parents' motives are assessed to determine if one is more compelling than the other. The ultimate question in this assessment is whether one parent's aim in supporting or opposing the proposed removal is to frustrate or manipulate the other parent.

In weighing the mother's motives for removal in *Korth*, the Supreme Court iterated her stated reason for leaving the state: She desired to form a new family unit with her new husband in a different state. It found that motive "understandable." *Id*.

Here, despite Jarrett's testimony at trial that he wished to pursue a better business opportunity and be closer to family, the district court found that Jarrett's motive was to frustrate Samantha's ability to parent the minor child. It based this finding on Jarrett's "continuous litigation" and his "generalized" description about the economic benefits and details of his employment opportunity in Texas. These findings are based primarily on a credibility assessment, a responsibility entrusted to the district court.

Samantha, however, expressed concerns that relocating would cause hardship on the minor child in leaving her family. The district court found that Samantha opposed removal because it would have a significant effect on her daily contact with the minor child.

Comparing these motives, the district court found this factor did not weigh in favor of relocation. We find no abuse of discretion. But even if we were to find to the contrary, this factor is not dispositive of our analysis, as the remaining factors weigh against removal.

(b) Enhanced Quality of Life

[11] The next portion of our analysis looks to the potential that the move holds for enhancing the quality of life for the child and Jarrett. See *Korth v. Korth*, 309 Neb. 115, 958

N.W.2d 683 (2021). There are nine components that may be involved in a trial court's consideration as to whether removal to another jurisdiction would enhance the quality of life of the child and custodial parent: (1) the emotional, physical, and developmental needs of the child; (2) the child's opinion or preference as to where to live; (3) the extent to which the custodial parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the child and each parent; (7) the strength of the child's ties to the present community and extended family there; (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parents; and (9) 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. *Id*.

The district court determined that the move would not enhance the minor child's quality of life and that it would "diminish" if removal was permitted. We agree. The evidence showed some positive aspects to the move. If the new job came to fruition, Jarrett's career would be enhanced, and his income would increase. Jarrett and the minor child would live near Jarrett's family members, and Jarrett could help care for his mother. But the minor child would relocate away from Samantha and her family in Nebraska.

Jarrett presented no evidence regarding the resources available in Texas for the minor child's education, nor had he identified a therapist or pediatrician to provide mental health and medical care. Given the minor child's struggles in school and her prior mental health needs, these services are important for her well-being. The home where the minor child would reside in Texas had a higher value than Jarrett's Omaha home, but this does not automatically equate to a better living situation. The child has her own bedroom in Omaha and would have her own bedroom in Texas.

The evidence established that Jarrett's quality of life would improve and the child's quality of life would correspondingly benefit. However, the minor child would lose her proximity to Samantha's family. The evidence did not show that the move would provide enhanced educational opportunities or that the child's mental and/or physical needs would continue to be met. Overall, the evidence failed to establish that the move would enhance the minor child's quality of life, and this weighs against removal.

(c) Impact on Noncustodial Parent

The parties utilized a week-on-week-off parenting schedule. If the minor child relocated to Texas, the current custody arrangement would not be possible. Although changes could be made to allow Samantha additional holiday and summer parenting time, this would not negate the impact on Samantha's relationship with the minor child. Samantha would not be able to be as involved in the minor child's daily life as she is under the current arrangement. This factor weighs against removal.

The evidence failed to establish that the move was in the best interests of the minor child. The district court did not abuse its discretion in this finding. This assignment of error fails.

3. Motion for New Trial

Jarrett assigns that the district court erred in denying his motion for new trial. We disagree.

(a) Additional Background

Jarrett filed a motion for new trial alleging the district court denied his request for removal in part because of the minor child's mental health issues and the displacement that removal would cause from the minor child's current providers. Jarrett alleged the minor child's therapist informed the parties over a month after trial concluded that she would no longer be able to treat the minor child and that based upon the child's progress, the minor child was successfully discharged

from therapy. Jarrett requested that because the district court appeared to give weight to the therapist's opinion and recommendation, it should reconsider.

At a hearing, both Jarrett and Samantha offered affidavits. Attached to Jarrett's affidavit was an email from the minor child's therapist in which she informed the parties she could no longer treat the child due to a job change and offered to either successfully discharge her or transfer her to a new therapist. The therapist sent another email in which she successfully discharged the minor child. In her affidavit, Samantha averred that the therapist had offered continued care with another treatment provider but that Jarrett and Samantha decided against it at that time. The district court denied the motion, stating that even if the evidence were true, it would have come to the same determination, and that it had considered multiple factors in arriving at its opinion.

