probation, which included a requirement that he participate in a "'work ethic camp.'" The defendant later violated his probation, and the district court eventually revoked probation and sentenced him to 5 years in prison. The district court gave the defendant credit for time served in jail, but not for the 125 days served at the work ethic camp. The Nebraska Supreme Court determined that the defendant was in custody pursuant to § 83-1,106(1) and held that in addition to the credit given for time served in jail, the defendant was also entitled to custody for the 125 days served at the work ethic camp.

In this case, the record is clear that Bartlett was in custody for 101 days prior to being sentenced to probation for the conviction in this case. The record is also clear that upon his arrest for the probation violation in this case, Bartlett spent an additional 213 days incarcerated until being sentenced. Thus, in accordance with § 83-1,106(1), the district court should have credited Bartlett with a total of 314 days for time served as requested at the sentencing hearing, instead of denying the remaining 101 days from time previously served.

Therefore, the State's motion for remand is well taken. We vacate the sentence and remand the cause to the district court with directions to grant Bartlett those additional 101 days' credit, for a total credit for time served of 314 days.

SENTENCE VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

JAN K. PLOG, APPELLEE, V.
TERRANCE L. PLOG, APPELLANT.
824 N.W.2d 749

Filed December 11, 2012. No. A-12-016.

1. **Divorce: Property Division: Appeal and Error.** In actions for the dissolution of marriage, the division of property is a matter entrusted to the discretion of the trial judge, whose decision will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion.
2. **Divorce: Property: Words and Phrases.** Dissipation of marital assets is one spouse's use of marital property for a selfish purpose unrelated to the marriage at the time when the marriage is undergoing an irretrievable breakdown.

3. **Divorce: Property Division.** Marital assets dissipated by a spouse for purposes unrelated to the marriage after the marriage is irretrievably broken should be included in the marital estate in dissolution actions.
4. ____: ____. Under Neb. Rev. Stat. § 42-365 (Reissue 2008), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
5. ____: ____. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
6. **Divorce: Alimony: Property Division.** Although alimony and distribution of property have different purposes in marriage dissolution proceedings, they are closely related and circumstances may require that they be considered together.
7. **Real Estate: Contracts: Vendor and Vendee: Equity: Title.** Upon the execution of a contract for the sale of real estate, the equitable ownership of the property vests in the vendee, even though the seller retains the legal title as security for deferred installment payments of the purchase price.
8. **Divorce: Property Division.** The manner in which property is titled or transferred by the parties during the marriage does not restrict the trial court's ability to determine how the property should be divided in an action for dissolution of marriage.
9. **Divorce: Property Division: Proof.** The burden of proof to show that property is nonmarital remains with the person making the claim.
10. **Divorce: Property Division.** When awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the gift or inheritance and is not considered a part of the marital estate. An exception to the rule applies where both of the spouses have contributed to the improvement or operation of the property which one of the parties owned prior to the marriage or received by way of gift or inheritance, or the spouse not owning the property prior to the marriage or not receiving the gift or inheritance has significantly cared for the property during the marriage.
11. **Divorce: Property Division: Livestock.** The "disposable" nature of a cow does not, by itself, mean that a set-aside for cattle owned by a spouse before the marriage is not allowable.
12. **Divorce: Property Division: Alimony.** Although the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately.
13. **Divorce: Property Division: Alimony: Child Support.** Alimony, support, and property settlement issues must be considered together to determine whether a court has abused its discretion.
14. **Divorce: Attorney Fees: Appeal and Error.** In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.

Appeal from the District Court for Garden County: DEREK C. WEIMER, Judge. Affirmed in part, and in part reversed and remanded with directions.

Jeffrey S. Armour, of Lane & Williams, P.C., L.L.O., for appellant.

J. Leef, of Sonntag, Goodwin & Leef, P.C., for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

PER CURIAM.

I. INTRODUCTION

Terrance L. Plog appeals from a decree of the district court for Garden County, Nebraska, in which the court dissolved his marriage to Jan K. Plog, awarded alimony to Jan, and attempted to divide the parties' marital and nonmarital estate. Terrance alleges that the court erred (1) in its determination and division of the marital estate, (2) in finding that Jan did not dissipate marital assets, (3) in its award of alimony to Jan, (4) in its award of attorney fees to Jan, and (5) in its denial of Terrance's motion for new trial. Because we find that the trial court erred in its handling of the marital estate and in its award of alimony, we remand with directions for additional findings and correction of the errors we discuss herein.

II. FACTUAL BACKGROUND

Terrance and Jan were married on May 26, 1990. Terrance was 62 years old at the time of trial, and Jan was 59 years old. No children were born or adopted over the course of the parties' 20-year marriage. Jan had custody of a daughter from a previous marriage, who was age 6 when the parties married. At some point before graduating from high school, Jan's daughter, Corey, legally changed her last name to Plog. Although Terrance never legally adopted Corey, they claimed each other as father and daughter.

When the parties married, and continuing through the time of trial, Terrance was working as a veterinarian at a veterinary clinic he owned (vet clinic). The vet clinic and the trailer home which served as the parties' residence throughout their

marriage are located in Garden County on an approximately 70-acre tract of land, often referenced at trial and throughout this opinion as the "Home Place." In 1981, Terrance and his first wife entered into a purchase agreement to buy the Home Place for $75,000, with a downpayment of $15,000, 10-percent interest per year, and a payment period of 10 years. Terrance was awarded the Home Place in his first divorce in approximately 1984. Terrance testified that he made annual payments on the Home Place to an attorney in Ogallala, Nebraska, who acted as an escrow agent. The payments continued after his first divorce, and then he and Jan made the two final payments of $6,000 each after they were married. After the final payment, Terrance received a warranty deed for the Home Place titling the property in joint tenancy with Jan. Terrance's testimony was that he did not intend such to be a gift to Jan.

