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[11] In the present case, we conclude that Griffin's due process rights were not violated at the time of his pleas because there was not sufficient indication at that time to raise a sufficient doubt about his competency to trigger the trial court's obligation to provide notice and a hearing. We conclude, however, that there was a sufficient indication to trigger that obligation at the time of Griffin's sentencing. As such, we vacate Griffin's sentences and remand the matter to the district court with directions to conduct a new sentencing hearing. Included within the direction for a new sentencing hearing should be the question whether Griffin is competent to be sentenced at the time of that proceeding. See *State v. Johnson, supra*.

V. CONCLUSION

We find that the district court erred in denying postconviction relief. The record demonstrates that there was sufficient indication to create a sufficient doubt about Griffin's competency at the time of his sentencing and that the trial court failed to comport with due process in resolving the competency issue. We vacate the sentences and remand the matter for a new sentencing hearing consistent with this opinion.

SENTENCES VACATED, AND CASES REMANDED FOR FURTHER PROCEEDINGS.

ERIN K. TOLAN KEIG, APPELLEE AND CROSS-APPELLANT, V. THOMAS E. KEIG, APPELLANT AND CROSS-APPELLEE.

826 N.W.2d 879

Filed December 4, 2012. No. A-11-776.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of discretion.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

3. **Evidence: Appeal and Error.** When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Divorce: Property Division.** In a divorce action, the purpose of a property division is to distribute the marital assets equitably between the parties.
5. ____: ____. Equitable property division under Neb. Rev. Stat. § 42-365 (Reissue 2008) is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
6. **Property Division.** The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
7. **Divorce: Property Division.** In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held.
8. **Divorce: Modification of Decree: Child Support.** The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child.
9. **Child Support: Rules of the Supreme Court.** The main principle behind the Nebraska Child Support Guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes.
10. ____: ____. The Nebraska Supreme Court has not set forth a rigid definition of what constitutes "income," but has instead relied on a flexible, fact-specific inquiry that recognizes the wide variety of circumstances that may be present in child support cases.
11. **Child Support: Taxation.** Income for the purpose of child support is not necessarily synonymous with taxable income.
12. **Child Support: Rules of the Supreme Court: Equity.** A flexible approach is taken in determining a person's "income" for purposes of child support, because child support proceedings are, despite the child support guidelines, equitable in nature.
13. **Child Support.** A court is allowed to add "in-kind" benefits, derived from an employer or other third party, to a party's income for child support purposes.

Appeal from the District Court for Nemaha County: DANIEL E. BRYAN, JR., Judge. Affirmed in part, and in part reversed and remanded with directions.

Richard H. Hoch, of Hoch, Partsch & Noerrlinger, for appellant.

Louie M. Ligouri, of Ligouri Law Office, for appellee.

INBODY, Chief Judge, and MOORE and RIEDMANN, Judges.

INBODY, Chief Judge.

INTRODUCTION

Thomas E. Keig appeals from the decree of dissolution entered by the Nemaha County District Court, which dissolved his marriage to Erin K. Tolan Keig and divided the parties' marital property. Erin has also cross-appealed the district court's child support calculation in the decree of dissolution.

STATEMENT OF FACTS

Thomas and Erin were married on January 30, 2004, although the parties began residing together in 1996. Thomas and Erin are the parents of two children: a daughter born in 1994 and another daughter born in 1999. Thomas is not the older child's biological father, but he adopted her in 2007. Prior to trial, the parties were able to agree on several issues, including custody, visitation, and alimony. Thomas and Erin were not able to agree upon the division and distribution of the marital estate and the calculation of child support.

In 2002, the family moved from a farm near Papillion, Nebraska, to a farm located in Nemaha County. The farming operations at that site were called Mooarkegin Farms, LLC, hereinafter referred to as "the farm." A $250,000 home was built on the land for the family to reside in. Erin was the children's primary caregiver and took most of the responsibility for the home. Erin also earned a salary of $623 per month from the farm. Erin assisted with farmwork by cleaning out tree lines, removing dead trees, mowing, landscaping, filling trenches, cleaning out grain bins, and removing debris from around the farmhouse. Erin planted and maintained fruit trees and shrubs, in addition to a vegetable garden on the farm. Erin testified that she was Thomas' primary mode of transportation from field to field. Erin explained that she also took soil samples for plant diagnostics and consulted with an agronomist regarding disease and pests. Erin testified that she used the farm salary for family needs and did not save any of those funds for herself. The evidence indicates that during the marriage, $313,750.11

in farm machinery and equipment was purchased by the farm, for the farm.