(b) Analysis

[12] Evidence of facts occurring after a trial ordinarily cannot be made the basis for a motion for new trial on the ground of newly discovered evidence. *Martinez v. Peterson*, 212 Neb. 168, 322 N.W.2d 386 (1982). Jarrett requested a new trial based on the change in the minor child's mental health treatment, which occurred after the trial. It was not error for the district court to deny the motion for new trial based on newly discovered evidence because the evidence was based on facts occurring after the conclusion of the trial. Further, even if this evidence had existed at the time of trial and been presented to the district court, it is one factor among many considered. The district court stated it would not have changed the outcome, and this court agrees. The district court did not abuse its discretion in denying Jarrett's motion for new trial. This assignment of error fails.

4. CHILD SUPPORT

Jarrett assigns that the district court erred in utilizing a child support calculation that included "impermissible income

averaging," included fringe benefits that did not have foundation and that were not the result of a material change in circumstances, and included a credit for Samantha's afterborn child, even though she was not the obligor. We find that the district court abused its discretion in modifying the child support order because Samantha failed to show a material change in circumstances.

(a) Additional Background

Jarrett lives in a home purchased by his father. Jarrett is responsible for paying the utilities and property taxes for the home. He has access to two vehicles, a 2011 model and a 2015 model, both purchased by his father. Jarrett's father also pays for the vehicle insurance. Jarrett's employer pays for fuel for his personal use. Jarrett testified that he is paid a weekly salary of $805, and he provided paycheck records from December 2022, December 2023, and September 2024 supporting this. If Jarrett were to accept the Texas job offer, he would be paid an annual salary of $115,000.

The 2018 child support order attributed a monthly income of $3,333.33 to Jarrett. Samantha's proposed child support worksheet attributed a monthly income of $6,541.66 to Jarrett. Samantha confirmed this number was the "median" between what Jarrett was earning based on his pay statements and the salary of the job offer in Texas. In the proposed worksheet, Samantha provided herself with credit for support for her other child. Under Samantha's proposed worksheet, Jarrett's child support payment would increase to $417 per month. The district court found that Jarrett's income was underreported and that he received significant in-kind income. It adopted Smantha's proposed worksheet and modified Jarrett's child support obligation to $417 per month.

(b) Analysis

[13-16] Child support orders are always subject to review and modification. *Langley v. Langley*, 29 Neb. App. 780, 959 N.W.2d 291 (2021). 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. *Kotas v. Barnett*, 31 Neb. App. 799, 990 N.W.2d 37 (2023). Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent. *Id*. The party seeking the modification has the burden to produce sufficient proof that a material change of circumstances has occurred that warrants a modification and that the best interests of the child are served thereby. *Id*. But, the paramount concern in child support cases, whether in the original proceeding or subsequent modification, remains the best interests of the child. *Langley, supra*.

[17] The Nebraska Child Support Guidelines provide, in part, that "[t]otal monthly income is the income of both parties derived from all sources, except all means-tested public assistance benefits . . . ." Neb. Ct. R. § 4-204(A) (rev. 2020). Income for the purposes of calculating child support is not necessarily synonymous with taxable income. *Harrison v. Harrison*, 28 Neb. App. 837, 949 N.W.2d 369 (2020). A flexible approach is taken in determining a person's income for purposes of child support, because child support proceedings are, despite the child support guidelines, equitable in nature. See *id*.

Jarrett argues the child support calculation violated the child support guidelines by employing an "impermissible averaging of earning capacity by factoring income that [he] would not receive" because of the denial of his request for removal. Brief for appellant at 35. The district court adopted Samantha's proposed child support calculation. It provided no explanation other than to state that Jarrett's income was

underreported, that he received significant in-kind income, and that his testimony was not reliable.

At trial, Samantha confirmed that when creating her proposed worksheet, she put Jarrett "in at a median place" between what he earned and the salary of the Texas job offer. Jarrett's pay records reflected a weekly salary of $805, which equates to an annual income of $41,860 ($805 × 52). Averaging this amount with the $115,000 annual salary Jarrett would earn if he accepted the Texas job offer and dividing the average salary into 12 monthly payments equals a monthly salary of $6,535.83. This calculation can be expressed as follows:

$115,000 + $41,860 = $156,860
$156,860 ÷ 2 = $78,430
$78,430 ÷ 12 = $6,535.83

The $6,535.83 amount is very close to the $6,541.66 monthly salary attributed to Jarrett in the child support worksheet adopted by the district court.