When Terrance and Jan were married in 1990, the trailer home and an older vet clinic building were present on the Home Place and Terrance had just completed construction of a newer vet clinic building on the property. Terrance received a small business loan before the parties' marriage to finance constructing the new vet clinic building. Terrance testified that the majority of the small business loan was paid off before his marriage to Jan and that the remaining balance was paid off after their marriage by borrowing against the value of his life insurance policy. The details such as amounts, dates, interest rates, payoff amounts, and dates thereof on both of such loans are not in the record. Improvements to the trailer home in which the parties lived during the marriage were completed by the parties during the marriage; however, the testimony was inconsistent as to the extent of such, except that there were no additions made to expand the structure.

There were a total of six parcels of real estate at issue in this case. The parties executed a joint property statement (JPS), which included designations for all six parcels of real estate. The Home Place was designated on the JPS as parcel "K5." Terrance and Jan purchased the five other parcels of real estate in Garden County during the course of their marriage, and on the JPS, they designated those five parcels of real estate as

parcels "E1" through "E5," listed in section "E," the real estate section of the JPS.

The legal description used in the JPS for parcel E3 is identical to that set forth in exhibit 42, a purchase agreement for a 3.27-acre tract adjacent to the parties' other real estate and conveyed jointly to Terrance and Jan in 1995 for a purchase price of $3,270. However, underneath the legal description for parcel E3 on the JPS, the following text appears: "House & Clinic (includes new clinic and improvements)." Jan testified that such text was her addition to the description of parcel E3 in the JPS. However, the overwhelming weight of the evidence is that the trailer home and both the old and new vet clinic buildings were located on the 70-acre Home Place property, designated on the JPS as parcel "K5," and were present and existing when the parties married. Therefore, these structures could not have been on the 3.27-acre parcel E3 purchased after the marriage. Jan's notation concerning parcel E3 in the JPS was a mistake on her part. In addition to the mistaken notation Jan made about parcel E3 containing the home and vet clinics, Jan assigned in the JPS a value of $133,085 to parcel E3. Terrance assigned parcel E3 a value of $3,000. Terrance's testimony reflected that parcel E3 was, indeed, the 3.27-acre parcel purchased after the parties' marriage.

As noted above, parcel K5, the Home Place, was purchased via land contract and largely paid for prior to this marriage. The evidence is that $96,000 of the $108,000 total paid (which we assume includes interest in addition to the purchase price of $75,000) was paid before Terrance and Jan were married. Two payments of $6,000 were made after the parties married, after which the Home Place was deeded to the parties in joint tenancy in 1991. Parcel K5 is listed in section "K" of the JPS, entitled "Assets of Husband at the Time of the Marriage."

There is no evidence to indicate how the parties paid for the parcels of land that they acquired during the marriage. In the JPS, Jan indicated that parcel K5 was "gifted to Husband and Wife from Husband." The JPS does not list either a "husband or wife" valuation for parcel K5, nor did the court make any finding of value for parcel K5. Terrance, on the other hand,

maintains that parcel K5, which the evidence shows to be the Home Place, is his separate premarital property.

The district court's decision includes the following:

> The parties have submitted a [JPS] to the Court. This [JPS] has been completed by the Court reflecting the allocation of the assets and debts reflected therein. This document also reflects the Court's rulings regarding the classification of disputed items of real and personal property. This is attached hereto as Attachment 2.

There was no document attached to the decree and labeled "Attachment 2," although there was an "Attachment 1." We assume that the court was referring to what is in our record as "Attachment 1." We note that the trial court made no findings on its "completed" version of the JPS that establish valuation of the parcel designated as parcel "K5," nor is parcel K5 specifically awarded to either party. In the trial court's "completed" version of the JPS, however, parcel E3 was awarded to Terrance and valued using Jan's JPS valuation of $133,085.

It appears that the trial court was mistaken, similarly to Jan's mistake noted above, in treating the parcel designated as parcel "E3" as the Home Place. As a result, the trial court's award specifically awarded parcel E3 to Terrance, but valued it as if it were parcel K5, and did not specifically award parcel K5 to anyone or value parcel K5. It appears that the court was attempting to award the Home Place (parcel K5) to Terrance and to value it at approximately $133,000; it is not clear how the court intended to dispose of the parcel of property that actually constituted parcel E3 or what value the court intended to attribute to the parcel that actually constituted parcel E3.

In addition to Terrance's veterinary practice, the parties conducted farming, ranching, and "calving" on the Home Place and their adjoining properties. Terrance testified that he had 1 or 2 registered cows at the time the parties married and about 8 to 10 unregistered cows. According to Terrance, the parties had at the time of separation 40 registered cows, 7 unregistered cows, 1 herd bull, and 1 yearling bull. Terrance and Jan were both involved with the calving, branding, and vaccination of

their own animals, and Jan maintained the vet clinic's and the agricultural operation's bookwork, excluding tax returns. Tax returns were completed by a paid preparer. There are copies in evidence of thousands of checks from the parties' farm account and vet clinic account from as far back as 2006. All of these checks were signed by Jan until May 21, 2010, when Terrance signed two checks. The parties separated and Jan left on May 3, 2010.

The parties converted approximately 30 acres of dryland farm ground located within the Home Place parcel to irrigated land in 2002. They did so by placing a four-tower pivot irrigation system on the property. The State condemned 4.68 acres of this irrigated farmland located within the Home Place tract in 2004 "for State highway purposes." Payment for the condemned property in the amount of $130,486 was made jointly to Terrance and Jan. The proceeds from the condemnation were used to pay off the small business loan Terrance took out to pay for the new vet clinic building. As noted above, we have no other details about the payoff, nor do we have other details about the loan at its inception. The condemnation proceeds were also used to purchase property for the farming/ranching business, including a feed wagon, a tractor, and a grain cart. Terrance testified that $30,000 to $40,000 remained from the condemnation proceeds after those expenditures and that he believed such funds were placed in one of the parties' joint bank accounts accruing interest.