Erin earned two associate degrees, one in nursery management and one in landscaping. Prior to the younger child's birth, Erin worked for 7 years as the lead waitress for a restaurant. Erin testified that she and Thomas agreed that Erin become a stay-at-home mother once the younger child was born. Erin testified that after the parties separated, she moved with the two children to Papillion, where she took a position with a garden center as an associate manager and landscape designer. Erin earns about $10.50 per hour, depending upon if she is working in or outside of the store.

Thomas was employed as a full-time farmer for the farm, farming approximately 800 to 900 acres of corn and soybeans, with 140 of those acres being rented by the farm. Thomas and the family were the only individuals living on the farm, and Thomas was solely responsible for the day-to-day operations. For approximately 12 years prior to trial, Thomas did not have any employment other than the family farming business. The farm paid Thomas a yearly guaranteed payment of $24,000 and provided Thomas and Erin with the home that was built on the farm, in addition to paying for utilities, vehicles, and fuel for the vehicles. Thomas testified that the home in which the family had resided on the property was paid for by the farm and worth approximately $250,000. Although Thomas later testified that his father had actually paid for the home by putting those funds into the farm operations, he did not refute that it was built specifically for the family. The farm also provided Thomas with health insurance. Thomas testified that he still lives in the home and that the home was a benefit of working for the farm. Thomas testified that he believed those additional benefits were worth an additional $20,000 per year. Thomas also testified that each year, he takes out an additional $40,000 from his investments to use for the family. Both parties testified that throughout the marriage, they maintained separate financial accounts and deposited their earnings from the farm into those separate accounts. Thomas testified that he paid for all the family bills with his money and that

Erin paid for personal items for herself and the children with her earnings.

Thomas explained that when the limited liability company (LLC) for the farm was formed, prior to the marriage, he injected capital into the entity, which capital he received from inheritances, but that he had not made any capital contributions to the farm during the marriage. Thomas testified that he had a percentage interest of ownership in the farm which he acquired through "donations from [his] father." Thomas testified that he held a personal percentage of 30.92-percent interest in the farm, that the remaining interest was held in two trusts, and that all of the interest was premarital because the contributions to the farm were made from inherited money and were made prior to the marriage. Evidence received by the court indicates that in October 1997, the LLC for the farm was formed, and that Thomas was assigned a 0.1-percent interest in the LLC. In December 1999, Thomas' father assigned Thomas a 40.422-percent interest in the farm, and in 2002, an additional 1.23 percent was assigned to Thomas. In 2002, Thomas' father assigned a 46-percent interest in the farm to Thomas' mother, who, in July 2004, assigned 40.189 percent to the "Thomas E. Keig Skip Generation Family Trust."

Thomas testified that the farm equipment listed on the farm's depreciation report, and from which Erin had compiled the list of farm equipment and machinery purchased during the marriage, had been purchased during the marriage, with the exception of a laptop computer which had been purchased during the separation. Thomas testified that during the separation, the farm had spent $200,000 on farm "inputs" such as seed, fertilizer, herbicides, and fuel. Thomas also testified that during the marriage, there had been buildings and improvements made on the farm, including a "Morton" building in 2009, which cost $89,325. Thomas testified that the farm paid for the erection of that building, although he later explained that he loaned the farm about $44,000 for the project and that the farm had been making payments to him, but that the loan had not been completely repaid at the time of trial. Thomas explained that the income generated from the farming

operations was used to purchase all of the farm machinery and buildings purchased during the marriage. Thomas testified that none of the income from the farm was invested for the family during the marriage, outside of the farming operations, because Thomas was trying to "keep the business going." Thomas further testified that the only marital property they had acquired during the marriage was two vehicles and some furniture.

All of the grain farmed by Thomas was stored onsite at the farm in grain bins. Thomas testified that he had 32,000 bushels of corn in storage from the 2010 crop year which had not previously been sold, but that 2 weeks prior to trial, he sold 5,000 to 6,000 bushels of his 2009 corn for around $7 per bushel. Thomas also testified that he had 14,000 bushels of soybeans in storage from the 2010 crop year, which he had not sold, but that during the previous year, Thomas had sold soybeans at $14 per bushel.