[18] Jarrett argues earning capacity was misused in this case because he will only realize the $115,000 wage if he were to relocate to Texas. The child support guidelines provide that "earning capacity may be considered in lieu of a parent's actual, present income." § 4-204(E). Use of earning capacity to calculate child support is useful "'when it appears that the parent is capable of earning more income than is presently being earned.'" *Freeman v. Groskopf*, 286 Neb. 713, 720, 838 N.W.2d 300, 307 (2013) (quoting *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999)). Generally, earning capacity should be used to determine a child support obligation only when there is evidence that the parent can realize that capacity through reasonable efforts. *Anderson v. Anderson*, 27 Neb. App. 547, 934 N.W.2d 497 (2019).

Jarrett testified that there was no opportunity in Nebraska similar to what he was being offered in Texas. He stated this was "a unique opportunity that will never be offered ever in any way." Samantha presented no evidence that Jarrett could realize an annual salary of $115,000, or a salary of the average

of the Texas job offer and his current salary, through reasonable efforts. It was error to attribute to Jarrett an income based on the average of his current salary and his potential salary if he were to accept the Texas job offer. There was no evidence supporting that Jarrett had an earning capacity of that which was attributed to him in Samantha's proposed worksheet. As such, this method of calculation was erroneous.

There was evidence that Jarrett received in-kind income. Specifically, Jarrett's home and vehicles had been purchased by his father, Jarrett's father pays for Jarrett's car insurance, and Jarrett's employer pays for fuel for Jarrett's personal use. However, the evidence established that Jarrett began living in the home prior to the December 2018 order when child support was established, so the home was not a material change in circumstances. There was no evidence establishing when Jarrett received the vehicles, when Jarrett's father began paying for Jarrett's car insurance, or when Jarrett's employer began paying for fuel for Jarrett's personal use. Samantha failed to show that Jarrett's receipt of these in-kind benefits began after the 2018 child support order. The evidence did not establish a material change in circumstances. See *Kotas v. Barnett*, 31 Neb. App. 799, 990 N.W.2d 37 (2023) (defining material change in circumstance as one which occurred subsequent to entry of original decree or previous modification and was not contemplated when decree was entered).

[19] Further, there was no evidence of the value of these benefits. The court may add in-kind benefits derived from an employer or other third party to a party's income for purposes of calculating child support. See *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004). In determining child support, a court's findings regarding an individual's level of income should not be based on the inclusion of income that is entirely speculative in nature. See *Armknecht v. Armknecht*, 300 Neb. 870, 916 N.W.2d 581 (2018). The district court attributed a monthly income of $6,541.66 to Jarrett, an increase of $3,208.33 from the December 2018

order. The in-kind benefits Jarrett received had value, and the district court could include that value for purposes of determining Jarrett's income, provided the receipt of those benefits occurred subsequent to the entry of the December 2018 decree and they were not contemplated when the decree was entered. See *Kotas, supra*. But there was no evidence from which the district court could assign value to these benefits. The evidence did not support a finding that the in-kind income was worth $3,208.33 per month, and the record does not reveal the method by which the district court valued these in-kind benefits.

Samantha failed to meet her burden to show a material change in circumstances from the 2018 child support order, and she failed to show the value of Jarrett's in-kind income. The district court abused its discretion in modifying the child support order without a material change in circumstances. We vacate the district court's modification of Jarrett's child support obligation and reinstate the child support obligation of the December 6, 2018, order. Because we find the district court abused its discretion in modifying the child support obligation, we do not address Jarrett's argument that the district court erred in including credit for Samantha's other child in the modified child support order.

5. Attorney Fees

Jarrett assigns that the district court erred in awarding Samantha attorney fees. In his complaint, Jarrett requested an award of attorney fees, but in closing arguments, asked that each party be responsible for his or her own attorney fees. Samantha's counterclaim requested that Jarrett be ordered to contribute to her attorney fees, and in closing arguments, requested that if she prevailed, her fees be assigned to Jarrett. The district court determined that, as the prevailing party, Samantha was entitled to fees and costs. However, the underlying facts upon which that determination was based have now changed, as we have found that Samantha did not prevail

on her counterclaim. As neither party prevailed on the claim he or she brought, we find that each party should be responsible for his or her own attorney fees and costs. We modify the portion of the district court's order awarding Samantha attorney fees and costs to instead order that each party be responsible for his or her own attorney fees and costs.

VI. CONCLUSION

The district court did not abuse its discretion in denying Jarrett permission to relocate with the minor child to Texas, and we affirm this portion of the order. We vacate the district court's modification of Jarrett's child support obligation and reinstate the child support obligation of the December 6, 2018, order. We modify the portion of the district court's order awarding Samantha attorney fees and costs to order that each party is responsible for his or her own attorney fees and costs.

AFFIRMED IN PART AS MODIFIED,
AND IN PART VACATED.