Jan's educational background includes having graduated from high school and having taken courses in accounting and "office work" for a period of about a year. Prior to marrying Terrance, Jan worked at a school in Illinois where she "helped with the kids. [She] worked in the office, took attendance." She also did secretarial work in North Platte, Nebraska. After the parties' marriage, Jan worked for a local newspaper for about a year as a typist; thereafter, she was involved in the parties' farming/ranching operation and kept the books for it and the vet clinic. Terrance testified that Jan received $1,000 per month in wages for her work at the vet clinic from 1991 to 2007. Jan's testimony was that she received such wages for only 18 months during the parties' entire marriage. After

Social Security and Medicare were deducted from her $500 paycheck, $461 was deposited into the parties' farm account. Terrance testified that the vet clinic account was used to "sustain the vet clinic business" and "[t]o pay for the bills incurred by the vet clinic."

In Terrance's answer and counterclaim to Jan's complaint for dissolution of marriage, he alleged that Jan had dissipated approximately $250,000 of marital funds, which she expended on behalf of her brother, John Ready (John), and her daughter, Corey. Jan testified at trial that she gave $30,300 to Corey from approximately late 2006 to early 2010. Terrance testified that he was unaware of these transfers to Corey and that he would not have agreed with them had he known they were occurring. He testified that Corey struggled with substance abuse beginning in her last year of high school and continuing thereafter. He testified that he, Jan, and some other family members eventually paid for Corey to go to drug treatment, but that Corey left treatment early, after 6 months. Terrance testified that from 2003 until their separation, he and Jan "constantly" had disagreements about Jan's enabling Corey. Terrance testified that he "tried" to make it clear to Jan that they would give no more assistance to Corey. He testified that he was able to get bank statements dating back to 2006, which reflected money transfers and checks Jan made to Corey from 2006 through 2010, of which he had been unaware. He further testified that bank statements prior to 2006 are on microfilm and difficult to access.

Jan testified that she gave John $66,420 from late 2006 to early 2010. Jan's testimony was that John and his wife ran into personal and financial difficulties after John moved to Nebraska from Arizona to start his own plumbing business. With regard to the personal difficulties, John's wife was diagnosed with terminal cancer and had died by the time of trial, and there is evidence that John had issues with gambling and alcohol. Jan testified that she and Terrance helped John start a plumbing business through financial transfers. Jan testified that John did work on the parties' home and vet clinic, including repiping under their trailer home, remodeling their kitchen, working on their washer and dryer, putting rock in

the driveway of the clinic, and performing some work on the ventilation in the clinic. Jan testified that around $16,000 to $17,000 of the $66,420 she gave to John was to compensate him for the work he did and that the rest was for loans she took out to assist John and his wife. Terrance testified that he had to redo some of John's work because of its poor quality.

Terrance testified that he loaned John money on three separate occasions. Terrance testified that John repaid him for the first loan, in the amount of $1,000, but that John did not repay him for the other two loans, in the amount of $1,500 apiece. Terrance testified that he decided not to deal with John anymore after John failed to repay the second and third loans, because "[y]ou couldn't believe a word he said . . . ."

In the spring of 2010, the parties were moving cattle on their property when Jan injured her ankle. Terrance testified, "We were loading cattle and she was on the fence. She stepped off the fence to get in the pickup to go with us and she sprained her ankle." Jan testified that because they did not have health insurance, she did not get medical treatment for her ankle at that time. Shortly thereafter, on May 3, 2010, the parties separated and Jan moved to Utah to stay with Corey. Jan testified that she visited a doctor in Utah and was informed she had ligament damage to her ankle which required surgery, but that the doctor refused to repair it unless and until she had health insurance. She testified that she has been unable to work since she left the farm due to her ankle injury and that she has not sought employment.

III. PROCEDURAL HISTORY AND TRIAL COURT DECISION

Jan filed for dissolution of marriage on May 27, 2010. Trial on the dissolution action was held on July 21 and August 11, 2011. A decree of dissolution, parts of which we have already discussed, was filed in the district court on November 18. The property division section of the decree provides in part:

> The most difficult item to properly classify is the real estate that the Court will refer to as the "home place". [Footnote number omitted.] This property was in the possession (if not title) of [Terrance] at the time of the

> marriage. This was property on which his home and office were located. At the time of the marriage of the parties, [Terrance] had not yet completed the purchase of this real estate as he had additional payments to make pursuant to his first divorce. The parties jointly made the final payment after the marriage.

In a footnote to the decree, within the quote immediately above, the court mistakenly used the legal description of the 3.27-acre parcel, identified on the JPS as parcel E3, as the legal description for what the court indicated was the "home place." In the court's narrative, it is clear that when the court discussed the Home Place, it intended to reference the 70-acre parcel which was purchased via land contract and which Terrance was awarded in his first divorce. The district court found that it "cannot make a finding other than that [the Home Place] real estate is marital property," citing *Smith v. Smith*, 9 Neb. App. 975, 623 N.W.2d 705 (2001) (exception to separate property rule applies where both spouses contribute to improvement or operation of property which one spouse owned prior to marriage). The court reasoned that the purchase of the real estate was not completed until after the parties were married, title to the real estate did not transfer until the purchase was complete, and, when title did transfer, it transferred to both parties jointly. The court further reasoned that even if the court were to find that the Home Place property had been Terrance's premarital asset, Terrance failed to meet his burden of proving "its premarital value and the amount claimed now." The decree further recites:

> There is no question in the evidence that marital funds were used to pay off debts associated with this real estate and to improve the real estate. Whatever "value" the real estate had prior to the marriage that could conceivably be pre-marital, that value was consumed throughout the marriage by [the] use of marital funds to satisfy pre-marital debts associated with the real estate as well as the improvements/changes which took place: improvements to residence, condemnation action, and conversion to irrigated land.

The court, via attachment of its "completed" version of the parties' JPS, specifically awarded parcels E2 and E3 to Terrance and valued the two parcels at a total value of $276,085. The parties stipulated before trial that parcel E2 had a value of $143,000. To arrive at the figure of $276,085 for the value of these two parcels awarded to Terrance, the court would have to have used the stipulated value of parcel E2, $143,000, plus Jan's value assigned to parcel E3 of $133,085. This is consistent with our comments above that the trial court appears to have mistakenly relied on Jan's representation that parcel E3 was the Home Place, while the Home Place was actually parcel K5.