Thomas testified that he had six life insurance policies which he continued to pay for quarterly during the marriage with funds from a Wells Fargo investment account. Evidence indicates that the cash value of the six policies increased by $29,788.50 during the time of the marriage. Thomas had four Wells Fargo investment accounts which each contained significant funds. The first two accounts had balances of $378,004.67 and $1,448,753.93, respectively, and were funded by inheritances Thomas received. Thomas testified that no marital income was utilized to fund these accounts and that he annually receives interest and dividends from those accounts. The other two Wells Fargo accounts consisted of educational accounts for the older child and the younger child, containing $63,000 and $122,000, respectively. At the time of trial, the account statement indicated that the younger child's educational account had an increased value of $189,000, which Thomas testified was actually a "combined snapshot" of both of the children's accounts. Thomas testified that the funds in the children's educational accounts came from funds from either of the other two Wells Fargo accounts. Thomas also testified that he had an interest in the limited life estate of the Thomas E. Keig Skip Generation Family

Trust, but had never received any income distributions from said trust.

Tax returns indicate that in 2009, Erin earned $13,362, and that in 2010, Erin earned $14,462. Tax documents indicated that in 2009, Thomas received $24,000 from the farm, $29,598 in interest income, $36,596 in dividend income, and $18,189 in partnership income. In 2010, Thomas earned a total of $123,155 from the interest, dividend, and partnership income. The tax returns for the farm indicate that in 2009, the farm's ordinary income was a loss of $18,793 after deducting Thomas' $24,000 payment, and that in 2010, the ordinary income of the farm was $94,944 after deducting Thomas' $24,000 payment. Partnership tax documents also indicate that in 2010, the farm sold $444,389 worth of grain.

Joe Hower, a certified public accountant and the Keig family accountant, testified that he had been the family's accountant since 2006. Hower testified that Thomas owns a 30.8-percent interest, even though based on the assignments of interest in the farm, Thomas owns approximately 40.19 percent. Hower testified that Thomas' shares were diluted by money that had been placed in the farm by other family members. Hower testified that based upon the farm's records, Thomas was not receiving any more benefits than other members; however, Thomas' additional benefits, including the home and the utilities, should have been reported and reflected in the tax returns.

Ronald Parsonage, the family attorney since 1968, testified that he was involved with the formation of the family LLC in connection with the farm. Parsonage testified that Thomas' father purchased the farmland and machinery in the name of the farm. It was determined that Thomas would farm the property as the operating employee and would be paid a guaranteed payment of $24,000 per year. Thomas would also receive indirect benefits of vehicles, utilities, and a new home built on the land. Parsonage explained that by 2002, Thomas had received approximately 23-percent ownership in the farm from his father. Parsonage testified that currently, the family marital skip generation trust holds 33.8-percent

ownership, the Thomas E. Keig Skip Generation Family Trust holds 35.3 percent, and Thomas holds 30.9 percent. Parsonage explained that the difference in the ownership percentages offered for Thomas is explained by a capital contribution made by Thomas' grandmother that diluted the shares and changed the percentages. Parsonage testified that there was no document specifically drafted to show those changes and that he found the percentage information in Thomas' father's tax returns prior to 2002.

Bryan Robertson, an attorney and accountant in the appraisal business, testified that he was retained by Thomas to make a determination of Thomas' direct interest in the farm. Robertson explained that he utilized the evaluation date, trial balance, income tax returns, 1065 tax documents for the LLC from 2004 through 2010, amended and restated operating agreement, guaranteed payment agreement, articles of organization, depreciation schedules, yield reports, and an appraisal completed by Mark Caspers. Robertson opined that Thomas held a 30.9209-percent ownership in the farm, but explained that he did not make any assertions regarding an alleged 40.189-percent beneficial interest in the Thomas E. Keig Skip Generation Family Trust. Robertson explained that his valuation discounted percentages, which accounted for the difference in value from the documents which showed the assignments made to Thomas.