Next, the court discussed Terrance's claim that Jan dissipated approximately $250,000 in marital assets through gifts/loans to Corey and to John and his wife. In analyzing the expenditure of funds for Corey, the court found that these expenses—payment of telephone bills, gifts, et cetera—were consistent with a parent-child relationship and "d[id] not represent a quick withdrawal of funds to 'squirrel' money away in preparation for a divorce." Thus, the court found that the payments to Corey did not amount to dissipation of marital assets.

With respect to funds expended for John and his wife, the court found that most of those funds appeared to have been made in "an ultimately vain attempt to keep [John's] flagging [plumbing] business afloat." The court found that although Terrance claimed he would never have agreed with these expenses if he had been aware of them, there was no evidence that Terrance was unable to access the parties' finances anytime he saw fit. The court found that, in any event, there was no evidence these gifts/loans to John were made when the marriage was undergoing an irretrievable breakdown. The court concluded that "[c]learly [Jan's] efforts to assist [John] were misguided and unsuccessful. They were not, however, nefarious or designed to create some type of nest egg to fall back on in the event of a divorce." Therefore, the court rejected Terrance's claim that Jan dissipated marital assets at a time when the parties' marriage was irretrievably breaking down.

Regarding alimony, the district court found the fact that the parties had planned for and worked toward their retirement together favored an award of alimony. The court found that a history of contributions to the marriage by both parties was shown. This included the use of Terrance's knowledge of the farming/ranching industry and real estate investing to help the parties create wealth during their marriage, as well as Jan's work for the vet clinic and her assistance with the farming/ranching business. However, the court found that although Jan's contributions to the marriage were significant, the financial assistance she provided to John was detrimental to the parties and needed to be taken into consideration when evaluating her claim for alimony.

In terms of the parties' financial circumstances, the court found that neither party's situation was ideal. The court found that Jan was living out of state with Corey, that the temporary alimony of $500 per month from Terrance was her only income, and that she had no retirement or health insurance. The court further found that the evidence established Terrance's veterinary practice was slowing down and that his earning capacity was "clearly compromised by both [his] age and availability of work," because, as he testified, many of his clients were older and were retiring.

The court found that this was an appropriate case for alimony and awarded such to Jan for 10 years in the amount of $1,000 per month for a period of 24 months, $750 per month for a period of 36 months, and $500 per month for a period of 60 months, commencing December 1, 2011. A "Property Division and Debt Allocation" set forth in the decree resulted in an equalization payment of $33,000 from Terrance to Jan at a judgment interest rate of 2.061 percent per year.

On November 23, 2011, Terrance filed a motion for new trial on the issues of the court's determination and calculation of the marital estate, property division and distribution, conclusions regarding Jan's "significant financial transfers," and alimony. The motion alleged that the decree was "not sustained by the evidence and [was] contrary to law." Terrance's motion for new trial was denied on December 9, and Terrance now appeals.

IV. ASSIGNMENTS OF ERROR

Terrance assigns, restated, that the district court erred in (1) finding that Jan did not dissipate marital assets, (2) dividing the marital estate, (3) awarding alimony to Jan, (4) awarding attorney fees to Jan, and (5) denying his motion for new trial.

V. STANDARD OF REVIEW

[1] In actions for the dissolution of marriage, the division of property is a matter entrusted to the discretion of the trial judge, whose decision will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. See *Malin v. Loynachan*, 15 Neb. App. 706, 736 N.W.2d 390 (2007). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

VI. ANALYSIS

1. Dissipation of Marital Estate

Terrance first asserts that the trial court erred in finding that the evidence was insufficient to prove that Jan had dissipated marital assets through her gifts/loans to Corey and to John and his wife. We agree with the trial court that Terrance's evidence was insufficient to prove dissipation of marital assets.

[2,3] The law concerning dissipation of marital assets is well settled. Dissipation of marital assets is one spouse's use of marital property for a selfish purpose unrelated to the marriage at the time when the marriage is undergoing an irretrievable breakdown. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001). Marital assets dissipated by a spouse for purposes unrelated to the marriage after the marriage is irretrievably broken should be included in the marital estate in dissolution actions. *Id.*

Exhibit 47, a spreadsheet offered by Jan, details her version of the payments to, or on behalf of, Corey, John, and John's wife. The exhibit covers a limited period of time, with August 2, 2006, being the earliest entry and May 10, 2010, being the

last. In that timeframe, Jan provided $30,300 to Corey or on her behalf, against Terrance's wishes, from the farm account or the vet clinic account. Jan wrote the checks and kept the books by entry in a ledger and on the computer. Jan alleges that Terrance was "aware" of these expenditures, because Terrance had "access" to the computer where the information was located. Jan testified that she did not directly inform Terrance of the expenditures. Terrance testified he was usually out tending to animals and was rarely in the office, and apparently, he was far from "computer savvy." After the separation, Terrance began studying the finances, although he had earlier inquired about why the parties frequently seemed to be out of money.

Jan's spreadsheet indicates that in the time period that it covers, $66,420.86 went to John. Jan admitted that she did not discuss with Terrance the money going to John, because she "knew the consequences," she "would have gotten in trouble," and she "knew exactly what would happen." We noted above Terrance's problems with and feelings about John. John had relocated to Garden County in 2007 and wanted to start a plumbing business. Jan assisted with John's business endeavor with farm account and vet clinic account moneys. There is no evidence to demonstrate that these transfers could reasonably be classified as loans, and thus marital assets.

With respect to Corey, the trial found that although she was not Terrance's biological or adopted daughter, Corey and Terrance had something approaching a father-daughter relationship, and that the money was used because Corey was struggling with addiction issues as well as being a mother at a young age. The court found that the funds spent on Corey were "consistent with a typical parent-child relationship" and that thus, the evidence did not show dissipation concerning the money that went to Corey.

The money that went to John and his wife was described by the trial court to be "ultimately [a] vain attempt to keep her brother's flagging business afloat." In finding that the evidence was insufficient to support a legal determination of dissipation, the court faulted Terrance for failing to keep his eye on the money, given that the information was accessible to him if he

had been concerned or interested and looked at the computer data. The trial court ultimately rejected the dissipation claim with the finding that Terrance failed to prove that at the time the money was going to John and his wife, the marriage was irretrievably broken. We agree that the evidence is insufficient to find that the marriage of Terrance and Jan was irretrievably broken at that point in time.

We agree with the trial court's conclusion on this issue, and we affirm the trial court's finding that Terrance's evidence was insufficient to prove dissipation of marital assets.

2. Division of Marital Estate

Next, Terrance alleges that the district court erred in its division of the marital estate. Specifically, he argues that the court failed to properly classify several of his premarital assets, "including without limitation, the Home Place, assets purchased with the Condemnation Money, and Vet Clinic assets such as the Vet Account." Brief for appellant at 31. Terrance further asserts that in consideration of the factors set forth in Neb. Rev. Stat. § 42-365 (Reissue 2008), an equal division of the marital estate was an abuse of discretion. Finally, he contends that the court erred in its mathematical calculation of the total marital estate by failing to include certain items of personal property awarded to Jan, thereby causing Jan to receive $62,773.86 worth of marital assets that were not figured into the 50-50 division.

[4-6] Under § 42-365, the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Malin v. Loynachan*, 15 Neb. App. 706, 736 N.W.2d 390 (2007). The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Id*. We further note that although alimony and distribution of property have different purposes in marriage dissolution proceedings, they are closely related and circumstances may require that they be

considered together. *Pendleton v. Pendleton*, 242 Neb. 675, 496 N.W.2d 499 (1993). We think this case has circumstances requiring that property division and alimony be considered together, to a degree.

(a) Did District Court Improperly Classify Assets?

(i) Home Place

First, Terrance claims that the Home Place should have been awarded to him as his separate nonmarital property which he brought into the marriage. We conclude that the trial court was correct in finding that the Home Place was a marital asset.

[7] The district court found that the property was not premarital, in part because Terrance lacked title when he was married to Jan. No authority was cited for this rationale, and in fact, it ignores well-established law that as the vendee under a land contract, Terrance had equitable title. See *Beren Corp. v. Spader*, 198 Neb. 677, 255 N.W.2d 247 (1977) (upon execution of contract for sale of real estate, equitable ownership of property vests in vendee, even though seller retains legal title as security for deferred installment payments of purchase price). Terrance argues that the property would have been titled in his name alone, except that the original deed to the property with his and his first wife's names on it was lost and he did not receive a new deed in his name alone after his first divorce. Thus, he contends that when he and Jan made the final $12,000 payment on the property and his attorney drafted a new warranty deed naming both Terrance and Jan as owners in joint tenancy, that designation of joint title was included only because a new deed had to be drafted and the parties happened to be married at that time. He argues that the fact that his and Jan's names both appear on the warranty deed should therefore not have any bearing on the characterization of the property. We do not agree with this broad proposition, but as will become apparent, how title was held is not determinative of this issue.

[8,9] The manner in which property is titled or transferred by the parties during the marriage does not restrict the trial court's

ability to determine how the property should be divided in an action for dissolution of marriage. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004). The burden of proof to show that property is nonmarital remains with the person making the claim, which in this case is Terrance. See *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003).

It is undisputed that Terrance entered into a purchase agreement with respect to the 70-acre Home Place property with his first wife in 1981 and that he was awarded the property in his first divorce. The purchase agreement provides for a $15,000 downpayment on the Home Place with annual interest of 10 percent due on the remaining $60,000, which "shall be payable in annual installments." An attachment to the purchase agreement provides a list of the principal and interest payments from 1981 through 1991, totaling $108,000. That total amount includes the $12,000 Terrance and Jan paid on the Home Place after their marriage, which amounts to approximately 11 percent of the purchase price. However, cost does not necessarily equal value. See *Hughes v. Hughes*, 14 Neb. App. 229, 706 N.W.2d 569 (2005) (it is elementary that cost or expenditure does not equate with value, and generally, we look to fair market value of asset). The trial court's decree further provides:

> There is no question in the evidence that marital funds were used to pay off debts associated with this real estate and to improve the real estate. Whatever "value" the real estate had prior to the marriage that could conceivably be pre-marital, that value was consumed throughout the marriage by [the] use of marital funds to satisfy pre-marital debts associated with the real estate as well as the improvements/changes which took place: improvements to residence, condemnation action, and conversion to irrigated land.

This language appears to allude to the *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982), exception to the rule that property acquired by a party before marriage is set off to that party in a dissolution action.

[10] When awarding property in a dissolution of marriage, property acquired by one of the parties through gift or

inheritance ordinarily is set off to the individual receiving the gift or inheritance and is not considered a part of the marital estate. The *Van Newkirk* exception applies where both of the spouses have contributed to the improvement or operation of the property which one of the parties owned prior to the marriage or received by way of gift or inheritance, or the spouse not owning the property prior to the marriage or not receiving the gift or inheritance has significantly cared for the property during the marriage. See *Van Newkirk v. Van Newkirk, supra*. There is little question that over the term of the nearly 20-year marriage, Terrance and Jan jointly operated and worked at the cattle, farming, and ranching business. In addition, at the least, the Home Place parcel was improved during the marriage by converting dryland farm ground to irrigated cropland by the purchase and installation of a pivot irrigation system. Accordingly, we agree with the trial court's conclusion that the evidence brings the *Van Newkirk* exception into play.

When applying the *Van Newkirk* exception, evidence of the value of the contributions and evidence that the contributions were significant are generally required. *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997). The weight of the evidence is that Jan's contributions to the parties' businesses were long-term and of consequence. But, other than the $500 a month salary she was paid for a disputed period of time (Terrance claims she was paid $1,000 a month from 1991 to 2007), which salary she put back into the parties' joint bank accounts, there is no direct evidence of the value of what she did over the many years of the marriage. See *id*.