Robertson testified that he made two primary discounts in his valuation, a 25-percent discount for lack of control and a 35-percent discount for lack of marketability. Robertson testified that the capacity of the interest holder to liquidate was a "big deal" in taking into account the interest holder's ability to liquidate the property and the actual cashflow available from the property's capital. Robertson testified that the property was "land rich and cash poor." Robertson explained that he utilized Caspers' appraisal that the real estate of the farm was valued at $2,789,000 and $758,000 in chattel, with an additional $437,000 for grain inventory, which equated to an approximate total value of $4,227,000. Robertson testified that once he had reached the valuation of $4,227,000, he made

adjustments for the noncontrolling interest. Robertson testified that he multiplied the $4,227,000 by Thomas' interest of 30.9 percent, then by 25 percent for lack of control and 35 percent for lack of marketability. Robertson opined that once those discounts were applied, the fair market value of Thomas' share was $637,000.

Two different appraisals of the farm were submitted at trial. Caspers, a certified real estate appraiser, completed an appraisal of the farm and farming equipment, which appraisal broke down the farm's total land into three tracts. Three approaches were used to estimate the market value, from which Caspers utilized a reconciled value from all three approaches. Caspers estimated the value of "Tract One" at $743,000, "Tract Two" at $1,134,000, and "Tract Three" at $912,000. The appraisal also contained an estimated fair market value of the farm's chattel property at $758,000.

A second appraisal, completed by another certified appraiser, was received into evidence. The appraisal values the home and the tracts of land of which the farm is composed. The appraisal values the home built on the farm at $310,000 and the tracts of land at a total of $3,098,000. The second appraisal did not contain an estimate of the value of any chattel.

At the conclusion of the proceedings, the court ordered Thomas and Erin to have joint legal custody of the children, with Erin to have physical care, custody, and control, subject to the reasonable rights of visitation by Thomas. The court ordered Thomas to pay $1,669.99 per month in child support for two children and $1,167.38 per month for one child, and each party was awarded one tax exemption until only one minor child remained, at which time the parties were ordered to alternate claiming said exemption. A child support calculation was attached to the dissolution decree.

The court then ordered Thomas to pay Erin $250,000 as a "*Grace* award" pursuant to *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986), as a division of a prime asset gifted to or inherited by Thomas as part of a large farming operation. The court ordered that Thomas be awarded the entire farm and all assets owned and used by the farming operations

and, further, that he be awarded each of the items he listed on one exhibit as nonmarital assets. Those items include Thomas' 30.92-percent interest in the farm, the four Wells Fargo investment accounts, the life estate in the Thomas E. Keig Skip Generation Family Trust, three vehicles, all of the life insurance policies, and some personal property items. Erin was awarded all of her personal property, certain furniture and household goods from the family home, the 2007 Chevrolet Silverado, and any other items in her possession. Thomas was ordered to pay the balance due on the Silverado.

Pursuant to the parties' stipulation, Thomas was ordered to pay Erin $750 per month in alimony for 6 years. The court further ordered:

> There are presently accounts established with Wells Fargo by Thomas . . . for the benefit of both minor children, . . . pursuant to the Uniform Gift[s] to Minors Act, and those accounts shall remain the property of the children, respectively, and shall not be considered as part of the marital estate, nor shall such accounts be subject to division by or between the parties.

Thomas was also ordered to pay Erin's attorney fees, the appraisal costs, and all court costs.

Thereafter, Thomas filed a motion for new trial, alleging that the child support calculation was not supported by the evidence regarding the incomes, expenditures, and health insurance deductions; that the order to pay attorney fees and appraisal costs was not justified; that the *Grace* award was excessive; that the "court's order restricting [Thomas] as to the use of the accounts established . . . for his daughters" exceeded the court's jurisdiction; and that he should have been awarded both tax exemptions. The district court overruled Thomas' motion for new trial, and Thomas has timely appealed to this court. Additionally, Erin has cross-appealed.

ASSIGNMENTS OF ERROR

Thomas assigns that the district court abused its discretion by awarding Erin a *Grace* award and by ordering that the educational accounts he established were property of the children.

Erin has cross-appealed, assigning that the district court erred in its child support calculation.

STANDARD OF REVIEW

[1] In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of discretion. *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009).

[2] An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Davis v. Davis*, 275 Neb. 944, 750 N.W.2d 696 (2008).

[3] When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006).

ANALYSIS

Grace *Award*.