In this case, however, we find *Tyler v. Tyler, supra*, to be distinguishable. That case involved a husband's discreet and definable work on a house in a brief timeframe by building a deck, carpeting and painting the family room, replacing kitchen countertops, and installing four ceiling fans. Applying the *Tyler* requirement of proof of value of contributions is, frankly, unrealistic and inequitable in the present sort of case, beyond requiring proof that the nonowning spouse's contributions were substantial. People in a marriage who work together to build what they envision as the marriage's

economic lifeblood do not keep timesheets or assign value to their efforts at building a successful economic future together. We think this is particularly true in a farming/ranching operation such as that which the parties operated. Moreover, people do not work together as Terrance and Jan did for many years with the thought of what they will have to prove if, after 20 years of working together for their joint economic benefit, the marriage unravels. The fact is that any value assigned to Jan's work and contribution, no matter by whom, would be speculative and arbitrary. Thus, for these reasons, we do not require proof of a dollar value of contributions that *Tyler* otherwise suggests is necessary.

Accordingly, given Jan's substantial efforts and work in the parties' businesses over a 20-year timeframe, we find that even if we were to say that the Home Place parcel, parcel K5, started as Terrance's nonmarital property, the *Van Newkirk* exception applies and the value of the Home Place, parcel K5, should be included in the marital estate because Jan's contributions to the parcel were substantial. See *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982). Accordingly, we find no abuse of discretion and affirm the trial court's decision that the Home Place should be included in the marital estate.

As noted above in the factual background, the trial court's decree did not specifically award parcel K5 to either party. The JPS included a notation by Jan related to parcel E3 indicating that she believed parcel E3 was the Home Place and valuing it at over $130,000, although the evidence clearly indicates that parcel E3 was not the Home Place, that parcel E3 was actually a parcel slightly larger than 3 acres purchased by the parties during the marriage for approximately $3,000, and that parcel K5 was actually the Home Place of more than 70 acres. As noted above, it appears that the trial court awarded parcel E3 to Terrance under the same mistaken belief that it was actually the Home Place, and valued it accordingly.

Although we agree with the trial court's conclusion that the Home Place should be considered a marital asset, we conclude that the trial court erred in not clearly and completely valuing and awarding both the smaller parcel of real estate designated

as parcel "E3" and the actual Home Place parcel designated as parcel "K5," and that such error merits remanding. On remand, the trial court is directed to specifically describe all six parcels of real estate, value them according to the evidence adduced at the prior dissolution trial, and clearly make an equitable award of them accordingly.

(ii) Parcel E3—3.27 Acres Acquired in 1995

Parcel E3, the 3.27-acre parcel, is clearly marital property because it was purchased by Terrance and Jan for $3,270 in 1995. The trial court awarded parcel E3 to Terrance and used Jan's valuation of $133,085 for parcel E3. However, as noted above, it is apparent that both Jan and the trial court mistakenly believed that parcel E3 was actually the Home Place, parcel K5, because there is no other reasonable explanation for Jan's having valued a parcel purchased for $1,000 per acre at over $40,000 per acre. As noted above, we direct that on remand, the trial court shall value parcel E3 using the existing trial record and award it equitably as part of the marital estate. Thus, we find that to the extent that the trial court by implication valued parcel E3 at $133,085, such valuation is reversed and vacated and shall be determined anew upon remand.

(iii) Condemnation Funds

Terrance also alleges that the funds from the condemnation award should have been awarded to him as his separate nonmarital property. The evidence was that the condemned property came out of the Home Place, which we have found to be marital property using the *Van Newkirk* exception as explained above. It follows that the condemnation funds, derived from that marital property, would also be marital property, and the district court did not abuse its discretion in so finding. We reject the claim of error that the condemnation funds should have been set aside to Terrance as his premarital property.

(iv) Vet Clinic Account

Additionally, Terrance asserts that the district court improperly classified as marital property the vet clinic account and a

2000 Chevrolet Silverado pickup purchased with funds from the vet clinic account. The evidence was that the parties' joint vet clinic account, which Terrance testified was in existence prior to the parties' marriage, was used to "sustain the vet clinic business" and "[t]o pay for the bills incurred by the vet clinic," as well as to pay utilities on the Home Place property. For the same reasons as those discussed with respect to the classification of the Home Place, above, we find that Jan's contributions to the vet clinic were substantial and that it was thus not an abuse of discretion for the trial court to include the vet clinic account, and the 2000 Silverado pickup purchased with earnings from the vet clinic account, in the marital estate. Accordingly, Terrance's claim of error in this regard is without merit.

(b) Calculation of Marital Estate

Terrance asserts that it was error under § 42-365 for the district court to order an equal division of the marital estate.

We begin this section of our analysis with the parcels of real estate. As noted above, the trial court did not specifically value or award the Home Place, parcel K5. As noted above, the court also did not properly value parcel E3. As we concluded above, it appears that the court did intend to value the Home Place at slightly more than $130,000 and did intend to award it to Terrance. Inasmuch as we decline to speculate further on whether that was, in fact, the court's intention, and inasmuch as we have already concluded above that the matter must be remanded and the trial court must specifically describe, value, and award each of the six parcels of real estate, we decline to further address this assertion. Until the court clearly and thoroughly values and awards the parcels of real estate, we cannot make a determination of whether the distribution will be equitable.

With respect to the value of parcel K5, we note that the parties' JPS contains no value for parcel K5 from either party. As noted above, it appears that Jan provided her opinion as to the value of the Home Place in her comments regarding parcel E3. At trial, Terrance testified that the value of the Home Place was "[w]hatever the assessed value is, . . . but I can't

recall what that was." Exhibit 45 is a series of Garden County assessor's records, and there is one designated as "Commercial Property Record" that has the same legal description and approximate size as the Home Place, taking into consideration the subtraction of several acres after the condemnation of land. That exhibit includes designations for the assessed value of the property for 2010. However, we note that Neb. Rev. Stat. § 77-201 (Reissue 2009) contains provisions that require that the Home Place—assuming that it is "agricultural land," as the evidence tends to prove—is to be assessed at 75 percent of "actual value." On remand, the trial court is specifically directed to take all of this evidence into consideration in its valuation of parcel K5.