Thomas argues that the district court abused its discretion by awarding Erin a *Grace* award in the amount of $250,000.

[4-6] In a divorce action, the purpose of a property division is to distribute the marital assets equitably between the parties. *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002); Neb. Rev. Stat. § 42-365 (Reissue 2008). Equitable property division under § 42-365 is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Tyma v. Tyma, supra*. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Id*.

The crux of Thomas' argument both at the trial level and in his argument to this court is that everything and anything having to do with the farm is premarital and not subject to any valuation or distribution by the district court. Thomas contends everything connected with the farm is premarital because all of the land was purchased by his father and all of Thomas' interest was inherited or gifted from family.

We discussed the concept of a *Grace* award at length in *Walker v. Walker*, 9 Neb. App. 834, 622 N.W.2d 410 (2001). In *Walker*, we described a *Grace* award as "a device to fairly and reasonably divide marital estates where the prime asset in contention is one spouse's gifted or inherited stock or property in a family agriculture organization." 9 Neb. App. at 843, 622 N.W.2d at 417. Further, in *Medlock v. Medlock*, 263 Neb. 666, 679, 642 N.W.2d 113, 125-26 (2002), the Nebraska Supreme Court used the following description of its decision in *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986): "[W]e ordered a cash award as compensation for the inadequacy of the marital estate."

The concept of a *Grace* award was also explained in *Charron v. Charron*, 16 Neb. App. 724, 730, 751 N.W.2d 645, 650 (2008), which provided:

> The inadequacy of the marital estate in cases of this nature involves a typical factual pattern where the wife devotes herself to running the household and caring for the children and where the husband's labors are devoted to a family farming or ranching corporation in which he owns stock, usually owned prior to the marriage or gifted solely to him during the marriage. Hence, under our cases, the stock is treated as the husband's separate property. Additionally, in the typical situation where the issue arises, the husband receives a rather nominal cash salary in exchange for his labor devoted to his family's farm or ranch but also receives such things as housing, utilities, vehicles, fuel, beef, use of the corporation's land for his private livestock herd, et cetera. As a result of the low cash earnings of the husband, the couple often has an inconsequential marital estate. This typical factual backdrop helps explain the Supreme Court's reference in

Medlock, supra, to a *Grace* award as compensation for the inadequacy of the marital estate.

We review de novo on the record for an abuse of discretion the district court's order that Thomas pay Erin a *Grace* award. Upon said review, we disagree with Thomas' contentions that the $250,000 award was an abuse of discretion.

Our review of the record indicates that the parties were married from 2004 through 2011. While the marriage was not of a long duration, the assets which were acquired during the marriage for the farm are substantial and include approximately $437,000 in grain stored on the farm, $314,000 in farm machinery and equipment, $43,850 of personal property, a $90,000 Morton building with drywall (for which the farm owed Thomas $44,000), and $327,000 in bank accounts, which equate to more than $1.1 million. Furthermore, Erin devoted her time during the marriage to running the household and caring for the children, in addition to working as needed for the farm. Thomas' labor was devoted to operating and managing the day-to-day operations of the family farming corporation, in which he holds a 30.92-percent member interest. Thomas and Erin both earned nominal cash salaries from the farm, in addition to numerous other benefits provided by the farm, such as building and paying for a $250,000 home for the family to reside in and paying for utilities, vehicles, fuel, and health insurance. Thomas testified that all of the capital earned by the farm was infused back into the farm, which clearly resulted in an inconsequential marital estate. Thomas testified that it was his belief that the marital estate consisted only of two vehicles and some furniture, despite knowing that the investments and capital of the farm, valued at over $4 million, were increasing each year and that his premarital trust accounts, in excess of $1 million, would continue to provide him with a substantial source of income.

Thomas argues that the *Grace* award was excessive because his share of the farm was valued at trial at only $637,000, which equates to Erin's receiving a 39.25-percent *Grace* award. In *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986), the husband owned an 18.14-percent share of an $8.3 million farming corporation, which share was worth about

$1.5 million. The wife was awarded $100,000, which was approximately 7 percent of the husband's total interest in the farming corporation.