We next address Terrance's argument that the district court failed to include two items of personal property awarded to Jan in its calculation of the total marital estate. Terrance asserts that the court neglected to include livestock valued at $24,500 and life insurance/retirement assets valued at $38,623.86. In the "Property Division and Debt Allocation" provisions in the decree, the trial court did not include in Jan's property award $38,623.86 in "Life Insurance and Retirement Plans" that the court awarded to her when it "completed" its version of the JPS attached to the decree. The same problem exists with respect to the "Miscellaneous Assets" section of the JPS, where the court "completed" the JPS by giving Jan $24,500 for half of the value of 38 registered cows and 1 herd bull. But again, that $24,500 is not added to Jan's award of assets on pages 15 and 16 of the decree. Thus, there is a mistake of $63,123.86 in the court's calculation of the total assets it previously awarded to Jan. However, because we are remanding the cause for what will be effectively a complete revision of the division of the marital property, we do not attempt to calculate what the net effect of this mistake might be. Rather, we direct the district court to include all marital assets and debts in its application of the three-step process, mentioned earlier, that must be used with respect to division of a marital estate.

[11] Moreover, we find that there is another error concerning the trial court's handling of the division and allocation of

the value of the cattle. The trial court made a specific finding in a footnote on page 10 of the decree that Terrance had a premarital cattle herd worth $24,000, that he was "entitled to a set-off against the value of the current cattle herd in that amount," and that $23,650 was the value of the remaining cattle after what is more properly referred to as a "set-aside" for Terrance's premarital cattle. Jan does not challenge this finding by cross-appeal. The trial court then purported to award each party $24,000 for his or her respective 50-percent share of the "40 registered cows at time of separation," finding specifically that said cows were worth "$24,000 premarital [and] $24,000 marital." Thus, in one instance, the court suggested that the total value of the herd was $47,650 ($24,000 premarital and $23,650 remaining), and in another instance, the court suggested that it was $48,000 ($24,000 premarital and $24,000 marital). There are more serious issues regarding the cows than the $350 difference in valuation amounts, however, because the trial court's methodology effectively negated the set-aside for the 20 head of cows the court found Terrance brought into the marriage. See *Shafer v. Shafer*, 16 Neb. App. 170, 741 N.W.2d 173 (2007) (holding that "disposable" nature of cow does not, by itself, mean that set-aside for cattle owned by spouse before marriage is not allowable). Despite its initial finding that $24,000 of the total herd (regardless of whether the total herd is valued at $47,650 or $48,000) was Terrance's premarital property and that Terrance was entitled to a set-aside for that, the court proceeded to divide as a marital asset the entire herd, not the $23,650 or $24,000 worth of cattle remaining after the set-aside. Terrance makes no specific assignment of error addressing this flaw, but it is clearly wrong and we find that such is plain error. Thus, upon remand, the court's property division should include only the value of the herd remaining as a marital asset after the $24,000 attributable to the premarital cows is set aside to Terrance and is excluded from the calculation and division of the marital estate.

We now turn to Terrance's claim that awarding possession and ownership to Jan of a large portion of the land is an inequitable and untenable property division because it materially and

adversely affects his farming/ranching operation, particularly at a time when his veterinary practice is waning. Terrance cites a number of factors for this decline in his veterinary practice, including the physical demands of a large-animal practice in light of his advancing age, competition from drug companies reducing his profits, and the age and fast-approaching retirement of many of his long-time clients. As we read the court's decree, it found this testimony credible. Remembering that Jan has now relocated to Utah and that it is simply unrealistic to expect a divorced couple located in two states to jointly, cooperatively, and successfully operate a smallish farming/ranching operation, we find some merit to Terrance's assertions. Additionally, it appears that there was no compelling evidence introduced that Jan should own land which adjoins land that Terrance intends to continue to use to earn his living and satisfy the financial obligations resulting from the divorce. In light of our conclusion above that the property distribution must be remanded, these are considerations that are ultimately more properly placed before the trial court for its consideration on remand.

[12] Finally, we address Terrance's claim that the trial court should not have ordered an equal division of the marital estate. According to § 42-365, although the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately. The purpose of a property division is to distribute the marital assets equitably between the parties. *Id*. In this case, we conclude, for a number of reasons, that the trial court abused its discretion in ordering what is essentially a pro forma 50-50 division of the marital property.

The record indicates that Terrance came into the marriage as a highly educated professional with an established veterinary practice and the substantial beginnings of a farming/ranching operation. Jan brought virtually no property into the marriage, and her work experience was limited. Although Jan contributed to the joint economic life of the couple and the financial success of the vet clinic and the farming/ranching operation, she also expended large sums of money on her brother and his wife without Terrance's knowledge. It appears

that the district court largely excused Jan's diversion to her family of substantial amounts of marital funds on the ground that Terrance could have merely looked through the parties' financial records and discovered the money transfers. It cannot be ignored that Terrance trusted Jan with the proper care and management of the money that he was largely responsible for producing through the vet clinic, and the fact that she "kept the books" was a basis for a finding that she substantially contributed to the Home Place and that the Home Place is marital property, which benefited Jan in the division of property. Clearly, Jan transferred substantial sums of money to her brother and his wife, and this is money which the record suggests is simply gone. We note in this regard that in her testimony, Jan references some of these outlays as "loans," but the parties' JPS contains no listing of such as assets, nor is there a suggestion in the record that these funds could be realistically treated as loans that are collectible or expected to be repaid. Therefore, we find that considering these circumstances, an equal division of the marital estate—as the trial court clearly tried to do, putting aside for the moment its mistakes discussed above—may not be equitable and reasonable and may constitute an abuse of discretion. Inasmuch as we have already found that we must remand for a new property distribution award, it is difficult to predict whether an equal division would necessarily be inequitable, but it would be appropriate for the trial court to consider the impact on the marital estate of Jan's transferring of money to her brother and his wife.

In light of our conclusions above that the trial court erred in not clearly and completely valuing real property, in not clearly and completely awarding real property, and in its treatment of some of the personal property, we have already concluded that the trial court, on remand, must redetermine the appropriate distribution of the marital estate, consistent with our previous findings. In so doing, the court is also directed to specifically take into account the impact that Jan's distribution of marital assets to her brother and his wife should have on the ultimate property distribution, and then make an appropriate division of the marital property consistent with

this state's jurisprudence concerning equitable distributions of marital estates.