In *Walker v. Walker*, 9 Neb. App. 834, 622 N.W.2d 410 (2001), the husband owned a 21.77-percent interest in the stock of a large farming corporation valued at $6.8 to $9.1 million, with that interest in the corporation valued at $265,492. The couple in *Walker* had also accumulated a marital estate of $130,000 over the span of their 30-year marriage. The wife was awarded a *Grace* award of $60,000, which was slightly less than 25 percent of the husband's nonmarital estate. In the opinion, this court indicated that the farming operation owned 745.42 acres of land, "all of which must be considered in determining the value of the corporation—which in turn determines the value of [the husband's] corresponding ownership of 21.77 percent of the stock of that corporation." 9 Neb. App. at 848, 622 N.W.2d at 420.

In the Keigs' case, the district court did not adopt any of the valuations given at trial regarding the value of the farm, nor were any specific valuations made in the dissolution decree. Nonetheless, the record contains sufficient evidence in order for us to determine whether the *Grace* award was appropriate or not. It was Robertson who opined that Thomas' share was worth $637,000. Robertson opined that the farm was valued at $4,227,000, which included the real estate, chattel, and grain inventory. Caspers valued the farm at $3,547,000, which valuation did not include the grain inventory, while a third appraisal valued the farm at $3,098,000, which valuation did not include any chattel. In addition to these valuations for the farm, the record also includes, as discussed above, the addition of a $90,000 Morton building and $327,000 in corporation bank accounts.

Another consideration is that, while it is undisputed by the parties that Thomas owns a 30.92-percent interest in the farm, Thomas also owns interest in the farm through a trust. Thomas testified that the remaining interest in the farm is held in two trusts, one of which is the Thomas E. Keig Skip Generation Family Trust, which Thomas' mother assigned a 40.189-percent interest to in July 2004. Thomas is the

beneficiary of said trust, which, at the time of trial, had a balance of $1,448,753.93. The trust is irrevocable, and, although he will receive only the life interest from that trust, the terms of the trust cannot change and we are obligated to consider that the trust has some value to him. However, in reviewing the valuations given to the farm, we are also mindful that, as Robertson explained in reaching his valuations, Thomas is entitled to a discount in his interest, because Thomas does not own a controlling interest and the portion of his interest in the trust is only a life interest.

[7] However, if we were to agree with Thomas' arguments that the award is unwarranted, we would essentially be allowing him to withhold, behind the cloak of the family business, any capital from the farm which may have been earned or reinvested for himself and Erin and which would have been considered part of the marital estate. Thomas is the only individual working the farm, and all of the income earned from the farm is through his efforts. Simply because any income or gains made by the farm were reinvested in the farm does not mean that income is excluded from consideration by the court in making an equitable division of property. In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held. *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002). After considering all of the evidence in the record and based on the totality of the circumstances which include the real estate, chattel, grain inventory, Morton building, bank accounts, and trust fund, we find that Thomas controls an interest in the farm of about $1 million. Therefore, we cannot say that it was an abuse of discretion for the district court to award Erin a $250,000 *Grace* award.

Educational Accounts.

Thomas contends that the district court was without authority to control the educational investment accounts which he funded with inheritance proceeds. Thomas agrees that the district court was correct in determining that these two educational accounts were premarital assets, but argues that the

accounts should be controlled by Thomas and "not setoff by the court." Brief for appellant at 15.

As set forth in the statement of facts, the district court ordered:

> There are presently accounts established with Wells Fargo by Thomas . . . for the benefit of both minor children, . . . pursuant to the Uniform Gift[s] to Minors Act, and those accounts shall remain the property of the children, respectively, and shall not be considered as part of the marital estate, nor shall such accounts be subject to division by or between the parties.

At trial, the court specifically stated that "the accounts that are presently in the children's names will remain in the children's names and cannot be withdrawn except for educational purposes for the children."

We have carefully reviewed the record and can find no indication that Thomas' authority to control the accounts was in any way removed or restricted by the district court, and there is nothing to indicate that the district court ordered the accounts set off, as Thomas argues. Thomas testified that those educational funds were funded through other trust fund accounts which were funded by inheritances and gifts he received. The district court found that the children's educational accounts were premarital and ordered only that the accounts could not be withdrawn except for educational purposes for the children, which was exactly what Thomas testified that the terms of the accounts require. Therefore, we find that the district court did not err in its determination regarding the educational accounts and that this assignment of error is wholly without merit.

Child Support Calculation.

In the dissolution decree, the district court ordered Thomas to pay $1,669.99 per month in child support for two children and $1,167.38 for one child. In her cross-appeal, Erin argues that the district court erred by setting the child support calculations below the Nebraska Child Support Guidelines. Erin contends that the district court should have taken into account the

in-kind benefits that Thomas received from the farm and also the stored crops which had not yet been sold.

[8,9] The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child. *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004). The main principle behind the Nebraska Child Support Guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes. Neb. Ct. R. § 4-201. See *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

The Nebraska Child Support Guidelines provide that in calculating the amount of child support to be paid, the court must consider the total monthly income, which is defined as the "income of both parties derived from all sources, except all means-tested public assistance benefits which includes any earned income tax credit and payments received for children of prior marriages" and includes income that could be acquired by the parties through reasonable efforts. Neb. Ct. R. § 4-204. If applicable, earning capacity may be considered in lieu of a parent's actual income.

[10,11] The Nebraska Supreme Court has not set forth a rigid definition of what constitutes "income," but has instead relied on a flexible, fact-specific inquiry that recognizes the wide variety of circumstances that may be present in child support cases. *Gangwish v. Gangwish, supra*; *Workman v. Workman*, 262 Neb. 373, 632 N.W.2d 286 (2001). Thus, income for the purpose of child support is not necessarily synonymous with taxable income. *Gangwish v. Gangwish, supra*; *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003).

[12,13] A flexible approach is taken in determining a person's "income" for purposes of child support, because child support proceedings are, despite the child support guidelines, equitable in nature. See *Gangwish v. Gangwish, supra*. A court is allowed, for example, to add "in-kind" benefits, derived from an employer or other third party, to a party's income. See, *Workman v. Workman, supra*; *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998).

In the case of *Gangwish v. Gangwish, supra*, one of the issues revolved around the child support calculation, which was challenged by the husband with regard to the trial court's decision to utilize the income of the husband earned by a family farming corporation and the in-kind benefits also received by the family from the farming corporation. The Nebraska Supreme Court determined that it would be inequitable for the children to suffer because of the husband's decision to take a nominal salary and instead build equity in the farm, and the matter was remanded to the trial court for a new calculation.

In this case, the district court imputed a total monthly income of $9,380 to Thomas, which equates to a yearly income from all sources of $112,560. The 2009 tax return indicates that the parties' total income was $97,760 ($13,362 of which is Erin's salary from the farm). The 2010 tax return indicates that Thomas earned a yearly income from all sources of $123,155. As far as Thomas is concerned, that amount includes $32,000 in interest earned; $38,000 in dividends; and partnership earnings of $53,358. Thomas' average earning during those 2 tax years equates to approximately $104,000.

Although in comments made at the conclusion of the proceedings the district court indicated that the $24,000 guaranteed payment was also included in the calculation, we are unable to determine how the court calculated Thomas' total income, because this amount is not entirely found in his tax returns. The district court did not go into any further detail and instead stated, "I'm just going to use the gross figure [$]9,380 for him and [$]1,205 for her." Thus, we are unable to determine how the monthly amount of income for Thomas was reached and what sources were included in the calculation. Clearly, some sources of income are not included in the calculation, but whether that income is the in-kind benefits, the stored grain inventory, or any of Thomas' various other sources of income such as dividend or interest income, partnership income, or the guaranteed salary payment from the farm, we cannot ascertain. Therefore, we reverse the child support determination and remand the matter for a new determination of Thomas' income. On remand, when determining Thomas' income, the trial court

should consider—in addition to looking to Thomas' reported income including interest, dividends, partnership income, and the guaranteed payment of $24,000 by the farm—the in-kind benefits that Thomas receives from the farm and the stored grain inventory.

CONCLUSION

In conclusion, we find upon our de novo review of the record that the district court did not abuse its discretion by awarding Erin a $250,000 *Grace* award and by determining that the children's educational accounts were premarital. However, with respect to the child support calculation, we conclude that the district court erred in its determination of Thomas' income, and we remand the matter for a new income determination in accordance with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL C. BARTLETT, APPELLANT.
825 N.W.2d 455

Filed December 4, 2012. No. A-12-080.

1. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Sentence vacated, and cause remanded with directions.

Michael J. Decker for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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