3. Alimony

[13] Terrance alleges that the trial court's alimony award was also an abuse of discretion. We agree. Section 42-365 provides in pertinent part:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment . . . .

As we have emphasized above, alimony, support, and property settlement issues must be considered together to determine whether a court has abused its discretion. *Olson v. Olson*, 195 Neb. 8, 236 N.W.2d 618 (1975). The crucial question in this case is whether Terrance can reasonably be expected to pay all of the amounts required. See *id*.

The trial court discussed each of the criteria from § 42-365 in its decree and then awarded Jan alimony of $1,000 per month for 24 months, $750 per month for 36 months, and $500 per month for 60 months—a total of $81,000 to be paid over 10 years. Terrance argues that the alimony award is excessive given his sparse earnings and the rather dire outlook for his veterinary practice, considering his age and the physical demands of a large-animal practice, in addition to the "drainage" of money by Jan for her brother and her adult daughter.

We first turn to the matter of Terrance's earnings, which he asserts are "only $1,088.00" averaged over a 6-year period, including his agricultural operations and the vet clinic. Brief for appellant at 46. Where this figure comes from and whether it is intended to be an annual figure is not clear. We have closely examined the information from the 2004 through 2009 income tax returns that are in evidence.

The tax returns reflect a total adjusted gross income over that time period indicating a loss of nearly $76,000. The depreciation evident on the tax returns during those years totals over $115,000. Subtracting the 6-year total loss evident in the adjusted gross income numbers produces income, in theory at least, of $39,706, or $6,617 a year. Study of the tax returns, even after adding back depreciation, reveals that Terrance's vet clinic income and agriculture income do not support the alimony awarded or demonstrate that he has the ability to pay the alimony awarded plus allow him to meet his own needs and service the debt he is responsible for. The trial court aptly detailed the economic challenges facing both parties; those challenges cannot be ignored and are borne out by the tax returns.

Terrance's earnings shown on 6 years of tax returns border on being negligible, and there is evidence that his future prospects are rather grim. Nonetheless, the record also demonstrates that despite the information on the tax returns reflecting very little income, the parties were able to sustain themselves and Jan was able to financially help her daughter, and her brother and his wife, with substantial transfers of money, all without Terrance's apparently being aware.

Jan is unemployed and has not sought employment since relocating to Utah. Jan claims that her injured ankle prevents her from working, and she testified that she has been unable to obtain medical treatment because of a lack of health insurance.

As we noted above in our discussion concerning the distribution of property on remand, when we consider Jan's contributions to the marriage, it is impossible to completely ignore her transfers of money to her adult daughter and to her brother and his wife in substantial amounts. The money she transferred to them could have come only from the parties' businesses. Even if we used only Jan's admitted transfers, Jan admits that these transfers were done without Terrance's knowledge. Jan was the one primarily responsible for managing the finances in their joint enterprise, but her management and transfer of funds to her family members, while not constituting dissipation of marital assets, has had an impact on Terrance's ability

to pay an alimony award as substantial as that awarded by the trial court. Therefore, we find that the award of alimony is unrealistic, is beyond Terrance's capacity to pay, and fails to fully factor in the impact of Jan's transfers of money to her family members.

As noted above, it is important to consider the property distribution and settlement, which we have remanded, along with alimony and support, in determining reasonableness. Inasmuch as the trial court will be reassessing the property distribution, it should also reassess the alimony award. Therefore, we reverse the trial court's award of alimony and remand the issue of the appropriate amount and duration of alimony to the trial court to determine on the trial record, taking into consideration our conclusions herein.

4. Attorney Fees

[14] Terrance assigns error to the trial court's award of an attorney fee of $1,500 to Jan's attorney. In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004). The fee awarded could be seen as rather inconsequential, given the size of the record and the complexity of the issues. We find no abuse of discretion in the fee award, and we therefore find this assignment of error to be without merit.

5. Motion for New Trial

While error is assigned to the denial by the trial court of the motion for new trial, we have already dealt with the claimed reasons meriting a new trial. Thus, it is unnecessary to discuss this claim further.

VII. CONCLUSION

We note that the trial court's use of attachments and footnotes in crafting the decree may have contributed to the errors we have found, because the final "Property Division and Debt Allocation" found on pages 15 and 16 of the decree does not correctly correspond to the footnotes or to "Attachment 1" of the JPS "completed" by the trial court. We remand the cause

for the entry of a new decree that divides the marital property in accordance with our opinion and determines an appropriate alimony award. On remand, the court shall address and remedy the errors in the original decree that we have discussed in detail in our opinion.

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

STATE OF NEBRASKA ON BEHALF OF KEEGAN M., A MINOR CHILD, APPELLEE, V. JOSHUA M., DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, AND AMY B., THIRD-PARTY DEFENDANT, APPELLANT.

824 N.W.2d 383

Filed December 11, 2012. No. A-12-074.

1. **Parties: Words and Phrases.** A necessary party to a suit is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.
2. **Courts: Parties: Jurisdiction.** The presence of necessary parties to a suit is a jurisdictional matter and cannot be waived.
3. **Motions for Continuance: Appeal and Error.** An appellate court reviews a judge's ruling on a motion to continue for an abuse of discretion.
4. **Trial: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
5. **Motions for Continuance.** The failure to comply with Neb. Rev. Stat. § 25-1148 (Reissue 2008) is a procedural defect that affects the technical rights of an opposing party. It does not affect the opposing parties' substantial rights.
6. **Motions for New Trial: Appeal and Error.** An appellate court reviews a judge's ruling on a motion for new trial for an abuse of discretion.
7. **Motions for New Trial.** Motions for new trial are entertained with reluctance and granted with caution, because of the manifest injustice in allowing a party to allege that which may be the consequence of the party's own neglect in order to defeat an adverse verdict, and, further, to prevent fraud and imposition.
8. ____. To grant a motion for a new trial, a court must also find that the injury materially affected a party's substantial rights.
9. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo