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STATE OF NEBRASKA, APPELLEE, V. SHIRLEY L. TINGLE, APPELLANT.

477 N.W.2d 544

Filed November 22, 1991. No. 90-538.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings of fact are clearly erroneous.
2. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed witnesses testifying in regard to such motion.
3. **Police Officers and Sheriffs: Arrests: Jurisdiction.** The power of a police officer at common law to make an arrest without a warrant is limited to the boundaries of the governmental unit by which he was appointed, unless the police officer is acting in fresh and continued pursuit of a suspected felon who has committed an offense in the officer's presence and within his territorial jurisdiction.
4. **Police Officers and Sheriffs: Arrests: Jurisdiction: Statutes.** A local peace officer acting outside the territorial limits of the jurisdiction under which he holds office is without official power to apprehend an offender, unless he is authorized to do so by state statute.
5. **Police Officers and Sheriffs: Arrests: Drunk Driving: Jurisdiction: Statutes.** There is no Nebraska statute authorizing a police officer of a city of the second class to arrest a suspect for misdemeanor driving while under the influence of alcohol outside the officer's geographical jurisdiction.
6. **Statutes.** Interpreting a statute is a question of law.
7. **Appeal and Error.** On questions of law, the Supreme Court has an obligation to reach a conclusion independent of that reached by the trial court.
8. **Statutes: Legislature: Intent.** The obligations of the court in consideration and application of a statute is to determine and give effect to the purpose and intention of the Legislature as ascertained from the entire language thereof considered in its plain, ordinary, and popular sense.
9. **Statutes.** Statutes which effect a change in the common law or take away a common-law right should be strictly construed.
10. _____. In construing a statute, courts will try to avoid a construction which lends itself to an absurd, unjust, or unconscionable result.
11. **Police Officers and Sheriffs: Misdemeanors: Jurisdiction: Case Overruled.** To the extent that *State v. Green*, 236 Neb. 33, 458 N.W.2d 472 (1990), implies that fresh pursuit outside an officer's geographical jurisdiction is applicable to misdemeanor suspects, it is overruled.
12. **Constitutional Law: Search and Seizure: Evidence: Trial.** Evidence obtained as the fruit of an illegal search or seizure, in violation of the fourth amendment to the U.S. Constitution and Neb. Const. art. I, § 7, is inadmissible in a state prosecution and must be excluded.
13. **Criminal Law: Arrests.** Although the illegality of the arrest in question gives rise

to collateral rights and remedies such as the exclusionary rule, it ordinarily is not a defense to the crime for which the arrest is made.

14. **Motions to Dismiss.** The act of a defendant in adducing evidence after the defendant's motion to dismiss is overruled at the close of the State's evidence operates as a waiver of any error in the trial court's overruling of the motion.

Appeal from the District Court for Antelope County, MERRITT C. WARREN, Judge, on appeal thereto from the County Court for Antelope County, STEPHEN P. FINN, Judge. Judgment of District Court reversed, and cause remanded with directions.

Mark A. Johnson for appellant.

Robert M. Spire, Attorney General, and Donald E. Hyde for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Claiming that evidence obtained after she was arrested should have been suppressed, Shirley L. Tingle appeals her conviction for second-offense driving while under the influence of alcohol (DWI). She originally was convicted in the Antelope County Court. Tingle appealed to the district court for Antelope County, which affirmed the defendant's conviction.

We agree with Tingle that in the absence of statutory authority it is not permissible for a police officer in a city of the second class to pursue and arrest a misdemeanant suspect beyond the limits of the officer's geographical jurisdiction.

Since Tingle was arrested outside the arresting officer's geographical jurisdiction, evidence obtained as a result of the defendant's arrest should have been suppressed. We therefore reverse the conviction and remand the cause to the district court, with instructions to remand it to the trial court for a new trial.

The record reflects that on August 31, 1989, at approximately 2 p.m., Officer Arvin Brandt of the Neligh Police Department received a radio dispatch requesting his presence at the Antelope County sheriff's office. Upon reaching that office, Brandt met Thomas Lanz, an insurance adjuster for Farm Bureau Insurance Company, who reported

that Tingle had been in his place of business and appeared intoxicated. Lanz observed that Tingle did not park her car straight in front of his office, that she was unsure of her footing as she walked into his office, that she had trouble opening the door, and that, once inside, Tingle's speech was slurred while she conversed with Lanz. Lanz described Tingle's automobile to Brandt, although the officer already knew the vehicle Tingle drove.

Brandt located the vehicle, parked in downtown Neligh, a city of the second class. The officer parked his cruiser and waited for Tingle to return to her vehicle. When Tingle returned to her vehicle, Brandt observed her as she drove first back to the insurance office momentarily and then west away from Neligh. Brandt followed immediately behind the defendant's vehicle. While within the city limits, Brandt observed Tingle's vehicle weave twice across the white line on the shoulder of the road about half the width of her vehicle and then twice across the centerline, once at least one-fourth the width of her vehicle. Brandt activated his overhead lights in an attempt to stop the defendant. Tingle passed another vehicle, at which time Brandt turned on his siren. Tingle failed to stop until she was 3 miles outside the Neligh city limits. Her speed hit 72 m.p.h. in a 55-m.p.h. zone. It was approximately 2:30 p.m. when Tingle was stopped on the highway.

Upon approaching the defendant's vehicle, Brandt noticed a slight odor of alcohol about Tingle. When asked to produce her driver's license, Tingle fumbled through her billfold and produced a credit card. Then, in the presence of a sheriff's deputy and a matron who had arrived at the scene at Brandt's request, Brandt asked Tingle to step out of the car and perform two field sobriety tests. After she failed these tests, Brandt placed Tingle under arrest for DWI and transported her to the sheriff's office. After signing an implied consent form, Tingle was given a breath test at 3:06 p.m. That showed a result of .188 grams of alcohol per 210 liters of Tingle's breath. Neb. Rev. Stat. § 39-669.07(3) (Reissue 1988) provides in substance that it shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle "[w]hen such person has a concentration of ten-hundredths of one gram or more by

weight of alcohol per two hundred ten liters of his or her breath."

Tingle was charged with DWI, second offense, a Class W misdemeanor under § 39-669.07. Her motion to suppress evidence obtained as a result of her arrest was overruled. Subsequently, a jury found Tingle guilty of driving while under the influence of alcohol, and thereafter, the court found the conviction to be Tingle's second offense. The defendant was sentenced to 30 days in jail and fined $500, and her driver's license was suspended for 1 year. The district court for Antelope County affirmed Tingle's conviction and sentence, and the defendant timely appealed to this court.

In her first assignment of error, Tingle claims that

> the lower court erred by failing to suppress any and all evidence obtained from the defendant, including statements by defendant, breath test results and officers' observations after defendant's arrest, as such arrest was made by an officer of the city of Neligh, Nebraska, outside the officer's jurisdiction to arrest, and as such such evidence was seized as the result of an exploitation of an illegal arrest.

In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings of fact are clearly erroneous. *State v. Gibbs*, 238 Neb. 268, 470 N.W.2d 558 (1991). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed witnesses testifying in regard to such motion. *State v. Walker*, 236 Neb. 155, 459 N.W.2d 527 (1990).

> "[T]he power of a police officer at common law to make an arrest without a warrant is limited to the boundaries of the governmental unit by which he was appointed, unless the police officer is acting in fresh and continued pursuit of a suspected felon who has committed an offense in the officer's presence and within his territorial jurisdiction."

Com. v. O'Hara, 30 Mass. App. 608, 609, 571 N.E.2d 51, 52 (1991), quoting *Commonwealth v. Grise*, 398 Mass. 247, 496 N.E.2d 162 (1986). It is clear that the common-law exception of "fresh pursuit" does not apply to Tingle's case. As stated, DWI under § 39-669.07 is a misdemeanor, whereas common-law fresh pursuit is limited to felonies.

There being no authority under common law to arrest a misdemeanant suspect outside an officer's geographical jurisdiction, the State must rely upon statutory authorization to prove that Tingle's arrest was lawful. See *Perry v. State*, 303 Ark. 100, 102, 794 S.W.2d 141, 142 (1990) ("[a] local peace officer acting without a warrant outside the territorial limits of the jurisdiction under which he holds office is without official power to apprehend an offender, unless he is authorized to do so by state statute"). Other states have allowed extraterritorial misdemeanor arrests under statutes that include (1) allowing the fresh pursuit of a misdemeanant outside a jurisdiction by express statutory language, see, *Inc. County of Los Alamos v. Johnson*, 108 N.M. 633, 776 P.2d 1252 (1989); *State v. Englehardt*, 465 So. 2d 1366 (Fla. App. 1985); *State v. Cochran*, 372 A.2d 193 (Del. 1977); *State, Department of Public Safety, v. Douglas Kaye Nystrom*, 299 Minn. 224, 217 N.W.2d 201 (1974); and *City of Scottsdale v. Kokaska*, 17 Ariz. App. 120, 495 P.2d 1327 (1972), or by language sufficiently broad to encompass misdemeanors, see, *People v. Carraher*, 199 Ill. App. 3d 965, 557 N.E.2d 975 (1990); *Commonwealth v. LeBlanc*, 407 Mass. 70, 551 N.E.2d 906 (1990); *Com. v. Fetsick*, 392 Pa. Super. 264, 572 A.2d 793 (1990); *City of Junction City v. Riley*, 240 Kan. 614, 731 P.2d 310 (1987), *appeal dismissed* 482 U.S. 911, 107 S. Ct. 3179, 96 L. Ed. 2d 669, *cert. denied* 482 U.S. 917, 107 S. Ct. 3191, 96 L. Ed. 2d 679; and *State v. McCarthy*, 123 N.J. Super. 513, 303 A.2d 626 (1973); and (2) allowing police officers to arrest as private citizens when outside their jurisdiction, see, *State v. Littlewind*, 417 N.W.2d 361 (N.D. 1987); *Windschitl v. Commissioner of Public Safety*, 355 N.W.2d 146 (Minn. 1984); and *People v. Bashans*, 80 Mich. App. 702, 265 N.W.2d 170 (1978).

In Nebraska, all of the above possibilities are inapplicable. Nebraska's Uniform Act on Fresh Pursuit applies only to police

officers from another state entering this state. See, Neb. Rev. Stat. §§ 29-416 to 29-421 (Reissue 1989). For intrastate fresh pursuit, resort must be had to the common law, which, as previously stated, only includes felonies. There is no Nebraska statute authorizing a police officer of a city of the second class to arrest a suspect for a misdemeanor DWI outside the officer's geographical jurisdiction. Nebraska's private-citizen statute allows warrantless arrests by a person not an officer only for felonies or petit larceny. Neb. Rev. Stat. § 29-402 (Reissue 1989).

In essence, the State argues that Neb. Rev. Stat. § 17-118 (Cum. Supp. 1990) extends the jurisdiction of police officers for cities of the second class to that of the sheriff in the county in which they operate. Section 17-118 provides:

> The police officers of the city shall have *power* to arrest all offenders against the laws of the state or of the city, by day or by night, in *the same manner* as the sheriff and to keep such offenders in the city prison or other place to prevent their escape until trial can be had before the proper officer.

(Emphasis supplied.) Similar statutes are found for all other classes of Nebraska cities. See, Neb. Rev. Stat. §§ 14-605 (Reissue 1987) (metropolitan class), 15-326 (Cum. Supp. 1990) (primary class), and 16-323 (Cum. Supp. 1990) (first class).

Interpreting a statute is a question of law. *State v. Ewing*, 221 Neb. 462, 378 N.W.2d 158 (1985). On questions of law, the Supreme Court has an obligation to reach a conclusion independent of that reached by the trial court. *State v. Jacobsen*, 238 Neb. 511, 471 N.W.2d 427 (1991); *Billups v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 238 Neb. 39, 469 N.W.2d 120 (1991). The obligation of the court in consideration and application of a statute is to determine and give effect to the purpose and intention of the Legislature as ascertained from the entire language thereof considered in its plain, ordinary, and popular sense. *Adkisson v. City of Columbus*, 214 Neb. 129, 333 N.W.2d 661 (1983). Statutes which effect a change in the common law or take away a common-law right should be strictly construed. *Mason v. Schumacher*, 231 Neb. 929, 439 N.W.2d 61 (1989).

The flaw in the State's reasoning is the distinction between power, duty, and jurisdiction. Loosely translated in their plain, ordinary, and popular sense, these elements correspond to "what the police may do," "what they must do," and "where they may do it." This distinction is clearly laid out in Neb. Rev. Stat. § 81-2006 (Reissue 1987), which refers to the State Patrol and states: "Performance of all duties, powers, and exercise of jurisdiction . . . shall extend to all freeways . . . ." It is only the cities of the metropolitan class that are covered by a statute which specifically extends the jurisdiction of police officers beyond that of the common law. Neb. Rev. Stat. § 14-603 (Reissue 1987) provides that the chief of police's "jurisdiction and that of his or her officers in the service of process in all criminal cases and in cases for the violation of city ordinances shall be coextensive with the county." It is clear that § 17-118 and similar statutes do not provide countywide jurisdiction for police officers. These statutes merely refer to the "power" to make certain arrests. See *State v. LeBlanc*, 149 Vt. 141, 540 A.2d 1037 (1987), where the court refused to interpret a general statute to provide police officers statewide jurisdiction similar to that of sheriffs, absent explicit statutory language. Absent statutory or common-law authority, city police officers may not make warrantless misdemeanor arrests outside their jurisdiction. See, e.g., Neb. Rev. Stat. § 23-1704 (Reissue 1987) (sheriffs do have power to summon assistance).

In support of its proposition that § 17-118 does confer countywide jurisdiction, the State cites *State v. Carpenter*, 181 Neb. 639, 150 N.W.2d 129 (1967), *cert. denied* 392 U.S. 944, 88 S. Ct. 2288, 20 L. Ed. 2d 1406 (1968), which raised the issue of whether police officers had the right to stop a defendant's vehicle outside the city limits. In *Carpenter, supra*, police officers in Blair, Nebraska, had instructions to note any suspicious vehicles in the area because of a rash of local burglaries. Sometime between 3 and 3:30 a.m. two officers noticed a vehicle licensed in another county slowly cruising the streets of Blair. It appeared that the driver attempted to evade the officers when they approached the vehicle. The officers finally stopped the vehicle outside the city limits. When one of the occupants exited the vehicle, his feet struck something that

gave off a metallic sound. The officers looked through the open door and saw pry bars. The defendant complied with a request of the officers that he drive his car to the police station in Blair. It was at the police station that the defendant was arrested and subsequently charged with two separate felonies. Despite the State's contentions, *Carpenter, supra*, is clearly distinguishable from the case at bar. That action did not involve an arrest outside the officers' jurisdiction. This court held that although the defendant was stopped outside the city limits, he was not arrested until he arrived at the Blair police station. Secondly, the arrest was for two felonies, possession of burglary tools and breaking and entering, not for misdemeanors. Finally, specific statutory reliance for the stop was made on Neb. Rev. Stat. § 29-829 (Reissue 1989), which provides in part:

> A peace officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and may demand of him his name, address and an explanation of his actions. When a peace officer has stopped a person for questioning pursuant to this section and reasonably suspects he is in danger of life or limb, he may search such person for a dangerous weapon. If the peace officer finds such a weapon . . . he may . . . arrest such person.

To whatever extent § 29-829 arguably allows for extraterritorial stops, it only allows arrests for possession of dangerous weapons and is thus inapplicable to the facts of this case. The defendant does not claim error with respect to the initial investigative stop.

The State also relies upon *State v. Green*, 236 Neb. 33, 41, 458 N.W.2d 472, 477 (1990), in which this court in dicta remarked that a jury instruction which stated, " 'A city police officer has the authority to stop and arrest a person outside the city limits if a misdemeanor offense was committed in his presence within the city limits,' " correctly stated the law. This case is distinguishable because the defendant in *Green, supra*, conceded the instruction was a correct statement of the law, and no authority was given for its proposition. As previously stated in this action, fresh pursuit in Nebraska is not applicable to misdemeanors. To the extent that *State v. Green, supra*, implies

that fresh pursuit outside the officer's geographical jurisdiction is applicable to misdemeanor suspects, it is overruled.

In *State v. O'Kelly*, 175 Neb. 798, 124 N.W.2d 211 (1963), *cert. denied* 376 U.S. 956, 84 S. Ct. 978, 11 L. Ed. 2d 975 (1964), this court recognized that evidence obtained as the fruit of an illegal search or seizure, in violation of the fourth amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, is inadmissible in a state prosecution and must be excluded. See, also, *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). After concluding that, as a matter of law, Officer Brandt was without statutory or common-law authority to make the questioned arrest, we hold that the arrest was constitutionally illegal and that the trial court was clearly wrong in not suppressing all evidence obtained subsequent to such arrest.

Although the illegality of the arrest in question gives rise to collateral rights and remedies such as the exclusionary rule recognized in *O'Kelly, supra*, it ordinarily is not a defense to the crime for which the arrest is made. See *State v. Knudsen*, 201 Neb. 584, 270 N.W.2d 926 (1978). See, also, *State v. Smith*, 207 Neb. 263, 298 N.W.2d 162 (1980) (illegality of arrest does not deprive State of opportunity to prove guilt through the introduction of untainted evidence). Here, the validity of the arrest is of no consequence so far as the prosecution of the offense is concerned. See, e.g., *State v. Green*, 238 Neb. 328, 342, 470 N.W.2d 736, 748 (1991):

> It is not necessary for a conviction for driving under the influence of alcoholic liquor that a sample of blood, breath, or urine show a certain concentration of alcohol in a defendant's blood, breath, or urine, as those are alternate offenses under § 39-669.07. [Citations omitted.] "Either a law enforcement officer's observations of a defendant's intoxicated behavior or the defendant's poor performance on field sobriety tests constitutes sufficient evidence to sustain a conviction of driving while under the influence of alcoholic beverages. . . ."

For purposes of remand we note that the arrest did not occur until after Tingle failed the field sobriety tests. There is evidence in the record sufficient to support the conclusion that the police

officer did not intend to arrest Tingle until after she failed the sobriety tests. See *State v. Prahin*, 235 Neb. 409, 413, 455 N.W.2d 554, 558 (1990) ("person is seized within the meaning of the fourth amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave").

Based on the foregoing analysis this court concludes that the trial court was clearly wrong in finding that the police officer had authority to arrest the defendant, and in failing to apply the exclusionary rule to evidence received subsequent to Tingle's arrest.

In the defendant's second assignment of error, she claims that "the trial court erred in allowing into evidence results of the breath test upon defendant over objection of counsel as no expert testimony was given to show the correlation between a breath test result at 3:06 p.m. and what the defendant may have had in her breath at the time she was driving 40 minutes earlier." This court need not address the merits of this assignment of error because of the conclusion regarding the first assignment of error that such breath test result is inadmissible.

In her third and final assignment of error, the defendant claims that the trial court erred in failing to grant defendant's motion to dismiss at the end of the State's evidence. The act of a defendant in adducing evidence after the defendant's motion to dismiss is overruled at the close of the State's evidence operates as a waiver of any error in the trial court's overruling of the motion. *State v. Coburn*, 218 Neb. 144, 352 N.W.2d 605 (1984). See, also, *State v. Hellbusch*, 213 Neb. 894, 331 N.W.2d 815 (1983). Since the defendant adduced evidence after her motion was overruled and failed to renew the motion at the end of the defendant's evidence, the assigned error is meritless.

Since there is merit in the defendant's first assignment of error, we reverse, and remand this cause for a new trial not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting.

I dissent from that part of the majority opinion holding that Neb. Rev. Stat. § 17-118 (Cum. Supp. 1990) does not empower police officers employed by cities of the second class to stop and

arrest suspected misdemeanants outside the city limits but within the county.

The jurisdiction of Nebraska police officers employed by cities of the second class to arrest criminal suspects is set out in § 17-118:

> The police officers of the city shall have the power to arrest all offenders against the laws of the state or of the city, by day or by night, *in the same manner as the sheriff* and to keep such offenders in the city prison or other place to prevent their escape, until trial can be had before the proper officer.

(Emphasis supplied.) Pursuant to Neb. Rev. Stat. § 23-1710 (Reissue 1987), it is the duty of the county sheriff "to preserve the peace *in his county*, to ferret out crime, to apprehend and arrest all criminals, and insofar as it is within his power, to secure evidence of all crimes committed *in his county*, and present the same to the county attorney and the grand jury . . . ." (Emphasis supplied.) Neb. Rev. Stat. § 29-404.02(2) (Reissue 1989) provides that a peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed a misdemeanor,

> and the officer has reasonable cause to believe that such person either (a) will not be apprehended unless immediately arrested, (b) may cause injury to himself or herself or others or damage to property unless immediately arrested, (c) may destroy or conceal evidence of the commission of such misdemeanor, or (d) has committed a misdemeanor in the presence of the officer.

Neb. Rev. Stat. § 49-801(15) (Reissue 1988) provides that city police officers are "peace officers."

The majority's position is in conflict with this court's decision in *State v. Carpenter*, 181 Neb. 639, 150 N.W.2d 129 (1967), *cert. denied* 392 U.S. 944, 88 S. Ct. 2288, 20 L. Ed. 2d 1406 (1968), that a city police officer had the authority to stop a suspected burglar "just across and outside the city limits" of Blair, Nebraska, pursuant to § 17-118. Significantly, the *Carpenter* court did not discuss the issue of the officer's geographical jurisdiction to detain a suspected felon in conjunction with "fresh pursuit," but based its decision on the

provisions of § 17-118. See, also, *Henning v. City of Hebron*, 186 Neb. 381, 183 N.W.2d 756 (1971), a workers' compensation case, holding that under § 17-118, a police officer of a city of the second class has the same powers and duties as a sheriff or constable and has the duty to apprehend and arrest felons and disturbers of the peace and to keep and preserve the peace within the whole area of his county.

The argument presented by the defendant in this case was similar to that considered and rejected in *Angel v. State*, 740 S.W.2d 727 (Tex. Crim. App. 1987). In *Angel v. State*, the defendant was arrested outside the city limits of Tomball, Harris County, Texas, by a Tomball city police officer after two officers saw him driving a piece of heavy road-paving equipment in the dark, without lights, on a public road. The officers were on routine patrol along the eastern edge of Tomball and were patrolling outside the city limits, but inside Harris County, when they stopped Angel. They noticed that the tractor Angel was driving appeared to have been "hot-wired," determined that there were two warrants issued against Angel in another county for speeding and failure to appear, and arrested Angel on the outstanding warrants and for investigation of possible theft. Angel was subsequently convicted of stealing the road-paving equipment.

Before trial, Angel moved to suppress all evidence seized as a result of his detention, arguing, in part, that the Tomball police officers acted outside their territorial jurisdiction by arresting him outside the Tomball city limits. The applicable Texas statutes provided that " '[a]ny peace officer is authorized to arrest without warrant any person found committing a violation of any provision of [the Uniform Act Regulating Traffic on Highways],' " and that " '[a] peace officer may arrest an offender without a warrant for *any offense* committed in his presence or within his view.' " (Emphasis in original.) 740 S.W.2d at 731. City police officers were "peace officers" under Texas law. *Id.* The Texas court found that it was against the law to drive road-paving equipment at night without headlights, that the Tomball police officers had probable cause to believe that a traffic offense had occurred within their view, and that the officers were authorized by statute to arrest Angel without a

warrant.

Regarding the issue of geographical jurisdiction, the Texas court observed that "statutes which confer upon a peace officer the authority to act may not necessarily define the geographic scope of that authority," *id.* at 732, and held that the legislative expression of a peace officer's jurisdiction must be found in some other statute or be controlled by common law. In this regard, Tex. Rev. Civ. Stat. Ann. art. 998 provided:

> "The city or town council in any city or town in this State . . . may, by ordinance, provide for the appointment, term of office and qualifications of such police officers as may be deemed necessary. . . . *Such officers shall have like powers, rights, authority and jurisdiction as are by said title vested in city marshals.* Such police officers may serve all process issuing out of a corporation court anywhere in the county in which the city, town or village is situated. . . ."

(Emphasis in original.) 740 S.W.2d at 732 n.13. Tex. Rev. Civ. Stat. Ann. art. 999 provided that " '[i]n the prevention and suppression of crime and arrest of offenders, [the city marshal] shall have, possess and execute like power, authority, and jurisdiction as the sheriff.' " (Emphasis omitted.) 740 S.W.2d at 733 n.13. Finally, Tex. Crim. Proc. Code Ann. art. 2.17 provided that " '[e]ach sheriff shall be a conservator of the peace *in his county* . . . .' " (Emphasis in original.) 740 S.W.2d at 733.

A divided court held that the term "jurisdiction" in the context of articles 998 and 999 referred to the geographic scope of a peace officer's power, rights, and authority, and that those statutes granted city marshals and city police officers countywide jurisdiction to arrest offenders.

We have held that the Legislature is presumed to have intended every statutory provision to have a meaning and that the Supreme Court will give effect, if possible, to every word, clause, and sentence thereof. See *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985). See, also, *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990). The majority's construction of § 17-118 fails to give reasonable effect to the

statute in its entirety and is merely repetitive of § 29-404.02, pursuant to which city police officers are specifically authorized to arrest suspected misdemeanants without a warrant under certain circumstances.

I would hold that the clause "in the same manner as the sheriff" found in § 17-118 gives a city police officer the same countywide jurisdiction as a sheriff to stop and arrest persons within the county and that the trial court did not err in failing to suppress evidence obtained after the defendant was arrested.

HASTINGS, C.J., and GRANT, J., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. DANIEL J. START, APPELLANT.

477 N.W.2d 20

Filed November 22, 1991. No. 90-656.

1. **Pleas: Waiver.** The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional.
2. **Pleas: Waiver: Indictments and Informations: Effectiveness of Counsel: Jurisdiction.** The only exceptions to the rule that the voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge are for the defenses of insufficiency of the indictment, information, or complaint; ineffective assistance of counsel; and lack of jurisdiction.
3. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.
4. **Sentences.** It is within the discretion of the trial court to impose consecutive rather than concurrent sentences for separate crimes.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Scott P. Helvie for appellant.

Don Stenberg, Attorney General, Susan M. Ugai, and J. Kirk Brown for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

This is a criminal appeal case in which the defendant-appellant, Daniel J. Start, was originally charged in a four-count information in the Lancaster County District Court with robbery, in violation of Neb. Rev. Stat. § 28-324(1) (Reissue 1989); operating a motor vehicle to avoid arrest, in violation of Neb. Rev. Stat. § 28-905 (Reissue 1989); assault on an officer in the third degree, in violation of Neb. Rev. Stat. § 28-931 (Reissue 1989); and attempted assault on an officer in the second degree, in violation of Neb. Rev. Stat. §§ 28-201 and 28-930 (Reissue 1989). As part of a plea agreement, the State amended count I of the information to attempted robbery, in violation of §§ 28-201 and 28-324(1), and dismissed count II, operating a motor vehicle to avoid arrest. The State also agreed to dismiss a felony escape charge pending against Start in another case. In return, Start pled guilty to attempted robbery and no contest to both the third degree assault and the attempted second degree assault counts, as well as agreeing to plead guilty to charges of robbery and theft pending against him in Douglas County.

Prior to accepting Start's pleas the court explained Start's legal rights and the consequences of his pleas. Start was specifically instructed that no contest pleas are treated the same as guilty pleas for purposes of sentencing and that the court could order that any sentence imposed be served consecutively. Start was asked whether he understood what the State would have to prove for each charge to gain a conviction, and Start responded that he did. Based on Start's responses to the questions, the court found that Start was acting freely, voluntarily, and intelligently, and accordingly accepted the pleas.

Following a hearing the district court sentenced Start to terms of incarceration under the supervision of the Department of Correctional Services of not less than 4 nor more than 8 years on the attempted robbery count, not less than 20 months nor more than 5 years on the third degree assault count, and not less than 20 months nor more than 5 years on the attempted second degree assault count. The court ordered the sentences to run consecutively to each other and to the sentences imposed in the

Douglas County case. The court also granted Start credit for time served and ordered him to pay the costs of the action.

FACTS

Prior to accepting Start's pleas, the district court judge asked the State to summarize the factual basis for the charges and then asked Start to respond to that recitation. The parties' respective responses to those requests reveal the following:

During the early morning hours of July 24, 1989, Start entered a Kwik Shop in Lincoln, Nebraska, and demanded money from the cashier. Start did not have a weapon, but pretended to have one by sticking his finger under his jacket. When the cashier asked Start if he was kidding, Start may have threatened to "blow a hole" in the cashier unless he turned over the money, though Start denies making such a threat.

The cashier gave Start a small amount of money from the cash register, and Start left the store. The police were notified, and when Officer Brian Hoefer of the Lincoln Police Department saw a van traveling at a high speed in the area, he gave chase. The driver of the van was Start. Start eventually alighted from the van, and Hoefer continued his pursuit on foot, advising Start several times to stop. Hoefer eventually caught Start and, with his gun in his holster, attempted to physically restrain him.

Start resisted Hoefer's attempt to physically restrain him, and a struggle ensued, during which Hoefer heard Start exclaim, "I got your gun," noticed his gun was missing, and heard a gunshot. Start later admitted he fired the weapon, but stated that he fired into the air and did not intend to kill Hoefer. Hoefer then observed Start pointing the gun toward the officer's face. Hoefer grabbed the gun with both hands in an attempt to take it from Start. At this point Hoefer felt and observed Start attempting to pull the trigger. Throughout the struggle Hoefer repeatedly told Start to put the gun down. During this time Start also bit Hoefer twice on the arm. Finally, Hoefer convinced Start to turn over the gun, and Start did so.

As Officer Hoefer attempted to handcuff him, Start began thinking, "[N]ow I'm in trouble," and decided to try to get away again. He struck Hoefer in the face with his fist three

times before Hoefer was able to handcuff him. At that point other officers arrived and assisted in transporting Start to the police station.

ASSIGNMENTS OF ERROR

On appeal to this court, Start argues that the district court erred in (1) imposing consecutive sentences on the two assault charges, in violation of his right to be free from double jeopardy; (2) imposing an excessive sentence on the attempted robbery count, given the nature of the offense; and (3) imposing an excessive sentence by ordering all the sentences to run consecutively, particularly the sentences on the two assault counts.

DOUBLE JEOPARDY

In his first assignment of error, Start argues that the district court violated his constitutional right against double jeopardy by imposing consecutive sentences on the two assault charges despite the fact they arose out of the same transaction. We need not reach that issue, however, because Start waived the double jeopardy defense by pleading no contest to the assault charges in the district court.

The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional. *State v. Biernacki*, 237 Neb. 215, 465 N.W.2d 732 (1991); *State v. Phinney*, 235 Neb. 486, 455 N.W.2d 795 (1990); *State v. Kennedy*, 224 Neb. 164, 396 N.W.2d 722 (1986). The only exceptions are for the defenses of insufficiency of the indictment, information, or complaint; ineffective assistance of counsel; and lack of jurisdiction. *Phinney, supra*; *State v. Maeder*, 229 Neb. 568, 428 N.W.2d 180 (1988).

In *Maeder, supra*, the defendant pled guilty to kidnapping and first degree sexual assault. He was sentenced to 15 to 25 years' imprisonment on each count, the sentences to run consecutively. He appealed, arguing that because the charges arose out of the same transaction, the consecutive sentences subjected him to double jeopardy. This court held that the defendant waived the double jeopardy argument on appeal by voluntarily pleading guilty to the charges below.

Maeder is directly on point with this case. The district court judge carefully explained to Start the consequences of his pleas, including the possibility of consecutive sentences on the two assault charges. Start was represented by counsel at this time. The court found that the pleas were freely and voluntarily made, and Start does not dispute that finding here. Under well-settled rules of this court, Start waived the double jeopardy defense by pleading no contest to the assault charges and is therefore precluded from raising that issue on appeal.

Even if this court were to reach Start's double jeopardy argument, it is without merit. The record clearly indicates that Start committed two separate crimes against Officer Hoefer. He first committed an attempted assault in the second degree by pointing a gun toward Hoefer's face with his finger on the trigger. Later, as the result of a fresh impulse, he committed an assault in the third degree by punching Hoefer in the face three times with his fist. Though the offenses undoubtedly occurred during the same transaction, the imposition of a separate punishment for each offense does not violate principles of double jeopardy established in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), and *Grady v. Corbin*, ____ U.S. ____, 110 S. Ct. 2084, 109 L. Ed.2d 548 (1990).

EXCESSIVENESS OF THE SENTENCES

Start's remaining assignments of error combine to assert that the sentences imposed by the district court are excessive.

Start first argues that a sentence of 4 to 8 years' imprisonment on the attempted robbery count is excessive. Attempted robbery is a Class III felony, punishable by a term of imprisonment of from 1 to 20 years, a $25,000 fine, or both. §§ 28-324(2) and 28-201(4)(b) and Neb. Rev. Stat. § 28-105(1) (Reissue 1985). Start argues that, when separated from the incident involving Officer Hoefer, the holdup was relatively minor in that it involved no weapon and only a small amount of cash. While this may be the case, it is also true that the sentence imposed is at the low end of the statutory range, Start has a lengthy record of felony convictions, and these crimes occurred within a week after Start's release from prison for a prior

offense. A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *State v. Campbell, ante* p. 14, 473 N.W.2d 420 (1991). We find no abuse of discretion in the sentence imposed on the attempted robbery count.

Start also argues that the district court abused its discretion by ordering that the sentences imposed run consecutively rather than concurrently. It is within the discretion of the trial court to impose consecutive rather than concurrent sentences for separate crimes. *State v. Zaritz*, 235 Neb. 599, 456 N.W.2d 479 (1990), citing *State v. Sanders*, 235 Neb. 183, 455 N.W.2d 108 (1990). The charges involving Start's assaults on Officer Hoefer are very serious. The district court tempered its sentences to take into account the sentences imposed in Douglas County. Any further reduction would depreciate the seriousness of the crimes involved. Therefore, Start's remaining assignments of error are without merit.

AFFIRMED.

FAHRNBRUCH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. DONALD MELTON, APPELLANT.

477 N.W.2d 154

Filed November 22, 1991. No. 90-699.

1. **Criminal Law: Verdicts: Appeal and Error.** The Supreme Court will not set aside a guilty verdict in a criminal case when such verdict is supported by relevant evidence. Only when evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
2. **Appeal and Error.** To be considered by the Supreme Court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred.
3. **Police Officers and Sheriffs: Assault.** A person commits the offense of assault on an officer in the third degree if he or she intentionally, knowingly, or recklessly causes bodily injury to a peace officer while such officer is engaged in the performance of his or her official duties.
4. **Police Officers and Sheriffs: Words and Phrases.** A deputy sheriff is a peace officer.

5. **Words and Phrases.** Physical pain is a bodily injury.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Affirmed.

Richard A. Koehler for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Unconvinced that the evidence supports the jury's finding that he is guilty of violating Neb. Rev. Stat. § 28-931(1) (Reissue 1989), assault on a peace officer in the third degree, Donald Melton appeals that conviction. For that felony, the defendant was sentenced to 18 months' imprisonment, the sentence to run consecutively to the sentences imposed upon Melton on other charges. We affirm the defendant's conviction on the assault charge.

The jury also convicted Melton of a second charge: damaging property owned by Fillmore County. The defendant has not appealed that conviction or the penalty imposed on that charge. We need, therefore, to discuss only Melton's conviction of assault upon a peace officer, third degree.

The Supreme Court will not set aside a guilty verdict in a criminal case when such verdict is supported by relevant evidence. Only when evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Martin*, *ante* p. 339, 476 N.W.2d 536 (1991).

About 6:30 p.m., January 6, 1990, a police officer and a deputy sheriff, while investigating a stolen truck report, observed Melton underneath a truck located in close proximity to a tire store in Geneva, Nebraska. The vehicle under which Melton was seen matched the description of the recently reported stolen truck. As the officers approached Melton, he began walking away from them. At that time, the defendant told Geneva police officer James Gewacke that he was going

home. Upon the officers' request, Melton accompanied Gewacke to the sheriff's office. Melton was not placed under arrest. The two law enforcement officers testified they merely wanted to talk to the defendant about the stolen truck.

Inside the sheriff's office, Melton began to take off his jacket. As he was doing this, Deputy Sheriff William Hogue, who had gone to the sheriff's office and was standing behind the defendant, observed that Melton was wearing a type of kitchen paring knife on his belt. Hogue reached forward and asked the defendant for the knife. Melton spun around. With an open hand, the defendant slapped Deputy Hogue on the right side of his face. The force of the blow knocked the eyeglasses Hogue was wearing 10 to 12 feet across the room. The defendant then slapped Hogue a second time, again on the right side of the deputy's face. When Melton attempted to strike Hogue a third time, the defendant caught a portable radio microphone attached to Hogue's jacket lapel. Hogue testified that following the first blow he felt pain and numbness in his right cheek.

Following presentation of the State's case in chief, the defendant moved for a directed verdict, claiming that (1) no evidence had been presented showing that Deputy Hogue had been acting in his official capacity when he was struck and that (2) there was no evidence that Deputy Hogue sustained bodily injury. When the motion was overruled, the defendant rested. After the jury was instructed, the case was submitted to it. The jury returned a verdict finding Melton guilty of assault on a peace officer, third degree.

On appeal, Melton does not assign as error or discuss whether Deputy Hogue was acting in his official capacity as a peace officer when he was struck by the defendant. To be considered by the Supreme Court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred. *State v. Keithley*, 238 Neb. 966, 473 N.W.2d 129 (1991). In this court, the defendant claims only that the trial court erred in submitting the assault on a peace officer in the third degree charge to the jury. Melton argues that there was insufficient evidence that Deputy Hogue suffered bodily injury as a result of the defendant's conduct and that thus the evidence

was insufficient to convict him.

Section 28-931 provides in part: "(1) A person commits the offense of assault on an officer in the third degree if he or she intentionally, knowingly, or recklessly causes bodily injury to a peace officer . . . while such officer . . . is engaged in the performance of his or her official duties." A deputy sheriff is a peace officer. See Neb. Rev. Stat. § 23-1704 (Reissue 1987). Physical pain is a bodily injury as defined by Neb. Rev. Stat. § 28-109(4) (Reissue 1989). Hogue testified he suffered physical pain as a result of Melton's slapping the deputy's right cheek. The blow was so forceful that it knocked the glasses Hogue was wearing across the room. From Deputy Hogue's testimony, the jury could find beyond a reasonable doubt that Melton caused bodily injury to the deputy. Melton's assignment of error is without merit.

AFFIRMED.

SCOTT D. HICKENBOTTOM, APPELLEE, V. JUDY L. HICKENBOTTOM, APPELLANT.

477 N.W.2d 8

Filed November 22, 1991. No. 90-1132.

1. **Actions: Stipulations.** Parties to litigation are bound by stipulations voluntarily made and are granted relief therefrom only under exceptional circumstances.
2. **Divorce: Minors: Stipulations.** Parties in a proceeding to dissolve a marriage cannot control the disposition of minor children by agreement.
3. **Parent and Child: Divorce: Words and Phrases.** A stepfather is the husband of a child's mother by virtue of a marriage subsequent to that of which the child is the offspring; a husband who divorces the mother of such a child is no longer the child's stepfather.
4. **Divorce: Courts: Jurisdiction: Minors.** The only statutory authority conferred on district courts to deal with children in dissolution actions is that contained in Neb. Rev. Stat. § 42-364 (Reissue 1988).
5. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning.
6. _____. When the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.
7. **Visitation: Appeal and Error.** In a dissolution of marriage action,

determinations concerning visitation with a minor are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's discretion, keeping in mind, however, that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other.

8. **Divorce: Courts: Jurisdiction: Parent and Child: Visitation.** Neb. Rev. Stat. § 42-364 (Reissue 1988) confers jurisdiction upon the district court in the course of dissolution proceedings to grant visitation rights to an ex-stepparent who stood in loco parentis to the former stepchild.
9. **Divorce: Courts: Stipulations: Visitation.** In dissolution proceedings the district court always has the power, based on the best interests of the child, to either approve or disapprove stipulations or agreements for visitation.
10. _____: _____: _____: _____. In dissolution proceedings the district court has a responsibility to make its own determination concerning matters of visitation, which responsibility cannot be forestalled by any agreements or stipulations of the parties.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Rita L. Melgares, of Qualley & Associates, for appellant.

Phillip G. Wright, of Quinn & Wright, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

In this dissolution of marriage action, the district court incorporated in its decree the stipulation of the parties that the petitioner-appellee husband, Scott D. Hickenbottom, have reasonable visitation with his former stepdaughter, a child born to the respondent-appellant wife, Judy L. Hickenbottom, on February 3, 1980, during an earlier marriage. The wife assigns the incorporation as error, asserting that she had rescinded the stipulation. We affirm.

The parties, who were married on May 18, 1984, produced two sons, one born on October 26, 1984, and the other on November 4, 1986. During the course of these proceedings, the parties executed a stipulation which made no provision for the younger boy, but gave the wife care, custody, and control of the older boy notwithstanding the fact he had been living with the husband. The stipulation also granted the husband reasonable visitation with the wife's daughter. At trial, the wife testified she

had been coerced into signing the stipulation because the husband told her he would allow the older boy to live with her if she agreed that he, the husband, could have visitation with her daughter.

The record establishes that the husband had lived with his former stepdaughter since she was approximately 2 years old. According to him, the girl's biological father had no contact with her and had paid nothing toward her maintenance. The husband testified that he, on the other hand, enjoyed a father-daughter relationship with her ever since she has been old enough to talk, saying that the girl "has been my daughter . . . ."

The husband also testified that he participated in raising his former stepdaughter in many ways. He disciplined her when she needed it, helped take care of her, cooked her meals, put her to bed, and attended her school plays and parent-teacher conferences. According to the husband, "[t]here was never reference to her as stepdaughter and she never referred to [him] as stepfather"; she calls him "daddy" and is known by his surname.

The husband further testified that he and his former stepdaughter have a mutual loving relationship and that they are quite attached to each other. The girl has been included in the husband's prior visitations with the parties' two boys in activities wherein the four have participated together as a family.

The wife admitted that the three children had "done activities together" and that her daughter likes the husband, but would not go so far as to say the daughter was fond of him.

When asked why she objected to the husband having visitation with the girl, she replied:

> First of all, it's not his child. It's just been me and [the daughter], we have our own life, he has his own life. I just want to get on with it. I don't want him coming and going when he pleases, you know. She was already abandoned, left —— I wouldn't say abandoned, but left by one father. I don't need it by a second father. I won't tolerate it from him. And his harassment, I won't tolerate it.

She also said she objected to the husband's "womanizing around," but this complaint is not elaborated upon.

The evidence persuaded the district court judge that it would be in the girl's best interests to visit with the husband. In so concluding, he noted that the only reasons advanced by the wife for a contrary result had nothing to do with the child's best interests but, rather, relied on the husband's lack of a blood relationship with the child and the wife's desire to get on with her own life without the husband.

We begin by observing that the wife is confused as to her right to rescind the stipulation she executed. As we recently reaffirmed, the parties to litigation are bound by stipulations voluntarily made and are granted relief therefrom only under exceptional circumstances. *White v. Mertens*, 225 Neb. 241, 404 N.W.2d 410 (1987). See, also, *State v. Wells*, 197 Neb. 584, 249 N.W.2d 904 (1977); *Martin v. Martin*, 188 Neb. 393, 197 N.W.2d 388 (1972). There is nothing in this record which demonstrates either the existence of the type of exceptional circumstances which would justify granting relief from the stipulation or that she entered into it other than voluntarily. It is obvious that she at one time during the course of the litigation made the judgment that in order not to have to litigate the issue of custody of the parties' older son, she would agree to give the husband the right to visit her daughter. Such a quid pro quo does not constitute coercion. The fact is that the wife simply changed her mind; a change of mind is not such an exceptional circumstance as to justify relief from a stipulation.

However, the wife's confusion in this regard is unimportant because, as she correctly argues, the parties in a proceeding to dissolve a marriage cannot control the disposition of minor children by agreement. *Hicks v. Hicks*, 223 Neb. 189, 388 N.W.2d 510 (1986); *Eliker v. Eliker*, 206 Neb. 764, 295 N.W.2d 268 (1980); *Koser v. Koser*, 148 Neb. 277, 27 N.W.2d 162 (1947). More is said later in this opinion about the factors to be considered when determining visitation issues.

A stepfather is the husband of a child's mother by virtue of a marriage subsequent to that of which the child is the offspring; thus, a husband who divorces the mother of such a child is no longer the child's stepfather. *Kogon v. Ulerick*, 12 Va. App. 595, 405 S.E.2d 441 (1991). Therefore, the threshold question in this case is whether the district court had jurisdiction to grant

the husband, as the ex-stepparent, the right to visit his former stepdaughter. Of the handful of jurisdictions which have examined this issue, most have concluded, on a variety of theories, that under appropriate circumstances, an ex-stepparent is entitled to visitation with a former stepchild.

Pennsylvania was apparently the first jurisdiction to examine the matter. In *Spells v. Spells*, 250 Pa. Super. 168, 378 A.2d 879 (1977), the Pennsylvania Superior Court held that an ex-stepfather could not be denied the right to visit his former stepchildren just because he lacked any blood relationship to them. In so holding, the court stated at 378 A.2d at 881:

> Clearly, a stepfather and his young stepchildren who live in a family environment may develop deep and lasting mutual bonds of affection. Courts must acknowledge the fact that a stepfather (or stepmother) may be the only parent that the child has truly known and loved during its minority. A stepparent may be as devoted and concerned about the welfare of a stepchild as a natural parent would be. Rejection of visitation privileges cannot be grounded in the mere status as a stepparent.

The *Spells* court discussed the status of one who may " 'put himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption. . . .' " *Id.* According to the court at 378 A.2d at 882:

> A stepfather who lives with his spouse and her natural children may assume the status "in loco parentis". We may expect that a bond will develop between stepparent and stepchild; we, therefore, should protect that relationship by conferring rights of visitation. The departure of a stepfather from the home would no more destroy the love and affection between stepparent and child than it would in the case of a natural child.

In remanding the cause for a determination of the ex-stepfather's relationship with his former stepchildren, the *Spells* court indicated that a relevant factor in the determination would be whether the ex-stepfather had stood in loco parentis to his stepchildren. See, also, *Simpson v. Simpson*, 586 S.W.2d 33 (Ky. 1979) (adopting the in loco

parentis approach in holding that visitation with a surrogate parent may be in the child's best interests).

Utah used the same approach in *Gribble v. Gribble*, 583 P.2d 64 (Utah 1978). Therein, the ex-stepfather had treated the child in question as his own during the time the two lived together over about a 4-year period. After the divorce, at which time the child was 4 years old, the natural mother objected to any visitation by the ex-stepfather. The relevant Utah statute provided for visitation rights in " 'parents, grandparents and other relatives . . . .' " (Emphasis omitted.) *Id.* at 66. The *Gribble* court stated that while the preexisting stepparent relationship, in and of itself, did not confer any rights or obligations, the assumption of an in loco parentis status put the ex-stepfather in a different position, conferring upon him the same rights as a natural parent. Under this analysis, a former stepparent was within the terms of the statute. The opinion noted that divorce does not terminate the in loco parentis status, observing that "only the surrogate parent or the child is able to terminate the status at will, and the rights, duties, and obligations continue as long as they choose to continue the relationship." *Id.* at 67. The opinion also declared that "a stepfather standing in the status of loco parentis is given the opportunity to seek visitation rights as a right afforded a natural parent, that he should not be permitted to escape the duties and obligations of the loco parentis status as long as that relationship remains intact." *Id.* at 68. With that in mind, the *Gribble* court remanded the cause with directions to make a determination as to whether the right to visitation should be conditioned on a requirement that the ex-stepfather accept the obligation to assist in the financial support of the child.

In *Bryan v. Bryan*, 132 Ariz. 353, 645 P.2d 1267 (Ariz. App. 1982), the natural mother claimed that in a dissolution proceeding the court has "jurisdiction to determine custody only if both parties to the proceeding are parents of the child." *Id.* at 355, 645 P.2d at 1269. Arizona custody proceedings were controlled by a statute providing that " '[a] child custody proceeding is commenced in the superior court: 1. By a parent, by filing a petition: (a) For dissolution or legal separation; or (b) For custody of the child . . . .' " *Id.* Contrary to the mother's

contention that the statute was ambiguous and did not intend that child custody issues be determined in a dissolution proceeding unless both parties were parents of the child, the *Bryan* court concluded that, read literally, the statute meant that when the mother filed a petition for dissolution, she also commenced a child custody proceeding. The court defined the issue as being "whether a stepparent who stands *in loco parentis* to a stepchild may be granted visitation rights when the marriage of the stepparent and the child's natural parent is dissolved." *Id.* at 354, 645 P.2d at 1268. The two earlier statutes had granted jurisdiction to determine custody over the " 'minor children of the parties' " and the " 'children of the marriage,' " respectively. *Id.* at 355, 645 P.2d at 1269. The *Bryan* court reasoned that while this earlier language limited the jurisdiction of the court in custody determinations, the absence of such "limiting language" in the present statute rendered the mother's argument meritless. *Id.* at 356, 645 P.2d at 1270. The *Bryan* court recognized that its ruling departed from the declaration in 27B C.J.S. *Divorce* § 303 at 426 (1959) that "[i]n a divorce suit, the court does not have the power to provide for the care and custody of stepchildren, since there is no common obligation on the parties to the divorce suit for their support." The court concluded that this older rule arose "from an outmoded view that custody and visitation rights are primarily a benefit to the parent, to be enjoyed in compensation for the duty to support." 132 Ariz. at 356, 645 P.2d at 1270. The court went on to explain, however, that Arizona "has long recognized that in matters of child custody it is the welfare of the child, not the gratification of the parent, that is paramount . . . ." *Id.* The *Bryan* court also declared that "[t]he state has a legitimate interest in the welfare of any child whose home is being divided by its laws, and that interest is equally strong regardless of whether the marriage being dissolved is that of both, or only one, of the child's parents." *Id.* See, also, *Rhinehart v. Nowlin*, 111 N.M. 319, 323, 805 P.2d 88, 92 (N.M. App. 1990) (holding that the trial courts are given "exclusive jurisdiction of *all matters* relating to the guardianship, care, custody, maintenance and education of the children," which includes "the granting of visitation rights to a person or persons who the

trial court determines are significant and important to the welfare of the children" (emphasis in original)). But cf. *Olvera v. Superior Court,* 168 Ariz. 556, 815 P.2d 925 (Ariz. App. 1991) (holding court did not have jurisdiction to award custody, either permanent or temporary, to an ex-stepparent, since statute provided that petition for dissolution need only allege names of children "common to the parties," and thus reasonable to conclude jurisdiction in domestic relations cases limited to such children).

In *Carter v. Brodrick*, 644 P.2d 850 (Alaska 1982), an ex-stepfather appealed from a lower court's decision refusing him visitation with his former stepson. The relevant statute permitted a divorce court to make determinations regarding custody and visitation as to " 'any *child of the marriage.*' " *Id.* at 852. The Alaska Supreme Court reversed, and remanded the cause for a determination as to whether the ex-stepfather had stood in loco parentis to the former stepchild. In doing so, the *Carter* court went further than did the *Bryan* court. As noted earlier, the *Bryan* court specifically stated that Arizona's prior statutory language granting jurisdiction over "any child of the marriage" limited custody jurisdiction of the divorce court to children born to, or adopted by, the parties to the proceeding. In contrast, the *Carter* court held that "where a stepparent has assumed the status of in loco parentis, a stepchild is a 'child of the marriage' . . . ." *Id.* at 855. But see, *Perry v. Superior Court of Kern Cty.*, 108 Cal. App. 3d 480, 485, 166 Cal. Rptr. 583, 586 (1980) (holding statute granting jurisdiction over " 'minor children of the marriage' " conferred no jurisdiction to award visitation if the child not " 'of the marriage' "; concurring opinion suggests if ex-stepfather had alleged he had stood in loco parentis, jurisdiction may have existed); *Kogon v. Ulerick*, 12 Va. App. 595, 405 S.E.2d 441 (1991) (holding statute conferring authority to grant visitation to stepparent did not extend to ex-stepparent).

Oklahoma examined the issue of a former stepparent's right to visitation in *Looper v. McManus*, 581 P.2d 487 (Okla. App. 1978). Oklahoma did not adopt the in loco parentis approach but, rather, relied on determining what best serves the interests of the child. In granting an ex-stepmother visitation rights with

a former stepchild for whom she had provided care over a period of approximately 3 or 4 years, the court wrote at 488-89:

> Visitation is not solely for the benefit of the adult visitor but is aimed at fulfilling what many conceive to be a vital, or at least a wholesome contribution to the child's emotional well-being by permitting partial continuation of an earlier established close relationship.
>
> Usually such an affiliation is with a natural parent. But it need not be. Those involved with domestic relations problems frequently see situations where one who is not a natural parent is thrust into a parent-figure role, and through superior and faithful performance produces a warm and deeply emotional attachment.

See, also, *Honaker v. Burnside*, 388 S.E.2d 322, 326 (W. Va. 1989) (holding that best interests of child required that she have visitation with her former stepfather and half brother in order to "ensure that she is not stripped of the right to continue a close relationship with the people she considers her family"); *Temple v. Meyer*, 208 Conn. 404, 544 A.2d 629 (1988) (denying visitation rights to ex-stepfather, but holding that only relevant criterion under the third-party visitation statute is best interests of the child).

In *Shoemaker v. Shoemaker*, 563 So. 2d 1032, 1034 (Ala. Civ. App. 1990), the court held that "[t]here is no prohibition against a former stepparent seeking, and being awarded in appropriate circumstances, visitation privileges with their former stepchild if the best interests of a child are involved and brought to the attention of a trial court." The court did question whether visitation by an ex-stepparent would be in the best interests of the child if the visitation was against the wishes of the natural parent. It stated that its "review of the case law on the subject of 'former stepparent visitation privileges' reveal[ed] that *only* after the best interests and welfare are raised *and* shown to be advanced by such visitation, would a trial court then have the *discretion* to award such privileges." (Emphasis in original.) *Id.* "Such an award would not arise from the relationship or a legal privilege (as granted by statute to grandparents, § 30-3-3) but from the inherent power of the court to act to promote the best interests of a child." 563 So. 2d

at 1034.

In *Collins v. Gilbreath*, 403 N.E.2d 921 (Ind. App. 1980), the court also followed a best interests analysis, although it also hints at the importance of a special in loco parentis relationship. The trial court had awarded visitation rights to a former stepfather despite the lack of a specific request by either of the parties. The natural father of the three children contended that the visitation order was contrary to law, asserting that visitation with an unrelated third party in the form of a former stepfather was not authorized by Indiana law. In upholding the lower court's grant of visitation, the *Collins* court reviewed the law of other jurisdictions and discerned a common thread running through the cases: Where the custodial parent objects to visitation by a third party, the courts generally deny visitation rights. This was especially true "where the relationship between the parties is so strained as to affect the well-being of the child." *Id.* at 923. The court went on to state, however, that while it found the case law instructive, it was not determinative of the issue before it.

> When the judicial system becomes involved in family matters concerning relationships between parent and child, simplistic analysis and the strict application of absolute legal principles should be avoided. The mere protest of a parent who asserts that visitation by another person would somehow harm his or her child should not be enough to deny visitation in all cases. . . . This is especially true where the third party has cared for a child as his or her own.

Id. In reaching its decision the *Collins* court emphasized that the trial court had specifically noted that the ex-stepfather had cared for and loved the children as a father for 2½ years. In addition, the court recognized that

> [t]o abruptly end this close relationship and deny him the privilege of ever seeing the girls again would be unfair and traumatic to both [the former stepfather] and the three young girls. The children would in essence lose their second parent in ten days—one by suicide and one by court decree.

Id. The *Collins* court made clear its decision was not intended to

open the door such as to allow the "granting of visitation rights to a myriad of unrelated third persons, including grandparents, who happen to feel affection for a child." *Id.* at 923-24. Rather, the court specifically limited its holding to similar factual situations wherein the party pursuing visitation had acted in a parental and custodial capacity. Compare *Evans v. Evans*, 302 Md. 334, 343, 488 A.2d 157, 162 (1985) (holding that "[w]hile an *in loco parentis* status may affect the court's determination as to the best interests of the child," such a relationship did not have to exist under Maryland law before a stepparent could be granted visitation rights).

With that background, we turn our attention to our own statutes. Neb. Rev. Stat. § 42-311 (1943) formerly granted the district courts jurisdiction to determine custody as to the "minor children of the parties." Today, the only statutory authority conferred on district courts to deal with children in dissolution actions is that contained in Neb. Rev. Stat. § 42-364 (Reissue 1988). *Meyers v. Meyers*, 222 Neb. 370, 383 N.W.2d 784 (1986). That statute, the constitutionality of which is not in question, provides, in relevant part:

> When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, including placing the minor children in the custody of . . . third parties . . . . Custody and visitation of minor children shall be determined on the basis of their best interests.

§ 42-364.

Farmer v. Farmer, 200 Neb. 308, 263 N.W.2d 664 (1978), an action to modify a dissolution decree, is instructive on the question before us. One of the issues was whether the district court had jurisdiction to determine if the husband was the natural father of a child born prior to the marriage. In concluding that such jurisdiction existed, this court looked to § 42-364, as well as to the language of Neb. Rev. Stat. § 42-351 (Reissue 1988), which provides for the jurisdiction of the district court in divorce cases:

> (1) In proceedings under sections 42-347 to 42-379, the court shall have jurisdiction to inquire into such matters,

> make such investigations, and render such judgments and make such orders, both temporary and final, as are appropriate concerning the status of the marriage, the custody and support of minor children . . . .

§ 42-351. We also cited Neb. Rev. Stat. § 42-377 (Reissue 1988), which deals with the legitimacy of children, and held that "[t]he above-quoted statutes give the District Court complete jurisdiction over the custody, support, and welfare of all minor children who are touched upon by the divorce proceedings and all related issues." 200 Neb. at 310, 263 N.W.2d at 666. See, also, *State ex rel. Storz v. Storz*, 235 Neb. 368, 455 N.W.2d 182 (1990) (holding that full and complete general jurisdiction over the entire marital relationship and in all related matters, including child custody and support, is vested in district court in which petition for dissolution is properly filed).

In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning. When the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *State v. Matthews*, 237 Neb. 300, 465 N.W.2d 763 (1991); *State v. Rios*, 237 Neb. 232, 465 N.W.2d 611 (1991). Section 42-364 specifically confers upon the district court jurisdiction to award custody to third parties pursuant to a decree of dissolution. As observed in *Carter v. Brodrick*, 644 P.2d 850 (Alaska 1982), it would be inconsistent to rule that the court has jurisdiction to grant custody to the stepparent but lacks jurisdiction to grant visitation.

We therefore conclude the district court had jurisdiction to award the husband rights of visitation with his former stepdaughter. The remaining question is whether it was appropriate for the district court to so order under the circumstances of this case.

We begin this aspect of our review by recalling that in a dissolution of marriage action, determinations as to custody of and visitation with minor children are matters initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's discretion, keeping in mind, however, that the trial judge

observed and heard the witnesses and accepted one version of the facts rather than the other. *Wyman v. Wyman*, 235 Neb. 287, 454 N.W.2d 692 (1990); *LeDoux v. LeDoux*, 234 Neb. 479, 452 N.W.2d 1 (1990); *Rice v. Rice*, 231 Neb. 428, 436 N.W.2d 518 (1989).

It is also appropriate to recall that the best interests of the child are the primary and paramount considerations in determining visitation rights. *Manewal v. Manewal*, 220 Neb. 867, 374 N.W.2d 39 (1985); § 42-364. This rule, long established in case law and now codified, imposes upon the court the responsibility to make its own determination concerning matters of visitation, which responsibility cannot be forestalled by any agreements or stipulations of the parties. *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991); *Lautenschlager v. Lautenschlager*, 201 Neb. 741, 272 N.W.2d 40 (1978). Thus, the trial court always has the power, based on the best interests of the child, to either approve or disapprove stipulations or agreements for visitation. *Lautenschlager v. Lautenschlager, supra.*

Section 42-364(1) provides, in relevant part, that the factors involved in considering the best interests of the children include, but are not limited to, "(a) [t]he relationship of the children to each parent prior to the commencement of the action or any subsequent hearing [and] (c) [t]he general health, welfare, and social behavior of the children."

In *Gerber v. Gerber*, 225 Neb. 611, 619, 407 N.W.2d 497, 503 (1987), we stated that a court is to determine

> the nature and extent of visitation rights on a case-by-case basis and may consider many factors and circumstances in each individual case, such as age and health of the child; character of the noncustodial parent; the place where visitation rights will be exercised; frequency and duration of visits; the emotional relationship between the visiting parent and the child; the likely effect of visitation on the child; availability of the child for visitation; likelihood of disrupting an established lifestyle otherwise beneficial to the child; and, when appropriate, the wishes of the child.

In situations similar to those presented by the case before us, some courts have held that the determination of what is in the

best interests of the child involves looking to whether the former stepparent stood in loco parentis with the child. See, e.g., *Simpson v. Simpson*, 586 S.W.2d 33 (Ky. 1979); *Spells v. Spells*, 250 Pa. Super. 168, 378 A.2d 879 (1977). See, also, *Shoemaker v. Shoemaker*, 563 So. 2d 1032 (Ala. Civ. App. 1990); *Temple v. Meyer*, 208 Conn. 404, 544 A.2d 629 (1988). Although the in loco parentis status is not specifically enumerated as a requirement in § 42-364, it is certainly a relevant inquiry in considering the relationship of the children to each parent. Requiring the existence of such a status as a condition to permitting visitation between a former stepparent and a child will help ensure that the door to visitation rights is not open to one merely because he or she has the legal title of stepparent. Thus, we hold that an ex-stepparent pursuing visitation with a former stepchild must establish that during the marriage, he or she acted as a parent to the child.

In *Austin v. Austin*, 147 Neb. 109, 112-13, 22 N.W.2d 560, 563 (1946), we adopted the following:

> "A person standing in loco parentis to a child is one who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. The assumption of the relation is a question of intention, which may be shown by the acts and declarations of the person alleged to stand in that relation." 46 C. J., Parent and Child, § 174, p. 1334.

The record shows that the husband had established an in loco parentis status with the former stepdaughter. He lived with her for almost 8 years. They referred to each other as father and daughter; there was a close and loving relationship between them; he was involved in her day-to-day care, including any necessary discipline; and he took an active interest in her education and other school activities.

The only reason the wife gives for objecting to the husband's visitation is that the stepdaughter is "not his child. It's just been me and [the daughter], we have our own life, he has his own life." The fallacy in this position, however, is that once the wife

married the husband, it was no longer just she and the girl; it has been she, the girl, the husband, and the two boys they produced.

The record convinces us, as it did the district court, that the wife is more interested in punishing the husband by denying him access to her daughter than she is in doing what serves the girl's best interests. The girl is not a piece of property; she is a living, breathing, and, as is any child, fragile person who is seemingly already distraught by the destruction of what she has known as her family. There is no need to further damage her by removing the emotional support of one who has cared for her during the marriage.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

FAHRNBRUCH, J., concurring in part, and in part dissenting.

Preliminarily, I agree with the majority's analysis that visitation with a stepchild may be granted to a stepparent who established the status of in loco parentis with the child while married to the child's natural parent.

Additional consideration of the in loco parentis doctrine requires that this cause be remanded to the trial court for further proceedings.

The term "in loco parentis" means in place of a parent, and a "person in loco parentis" is one who has assumed the status *and obligations* of a parent without formal adoption. *Gribble v. Gribble*, 583 P.2d 64 (Utah 1978). The common law concerning termination of loco parentis status is that only the surrogate parent or the child is able to terminate the status at will, and rights, duties, and obligations continue as long as they choose to continue the relationship. *Id.* Since the child in this case is of a tender age, she can only exercise her right to terminate a loco parentis status through a guardian ad litem. No separate guardian ad litem was appointed for her. Because the child's mother bartered the child's visitation with the child's stepfather to obtain the custody of the parties' elder son, her interests and her daughter's interests were in conflict. Likewise, since the stepfather was using both his son and his stepdaughter as

bargaining chips, the stepdaughter's and stepfather's interests were not the same.

As noted by the majority, the wife in this case allowed the stepfather visitation privileges with her natural daughter in return for her husband's giving her custody of the elder son of the parties. Under that type of bartering system, who represented the best interests of the daughter? The trial court did appoint a lawyer as an attorney and guardian ad litem "for the minor children of these parties." It is unclear from the record whether the lawyer was appointed as an attorney and guardian ad litem for only the parties' two sons or for the appellee's stepdaughter as well. Regardless of any guardian ad litem appointment, the parties should not have been permitted to barter either the rights of the elder son of the parties or those of his half sister.

The result of the bartering was reduced to a stipulation which was signed not only by the parties, but also by the guardian ad litem appointed by the court. Each party testimonially admitted their son's custody was granted to the mother conditioned upon the appellee's obtaining visitation rights with his stepdaughter. The trial judge was of the opinion that he could not legally order visitation of the stepdaughter with the appellee. He stated, "I can do something else that effectively provides the same thing, which I'm going to do, and I'm going to adopt the stipulation that they entered into and order that both parties comply with it." The trial judge then pointed out that if Mrs. Hickenbottom chose not to grant Mr. Hickenbottom visitation with her daughter, Mrs. Hickenbottom could be held in contempt of court.

The bartering of custody and visitation rights shown in this record involves the lives and emotions of young children and is nothing short of outrageous. It should be discouraged by this court in the strongest of terms. As we have declared previously, "[c]hildren have the right to be treated as interested and affected persons and not as pawns or chattel of either or both parents." *Hibbard v. Hibbard*, 230 Neb. 364, 366, 431 N.W.2d 637, 639 (1988). The mother's natural daughter and that child's half brother were merely pawns and chattel in this case.

Based upon the record, it is apparent that neither the lawyer

appointed as attorney and guardian ad litem for the parties' children nor the trial court considered the lawyer to be representing Mrs. Hickenbottom's natural daughter. First, no issue was raised by the guardian ad litem as to the liability of Mr. Hickenbottom for support for his minor stepdaughter. Had he done so, the guardian ad litem might well have had a conflict of interest concerning the parties' two sons and the appellee's stepdaughter. Secondly, the court stated, "I am not making any determination that there was any legal right on the [appellee] to have visitation [with his stepdaughter] other than he and his wife entered into an agreement and that agreement showed that that visitation would be in the best interests of the stepdaughter." There is no requirement in the dissolution decree for the appellee to provide child support or other support, such as medical insurance benefits, to his wife's natural daughter.

In the record, there is no indication that the about to be ex-stepfather is willing to continue completely his in loco parentis status. The appellee wants visitation privileges with his stepdaughter, but apparently wants to terminate any of the obligations attendant with an in loco parentis status. By dissolution of her mother and stepfather's marriage, appellee's stepdaughter is deprived of her stepfather's obligation to support her. See Neb. Rev. Stat. §§ 28-705 and 28-706 (Reissue 1989). The appellee has made no provision for his stepdaughter's support, nor did the trial court make any support provision from her stepfather for her. This may be an indication that the stepfather intended to terminate his loco parentis status. Obviously, by their bartering the visitation of one child against the custody of another, the principals in this dissolution proceeding acted in their own interests and gave scant consideration to the best interests of the mother's daughter born of a previous marriage. These facts alone required the trial court to appoint a separate guardian ad litem for the girl.

In *Gribble v. Gribble*, 583 P.2d 64 (Utah 1978), the stepfather offered to set up a trust fund for his stepson. But as in *Gribble*, the stepfather here made no offer to pay child support, and certainly he has no legal duty to do so after a marriage dissolution decree is entered unless he maintains his "loco

parentis" status. In *Gribble* the court declared:

> It may be that if a stepfather standing in the status of loco parentis is given the opportunity to seek visitation rights as a right afforded a natural parent, that he should not be permitted to escape the duties and obligations of the loco parentis status as long as that relationship remains intact. A hearing could determine not only the right to visitation, but could determine whether that right should be conditioned on a requirement that the stepfather accept an obligation to assist in the support of the child. This is not only consistent with the concept of loco parentis but may well be necessary to the child's welfare. *Loco parentis does not envision that a stepparent be permitted to enjoy the rights of a natural parent without also accepting the responsibilities that are incurred.*

(Emphasis supplied.) 583 P.2d at 68.

As stated in *Klipstein v. Zalewski*, 230 N.J. Super. 567, 553 A.2d 1384 (1988), the obligation to support and the right to visitation are correlative and the two legal tenets should be applied in pari materia. Holding a stepparent liable for child support may serve to discourage suits for visitation by one who, rather than wishing to preserve a relationship with a former stepchild, wishes only to annoy or harass a former spouse.

Visitation privileges of stepparents should not be granted lightly. As the *Klipstein* court declared:

> There must be some limits on stepparent visitation rights because in our society it is not difficult to conceive of a child having three, four or even more stepfathers and there are not enough days in a week for the child to have visitation with all of them. Frequently, there will be no satisfactory solution which will please everyone. Justice to both the stepfather and the child, which is the desired objective, can rarely be attained [in certain cases] because the interests of one can be satisfied in many cases only at the expense of the other. And if these competing interests cannot be reconciled, it is the rights of the stepfather which must fall.

230 N.J. Super. at 571, 553 A.2d at 1386.

Equally troubling in this case is the absence of the child's

biological father as a party to the dissolution action. The record reflects that his location was readily available. Although he may be completely indifferent to the child, nonetheless the biological father has a legal interest which he is entitled to protect should he wish to do so. We have held:

> " ' "Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. . . ." ' "

Koch v. Koch, 226 Neb. 305, 312, 411 N.W.2d 319, 323 (1987).

It is obvious that granting rights of visitation to a former stepparent may in some cases interfere with some rights of a biological parent who is not otherwise affected by the dissolution proceeding. For example, under some circumstances any rights of visitation granted the former stepparent might disrupt a natural parent's established schedule of visitation. Thus, a stepparent seeking visitation rights with one about to become a former stepchild should be required to join as a party to the dissolution action the otherwise not affected biological parent of the child.

In this case it is conceivable that the biological father may have forfeited any rights he had as the natural parent of appellee's stepdaughter. However, that is not a determination that can be made without giving appropriate notice to the biological father and an opportunity for him to be heard.

This case should be remanded to the trial court, where, after notice to the biological father of the minor child involved and the appointment of a separate guardian ad litem for the child, a determination should be made as to whether the appellee wishes to continue his status of loco parentis to his ex-stepdaughter not only by exercising the privilege of visitation, but also by assuming the obligations of that status. Should Mr. Hickenbottom desire to maintain his loco parentis status and should the trial court find that it is in the best interests of the child that the status of appellee as loco parentis be maintained, then the trial court should require the appellee to appropriately

support the child.

WHITE, J., joins in this concurrence and dissent.

STATE OF NEBRASKA, APPELLEE, V. BENNY R. FOSTER, APPELLANT.

476 N.W.2d 923

Filed November 22, 1991. No. 90-1139.

1. **Sentences: Judges: Time.** That a sentence validly imposed takes effect from the time it is pronounced and a subsequent sentence fixing a different term is a nullity does not mean that a judge may never correct an inadvertent mispronouncement of a sentence.
2. **Sentences: Judges: Records.** The circumstances under which a judge may correct an inadvertent mispronouncement of a sentence are limited to those instances in which it is clear that the defendant has not yet left the courtroom, it is obvious that the judge, in correcting his or her language, did not change in any manner the sentence originally intended, and no written notation of the inadvertently mispronounced sentence was made in the records of the court.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed.

Robert P. Lindemeier, of Ruff, Florom & Nisley, for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Defendant-appellant, Benny R. Foster, urges that the district court, through the Honorable Jack H. Hendrix, erred in changing its original sentence. We affirm.

Pursuant to pleas entered in accordance with an agreement with the plaintiff-appellee State, Foster was adjudged guilty in each of two cases. In district court case No. 13,819, he was adjudged guilty of third degree assault on an officer, in violation of Neb. Rev. Stat. § 28-931 (Reissue 1989), a Class IV felony punishable by imprisonment for up to 5 years, Neb. Rev.

Stat. § 28-105 (Reissue 1989). In district court case No. 13,840, he was adjudged guilty of attempted criminal mischief, in violation of Neb. Rev. Stat. §§ 28-201 and 28-519 (Reissue 1989), a Class I misdemeanor punishable by imprisonment for a period of not more than 1 year, Neb. Rev. Stat. § 28-106 (Reissue 1989).

In conformance with the parties' agreement, Judge Hendrix imposed the sentence in each of the cases at a single sentencing hearing. Only the sentence on the assault conviction, No. 13,819, is involved in this appeal; the attempted criminal mischief sentence, No. 13,840, was the subject of a separate appeal and was summarily affirmed. *State v. Foster*, 237 Neb. xxxv (case No. 90-1138, Mar. 22, 1991).

In imposing the sentences, Judge Hendrix observed that given Foster's past record, "close to the maximum sentence is what must be imposed . . . ." Judge Hendrix went on to say:

> [Foster] is sentenced in Case 13,819 to one year with the Department of Corrections . . . .
>
> In Case 13,840, criminal mischief, it is the judgment of the court that [Foster] be and he hereby is sentenced to the Department of Corrections for a period of not less than eighteen months nor more than five years. Said sentence . . . is consecutive to and not concurrent with the sentence in Case 13,819, for assault of an officer.

Judge Hendrix then asked the prosecutor whether he, the judge, had overlooked anything. The prosecutor responded that he believed the sentences had been turned around, pointing out that the assault was a felony and the attempted criminal mischief was a misdemeanor. Judge Hendrix commented that he had been looking at the probation officer's report, which had switched the crime classifications around. He then announced that in the assault case, No. 13,819, the sentence was to be 18 months to 5 years and that in the attempted criminal mischief case, No. 13,840, the sentence was to be 1 year.

The record contains a single journal entry which recites only that the assault sentence is as last mentioned above; the record does not include the trial docket.

The proposition that a "sentence validly imposed takes effect

from the day it is pronounced and a subsequent sentence fixing a different term is a nullity" appears to have first found expression in this court's syllabus in *State v. Brewer*, 190 Neb. 667, 668, 212 N.W.2d 90, 91 (1973). This precise statement is not, however, contained in the *Brewer* opinion.

Therein, the trial court had, during its morning session, imposed a sentence of imprisonment for a period of 20 months to 5 years for possession of a firearm. Later that day, another hearing was held, at which time the State informed the trial court that it intended to prove Brewer was a habitual criminal. The trial court then professed to set aside its earlier sentence and, at a hearing held a week later, found that Brewer was a habitual criminal and thereupon purported to sentence him to imprisonment for a period of 10 to 15 years. On appeal, this court concluded it was obvious that the trial court had meant to impose the sentence it pronounced the first time it considered the matter, and held the second sentence to be a nullity. It noted that the situation did not present a "case where there was some ambiguity in the sentence or inadvertent misstatement in pronouncing it." *Id.* at 676, 212 N.W.2d at 95. The *Brewer* opinion also stated it to be

> the majority rule long followed in this state that when a valid sentence has been put into execution the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed. Any attempt to do so is of no effect and the original sentence remains in force.

Id. at 676-77, 212 N.W.2d at 95.

In *State v. Snider*, 197 Neb. 317, 248 N.W.2d 342 (1977), the trial court imposed a sentence of probation for the killing of a steer. When probation was revoked after violation of the probation order, the trial court imposed a prison sentence of 1 to 2 years, with credit given for jail time spent awaiting hearing. While leaving the courtroom after that sentence was imposed, Snider slammed the door behind him. The trial court immediately ordered Snider back into the courtroom and resentenced him to a term of 1 to 2 years without the previously announced credit for jail time. On appeal, Snider argued that the trial court had erred in modifying the sentence first

imposed. This court agreed, stating:

> It is to be noted that the change in this instance was not the clarification of an ambiguity or correction of a prior misstatement in announcing sentence. The rule is that a sentence validly imposed takes effect from the time it is pronounced and that a subsequent sentence fixing a different term is a nullity.

Id. at 319, 248 N.W.2d at 343, citing *State v. Brewer, supra.*

In *State v. Cousins*, 208 Neb. 245, 302 N.W.2d 731 (1981), Cousins had been found guilty of escaping while under arrest for a felony. In passing sentence, the trial court stated that " '[t]his sentence then shall be . . . for a period of one year to eighteen months to be served consecutive to the one I sentenced him on this morning . . . and *concurrently* to' " another sentence. (Emphasis in original.) *Id.* at 246, 302 N.W.2d at 732. Approximately 6 minutes later, the trial court ordered the parties to return to the courtroom, whereupon it stated:

> " 'Let the record show I called the parties back and announced I am not changing any sentence but I am correcting a statement from the Bench. I did not mean this would be concurrent to the sentence imposed by [another judge]. . . . I mean this would be consecutive. I did not want to give this defendant the same amount because of a different history, but it is a second offense. I should have said consecutive to the one imposed by [the other judge].' "

Id. The State argued that as the use of the word "concurrent" was inadvertent, the trial court should be permitted, under the authority of *Brewer* and *Snider*, to amend its sentence. However, this court held that the trial court's attempt to correct its original pronouncement was ineffective. We again noted that a valid sentence takes effect from the time it is pronounced, and declared that

> to begin questioning whether a valid sentence has been pronounced inadvertently would involve this court in a morass. We would be called upon to read the mind of the sentencing judge in any circumstance in which a valid sentence had been pronounced and later amended due to the judge's proclaimed inadvertence. We think that would

> not be the better rule, nor would it be in keeping with the spirit of our previous cases. Therefore, to the extent that *State v. Snider, supra*, might indicate that the mere inadvertence in pronouncing a valid sentence would justify the court in pronouncing another sentence, it is overruled.

Cousins at 247, 302 N.W.2d at 733.

We also considered the matter in *State v. Carlson*, 227 Neb. 503, 418 N.W.2d 561 (1988), a case not cited by either party. The trial court in that case said at 505, 418 N.W.2d at 562: " 'As to the burglary charge, Count II . . . I am going to sentence you to a term of four years maximum—four years minimum, twelve years maximum. Both of these counts are to be served concurrently. Or consecutively. Excuse me, consecutively.' " Relying on *Cousins*, Carlson contended that having once pronounced a sentence, the trial court erred in attempting to both impose a different maximum sentence and change a concurrent sentence into a consecutive one. In reviewing the situation, this court considered significant that the trial court had corrected its "inadvertent statement almost immediately" after it had spoken, concluding that it was clear "under the facts of this case, that the [trial court] did not intend to change a sentence or had not finished pronouncing a sentence." *Carlson* at 505, 418 N.W.2d at 562. This court observed that the situation differed from that in *Cousins*, wherein the defendant had left the courtroom after his sentence had been pronounced and was then returned approximately 6 minutes later at the request of the trial court, which declared it had misspoken the original sentence. The *Carlson* court also noted that the defendant in *State v. Snider*, 197 Neb. 317, 248 N.W.2d 342 (1977), had left the courtroom after the sentence had been pronounced and was returned at the request of the trial court, which then changed the sentence as a result of Snider's actions in leaving the courtroom. The *Carlson* court explained further that it had been unable to find any Nebraska cases "even remotely similar" to the facts of the case then under consideration, *id.* at 505, 418 N.W.2d at 562, saying:

> In the case at issue here, the time which elapsed between the judge's words in sentencing was practically

> nonexistent. The "change" in the sentence is an obvious correction of a misstatement on the part of the judge. It is all part of one sentence, and not a case of imposition of a subsequent sentence. The fact that the judge in this case corrected himself immediately should be indicative of the fact that it was part of the sentence and not the imposition of a subsequent sentence. It is true that *Cousins* does enunciate the rule that a sentence validly imposed takes effect from the time it is pronounced. The question then presents itself as to what constitutes the pronouncement of a sentence, and when does a sentence take effect.

Id. at 506, 418 N.W.2d at 563. Although *State v. Cousins*, 208 Neb. 245, 302 N.W.2d 731 (1981), overruled *State v. Snider, supra*, to the extent it "might indicate that the mere inadvertence in pronouncing a valid sentence would justify the court in pronouncing another sentence," *Cousins* at 247, 302 N.W.2d at 733, the *Carlson* opinion distinguished *Cousins*, *Snider*, and *State v. Brewer*, 190 Neb. 667, 212 N.W.2d 90 (1973), by stating that "where a period of minutes or days elapsed between the pronouncement of sentences, some ambiguity might exist," *Carlson* at 506, 418 N.W.2d at 563, in that an appellate court might find different sentences in separate parts of the bill of exceptions.

The *Carlson* opinion recognized that it would be difficult to set a "hard-and-fast rule" on the question of how much time a court should be given within which to correct itself, saying that each case must depend on its particular facts. It concluded, however, that "under the facts of this particular case it should be clear to any reasonable person that the judge, in correcting his language, did not intend to enhance or increase the sentence in any manner." *Id.* at 506, 418 N.W.2d at 563.

The concern in *Cousins*, that "to begin questioning whether a valid sentence has been pronounced inadvertently would involve this court in a morass," was real under those facts. The trial court had adjourned, Cousins had left the courtroom, and time had elapsed before the trial court proclaimed it had inadvertently spoken an otherwise valid sentence. In such an instance, any reason advanced in support of a claim that the otherwise valid sentence was not the sentence intended would

be open to question. Under the facts in *Carlson*, however, this concern could not arise, for the correction was made while Carlson was still in the courtroom, while court was still in original session, and before anyone had an opportunity to make any ex parte statement to the trial court.

Regardless of the time factor, it is obvious that after the error was called to his attention in this case, Judge Hendrix immediately corrected what the erroneous presentence report had led him into saying by pronouncing the sentences he had always intended to impose. This is in part evidenced by his statement at the beginning of the sentencing that close to the maximum sentence must be imposed. Although it is true Judge Hendrix did not notice his mispronouncement until the prosecutor called it to his attention, the prosecutor's comments did nothing more than point out the inapplicability of the pronounced sentences to one of the crimes involved, a matter which should have been apparent to all—the sentence mistakenly imposed for the attempted criminal mischief conviction exceeded the maximum allowed by statute, and was thus erroneous. Under these facts, the *Cousins* concern of having to read a trial court's mind does not exist. The facts make it clear that Judge Hendrix misspoke and did not intend in this case the sentence he first pronounced.

It must also be remembered that to create finality in a criminal case, it is necessary that there be a judgment of conviction, followed by a sentence. See *State v. Kramer*, 231 Neb. 437, 436 N.W.2d 524 (1989), citing *In re Interest of Wolkow*, 206 Neb. 512, 293 N.W.2d 851 (1980). Thus, for the purpose of appeal in a criminal case, it is the sentence which is the judgment. *State v. Spotted Elk*, 227 Neb. 869, 420 N.W.2d 707 (1988). A judgment is rendered when it is both pronounced and some written notation of it is made and filed in the records of the court. See, *State v. Temple*, 230 Neb. 624, 432 N.W.2d 818 (1988); *Hoffman v. Reinke Mfg. Co.*, 227 Neb. 66, 416 N.W.2d 216 (1987); *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986); Neb. Rev. Stat. § 25-1301 (Reissue 1989). Foster has failed to establish that the sentence first pronounced by Judge Hendrix in this case was ever "rendered," for there is no showing that any written notation of it was made

in the records of the court.

That a sentence validly imposed takes effect from the time it is pronounced and a subsequent sentence fixing a different term is a nullity does not mean that a judge may never correct an inadvertent mispronouncement of a sentence. The circumstances under which a judge may correct an inadvertent mispronouncement of a sentence are limited to those instances in which it is clear that the defendant has not yet left the courtroom, it is obvious that the judge, in correcting his or her language, did not change in any manner the sentence originally intended, and no written notation of the inadvertently mispronounced sentence was made in the records of the court.

AFFIRMED.

GERRY HILDEBRAND, APPELLANT, V. LARRY HILDEBRAND, APPELLEE.

477 N.W.2d 1

Filed November 22, 1991. No. 91-163.

1. **Divorce: Marriage: Child Custody: Child Support.** If the parties to a divorce decree remarry each other, they no longer have separate rights of custody and separate obligations for future support; rather, the same joint rights to custody and joint obligations for future support which antedated the divorce are resumed.
2. **Child Custody.** Under the provisions of Neb. Rev. Stat. § 42-364(3) (Reissue 1988), two requirements must be satisfied before a court may grant joint custody of a child: (1) The parents must agree to the arrangement, and (2) a hearing must be held to determine that such serves the best interests of the child.
3. _____. Joint custody of a child is not favored and must be reserved for only the rarest of cases.
4. **Divorce: Alimony: Property Division.** Although alimony and distribution of property have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together.
5. **Divorce: Property Division.** The ultimate test in determining the appropriateness of the division of property is reasonableness as determined by the facts in each case.
6. **Divorce: Alimony: Pensions.** Awarding alimony in a specified amount to one spouse for her or his lifetime is an appropriate method of dealing with the other

spouse's pension funds.

7. **Divorce: Property Division: Pensions.** A trial court may exercise discretion in valuing pension rights and in dividing such rights between the parties.
8. **Divorce: Alimony.** One of the elements to be considered in the allowance of alimony is the earning capacity of the other spouse.
9. **Divorce: Property Division.** In dividing marital property, the trial court should take into consideration the indebtedness of the parties in order to divide the net marital estate.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed as modified.

Van A. Schroeder, of Bertolini, Schroeder & Blount, for appellant.

Richard W. Harter, of Harter Law Office, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

I. INTRODUCTION

The petitioner-appellant former wife, Gerry Hildebrand, instituted this action in an effort to obtain a legal separation from the respondent-appellee former husband, Larry Hildebrand. He in turn successfully cross-petitioned for dissolution of the marriage. In this court the wife asserts, in summary, that in granting the husband's prayer, the district court erred in its (1) child custody and related support determinations and (2) property divisions and alimony award. We affirm as modified.

II. FACTS

The parties married each other twice, the first time on July 31, 1966. That marriage lasted 13 years 10 months, having been dissolved by an Alaska decree in June 1980. The parties then remarried on October 4, 1984. That marriage lasted 6 years 3 months, being terminated by the decree in question on January 10, 1991. While the second marriage produced no children, the first union brought forth two daughters: Patricia Anna, born on January 17, 1970, and Grace Elaine, born on May 23, 1972. An automobile accident rendered the older daughter a quadriplegic in September 1987, and the wife serves as her

guardian. This daughter lives in a house which the parties acquired through a special government assistance program, but which they did not themselves occupy and which is not involved in the issues presented. Neither is this daughter's care at issue, except for the payment of the bills discussed in part III(2)(c) below.

Notwithstanding that each of the parties sought sole custody of the younger daughter, who was then a little less than a half year away from adulthood, the district court granted them joint custody. The district court specifically noted that with respect to the younger daughter's support, the "[o]rder of the Alaska court . . . remains in effect." While the record does not contain a copy of the Alaska decree, the district court, in the course of entering a temporary order on December 21, 1989, wrote that the husband remained obligated to pay "the sum of $200.00 per month" in support for the younger daughter under the terms of that decree. This statement apparently refers to the sum the husband, in satisfaction of the Alaska decree, had caused to be automatically deducted from his paycheck and deposited in an account owned by the wife.

The husband served in the U.S. Air Force throughout the 20 years the parties were married, and the wife accompanied him as required. The evidence suggests that the couple has lived in Germany, Alaska, Montana, and Nebraska. When the parties' older daughter was injured in 1987, the wife quit her employment and stayed home with the girl until February 1989. During this time, the wife withdrew the entire amount of her civil service retirement, approximately $5,000, to pay family expenses. The husband is a weather forecaster, but for the 4 years prior to retirement has worked in manpower management. He has an associate degree and has enrolled in a university course in order to earn a bachelor's degree in geography.

The husband was scheduled to retire from the U.S. Air Force on February 1, 1991, after 27 years of service, at which time he would receive a gross retirement pay of $1,711 per month. The wife specifically sought an interest in his retirement pension. However, the district court refused to grant the wife a property interest in the pension but, rather, awarded her alimony of $500

per month for 6 months, then $200 per month for her lifetime, regardless of whether she marries. In so ruling, the district court concluded that the husband's pension plan through the first years of military service was not a proper marital asset for distribution. Instead, the district court estimated that for the current 6 years of marriage, the wife's share of the pension had a value of slightly less than $200 a month.

The subject decree also awarded the parties' residence to the wife, subject to a mortgage requiring a $635.39 payment per month and a home improvement mortgage loan requiring a payment of approximately $100 per month, and holds the husband "harmless from liability for those debts."

The wife also received an interest worth approximately $3,700 in a retirement account and various other items of personal property, including life insurance policies and two automobiles, in one of which the younger daughter had an ownership interest. The wife was ordered to pay approximately $1,600 in debts she incurred and, in addition, was obligated to pay $162 per month on a loan covering an automobile she was awarded.

The husband was awarded an interest having a value of approximately $4,300 in the aforementioned retirement account, a checking account with a balance of $1,894, and various other items of personal property, including a pickup truck, a boat motor, and a trailer. He was ordered to pay approximately $13,800 in debts.

At the time of trial, the husband had a net monthly income of $2,636.57 from the Air Force and approximately $400 a month as an automobile salesman. The wife, a civil service secretary at Offutt Air Force Base, was earning $476.21 every 2 weeks.

III. ANALYSIS

With the foregoing factual background in mind, we turn our attention to an analysis of the issues presented by the wife's two summarized assignments of error.

1. Child Custody and Support

The first summarized assignment of error urges that the district court erred in granting joint custody of the younger daughter, arguing that sole custody should have been granted to

the wife, with appropriate child support.

We begin our review of this summarized assignment by noting that the district court erroneously concluded that the Alaska decree was effective and binding in regard to child support. We agree with the statement in *Schaff v. Schaff*, 446 N.W.2d 28, 31 (N.D. 1989), that "if the parties to a divorce decree remarry each other, they no longer have separate rights of custody and separate obligations for future support; rather, the same joint rights to custody and joint obligations for future support which antedated the divorce are resumed." See, also, *Davis v. Davis*, 68 Cal. 2d 290, 437 P.2d 502, 66 Cal. Rptr. 14 (1968); *In re Marriage of Root*, 774 S.W.2d 521 (Mo. App. 1989); *Oliphant v. Oliphant*, 177 Ark. 613, 7 S.W.2d 783 (1928); *Cain v. Garner*, 169 Ky. 633, 185 S.W. 122 (1916); *Lockard v. Lockard*, 49 Ohio Op. 163, 102 N.E.2d 747 (1951); *Jenkins v. Followell*, 262 P.2d 880 (Okla. 1953); *Slape v. Slape*, 553 S.W.2d 171 (Tex. Civ. App. 1977); *Warren v. Warren*, 213 Ga. 81, 97 S.E.2d 349 (1957). In *In re Marriage of Root, supra*, the court wrote at 774 S.W.2d at 523:

> It would be absurd to hold that once parents remarry each other and the family is again intact and residing in the same household, the former noncustodial parent must pay future installments of child support to the other parent per the past divorce decree. That is to say, the remarriage should terminate the former noncustodial parent's duty to pay any child support *that would have become due after the remarriage*.

(Emphasis in original.)

Indeed, *Scheibel v. Scheibel*, 204 Neb. 653, 284 N.W.2d 572 (1979), implies that child support obligations terminate upon remarriage of the parties. The parties therein were divorced and the decree required the father to pay $25 per month in child support. Six years later, the parties remarried and again divorced, at which time the mother brought suit against the father to collect arrearages for child support claimed to have occurred between the first divorce and the second marriage. This court affirmed the mother's right to collect the delinquent amount, thereby leading to the inference that once parties remarry, the former child support order is moot, while any

deficiencies prior to the marriage are collectible. See Annot., 26 A.L.R.4th 325 (1983).

When the parties to this action remarried in 1984, all future child support obligations under the Alaska decree were terminated. The fact that $200 continued to be automatically withdrawn from the husband's paycheck and placed into a private account for the wife cannot be interpreted as a continuation of the child support. At the moment of their remarriage, the $200 transfer became simply that, a transfer. It was no longer in satisfaction of any legal or court-enforced obligation.

That having been developed, we turn our attention to what should have been done.

(a) Custody

Neb. Rev. Stat. § 42-364(3) (Reissue 1988) provides:

> The court may place the custody of a child with both parents on a shared or joint-custody basis when both parents agree to such an arrangement. In that event, the parents shall have equal rights to make decisions in the best interests of the child in their custody. The court shall not place a child in joint custody without conducting a hearing in open court and specifically finding that joint custody is in the best interest of the child regardless of any parental agreement or consent.

Thus, two requirements must be satisfied before a court may grant joint custody of a child: (1) The parents must agree to the arrangement, and (2) a hearing must be held to determine that such serves the best interests of the child. In addition, this court has frequently and consistently expressed disapproval of joint custody as a purported solution for the difficulty confronted by a court in determining a question concerning child custody, *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988), explicitly stating that joint custody is not favored and must be reserved for only the rarest of cases, *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987).

In the instant action, neither the wife nor the husband requested joint custody; rather, each sought sole custody of the younger daughter. Additionally, no determination appears to

have been made concerning what custody arrangement would best serve the child's interests. While the district court made several references to the fact that the younger daughter was living alone in an apartment, it appears to have relied solely on the fact that she would be emancipated in 6 months. Whether the custody arrangement was to last 6 days or 6 years, § 42-364(3) was violated; however, at this point, the daughter is an emancipated adult, and, consequently, the issue of her custody is moot, except as it is necessary to determine which parent should have been given custody during the 6 months of the daughter's minority and whether child support should have been paid during that period and, if so, in what amount.

The younger daughter lived in the family home with the wife from the time the latter filed her petition on October 12, 1989, until October 1990, when the daughter moved into an apartment. In connection with that move, the wife testified that the daughter had a drinking problem, wanted to be on her own outside the presence of adults, and voluntarily moved out of the family home. Irrespective of the daughter's desire to be on her own, she continued to be supported by her parents and thus did not become emancipated. See *Accent Service Co., Inc. v. Ebsen*, 209 Neb. 94, 306 N.W.2d 575 (1981).

Under the circumstances, the younger daughter's custody, during the remaining period of her minority, should have remained with the wife. That leaves the matter of child support.

(b) Support

The daughter lived on her own as a minor for approximately 8 months, from October 1990 until May 1991, when she reached majority. From the entry of the temporary order to the first day of trial, November 26, 1990, the husband had paid $400 per month in support for the younger daughter, $200 under the arrangement carried over from the Alaska decree and $200 as the result of the district court's temporary order, and, in addition, had paid for the daughter's apartment. The wife testified that since the daughter moved out in October 1990, she has given her $300 a month and retained the rest of the support money for reimbursement for tires she bought for the daughter.

The Nebraska Child Support Guidelines (rev. 1991) compute

the presumptive share of each party's child support obligation on the basis of the "total monthly income," which is defined as the "income of both parties derived from all [moneys]" except for that derived from certain designated sources not involved in this case, less, so far as relevant to our inquiry, tax and Social Security insurance payments. *Peterson v. Peterson, ante* p. 113, 474 N.W.2d 862 (1991). The husband's monthly income to February 1, 1991, was $3,036.57 ($2,636.57 from the Air Force and $400 as a part-time automobile salesman). The wife had a 4-week income of $952.42, or approximately $1,030 per month. Thus, the total monthly income was $4,066.57, 75 percent of which was attributable to the husband and 25 percent to the wife.

According to the income shares formula of the guidelines, a total monthly income of $4,066.57 entitles an only child to $655.66 in support. Thus, the husband's share of the child support is equal to 75 percent multiplied by $655.66, or $491.74 a month; the wife's share is 25 percent multiplied by $655.66, or $163.92. Consequently, the husband initially owes the wife $333.11 for the 21 days in January remaining from the date of the decree, January 10, 1991.

From February until May, the husband had a gross military pension of $1,711 and earned approximately $400 a month as an automobile salesman, for a gross monthly income of $2,111. Giving him credit for $600 in tax and Social Security insurance payments, he had a monthly income of $1,511. The wife's monthly income remained at $1,030, producing a total monthly income of $2,541 for the parties. According to the guidelines, such a total monthly income entitles an only child to $466.74 per month in support. Since the husband's income represents 59 percent of the parties' total monthly income, he is responsible for $275.38 and the wife for the remaining 41 percent, or $191.36. Consequently, for the period from February 1, 1991, through May 22, 1991, the husband's initial share of child support is $1,021.57 (for the months of February through April, plus 22 days in May). The husband's total child support obligation from January 10 through May 22, 1991, is therefore $1,354.68, minus any child support contributions he has made subsequent to the entry of the subject decree.

2. PROPERTY DIVISIONS AND ALIMONY AWARD

In connection with the second summarized assignment of error, the wife makes four complaints: that she was not granted a sufficient interest in the husband's pension, that she was given insufficient alimony to cover the house mortgages, that the district court failed to account for a credit card debt, and that the district court ordered her to deliver to the husband a gun she no longer possessed.

We begin this aspect of our analysis by recalling that Neb. Rev. Stat. § 42-365 (Reissue 1988) states in part:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

Although alimony and distribution of property have different purposes in marriage dissolution proceedings, "they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together . . . ." *Kullbom v. Kullbom*, 209 Neb. 145, 149, 306 N.W.2d 844, 846 (1981). Moreover, the ultimate test in determining the appropriateness of the division of property is reasonableness as determined by the facts in each case. *Hallan v. Hallan*, 233 Neb. 261, 444 N.W.2d 896 (1989).

(a) Pension

The wife first avers that she has a right to a share of the husband's pension reflecting 20 years of marriage.

In considering this issue, it must be borne in mind that when the parties were divorced in 1980, Alaska did not recognize military pensions as marital property subject to division upon divorce. See *Cose v. Cose*, 592 P.2d 1230 (Alaska 1979). Thus, upon the entry of the Alaska decree, the portion of the pension

earned during the first marriage became the husband's separate property. See *Froelich v. Froelich*, 236 Neb. 808, 464 N.W.2d 310 (1991) (judgment rendered by sister state which has jurisdiction is to be given full faith and credit in Nebraska). The district court therefore correctly determined that the portion of the pension earned during the first marriage was not a marital asset and that the only part of the pension subject to distribution was the portion earned during the second marriage.

In that regard, Neb. Rev. Stat. § 42-366(8) (Reissue 1988) provides, in relevant part: "The court shall include as part of the marital estate, for purposes of the division of property at the time of dissolution, any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested." While it has been said that this court has not favored lifetime awards of alimony, *Albers v. Albers*, 213 Neb. 471, 329 N.W.2d 567 (1983), in *Taylor v. Taylor*, 217 Neb. 409, 348 N.W.2d 887 (1984), we held that the awarding of alimony in a specified amount to one spouse for her or his lifetime is an appropriate method of dealing with the other spouse's pension funds. We have also declared that a trial court may exercise "discretion in valuing pension rights and in dividing such rights between the parties." *Rockwood v. Rockwood*, 219 Neb. 21, 23, 360 N.W.2d 497, 499 (1985).

In *Carruth v. Carruth*, 212 Neb. 124, 321 N.W.2d 912 (1982), we stated that one of the elements to be considered in the allowance of alimony is the earning capacity of the other spouse. Not only is the husband's earning capacity in this case presently greater than that of the wife, it has the potential to increase even more as a result of his educational pursuit. On the other hand, the wife's earning capacity is unlikely to improve. It is also obvious that she has fixed expenses of approximately $900 per month in automobile and house mortgage loans over and above the costs of retiring the debts the decree obligated her to pay and the costs of clothing, feeding, and maintaining herself. Under the circumstances, we conclude that the alimony awarded is inadequate. Although the $500 per month awarded for the first 6 months should not be modified, the $200 per

month awarded thereafter for the rest of her life is to be increased to $400 per month.

(b) Mortgages

The wife next complains that the district court failed to provide her with sufficient funds with which to pay the mortgage loans against the house she was awarded.

In *Reuter v. Reuter*, 218 Neb. 732, 359 N.W.2d 78 (1984), the ex-wife had been given $200 a month in child support, $200 a month in alimony for 60 months, and the house, owned by her parents, which had improvement debts of $50,750. At the time of trial, the ex-wife was unemployed. The ex-husband earned $1,550 per month at his full-time job and $5,000 per year farming. The ex-wife challenged the district court decision, arguing that she should not be required to pay all of the joint debt and that the alimony award was inadequate, given the $600-a-month payments on the debt. This court, however, found that obligating the ex-wife for the full debt was not an abuse of discretion.

Neither can it be said that the district court abused its discretion in this case.

(c) Additional Debt

The wife also complains that the district court failed to consider and allocate the debt incurred on a particular VISA credit card account held in her name. There is no question that in dividing marital property, the trial court should take into consideration the indebtedness of the parties in order to divide the net marital estate. See *Keim v. Keim*, 228 Neb. 684, 424 N.W.2d 112 (1988). See, also, *Black v. Black*, 221 Neb. 533, 536, 378 N.W.2d 849, 851 (1985) ("[w]e have consistently spoken of dividing the *net* marital estate" (emphasis in original)).

The wife testified that she possessed her own VISA credit card account, which had approximately $1,500 to $1,600 in debt. She also testified that this debt was incurred for "our boat [and] some . . . for our handicapped child." Consequently, the wife has asked the husband to share responsibility in paying off her VISA debt by contributing $500.

The husband's VISA credit card account was paid off prior

to separation out of the joint account of the parties, but he, personally, had incurred an additional $1,200 in debt thereon.

The subject decree simply requires the husband to pay off VISA. Although it is unclear to which VISA account the district court makes reference, it appears that the court was obligating the husband to pay off his own account. Concluding that the wife's VISA account was not addressed and since the evidence is uncontroverted that part of the $1,500 to $1,600 debt was incurred for family expenses, we determine it was error for the district court to ignore disposition of the debt incurred on the wife's VISA account; accordingly, the husband is to pay $500 toward the retirement of this debt.

(d) Gun

Finally, the wife asserts the district court erred in requiring her to deliver to the husband a certain Ruger .243-caliber rifle, claiming that as she is no longer in possession of it, the gun cannot be considered marital property subject to distribution.

The husband testified that when the couple were in Montana, the gun "was bought for [the wife] to use and if you want to call it a gift then, yes, it was." However, the Alaska divorce decree awarded the gun to the husband, and it thus became his separate property which he brought to the second marriage. See *Simmonds v. Fenton*, 95 Neb. 771, 146 N.W. 944 (1914) (interest awarded wife pursuant to divorce decree becomes wife's property and is not subject to attachment in action against husband). See, also, *Henderson v. Henderson*, 764 P.2d 156 (Okla. 1988) (property distributed from previous marriage remains personal upon couple's subsequent marriage together). Subsequent to the husband's moving out of the house, the wife pawned the gun for $220 to her oldest brother, saying that she had "someone holding it for $220 that they loaned me."

The district court did not abuse its discretion in awarding the gun to the husband. The American Heritage Dictionary of the English Language 963 (1969) defines pawn as "[s]omething given as security for a loan." Further, the common understanding of pawning property connotes an intent to retrieve it at some later date. The wife's own words suggest that

the transaction was temporary and that she pawned the gun to her brother. She need only repay him the $220 he loaned her to retrieve the gun she pledged as security for the loan.

IV. ORDER

For the foregoing reasons, we direct that the decree of the district court be modified as set forth in this opinion, and as so modified, the decree is affirmed.

AFFIRMED AS MODIFIED.

JUDEE E. MOSER, APPELLANT, V. RANDALL S. MOSER, APPELLEE.

476 N.W.2d 922

Filed November 22, 1991. No. 91-187.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

James H. Hoppe, of Watkins-Scott-Hoppe, for appellant.

Gregory D. Barton, of Harding & Ogborn, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Judee E. Moser appeals the judgment of the district court which awarded sole custody of the parties' minor child to the child's father, Randall S. Moser, with specific visitation rights to Judee Moser as mother of the child.

> In an appeal involving an action for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme 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.

Huffman v. Huffman, 236 Neb. 101, 104, 459 N.W.2d 215, 219 (1990). Accord, *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991); *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990). "Child custody in a proceeding to dissolve a marriage is a matter within the trial court's discretion." *Ritter v. Ritter, supra* at 208, 450 N.W.2d at 209. Accord *Peterson v. Peterson*, 224 Neb. 557, 399 N.W.2d 792 (1987).

From our de novo examination and review of the record, we have determined that the district court did not abuse its discretion. See *Huffman v. Huffman, supra*.

AFFIRMED.

RODNEY PHELPS, APPELLANT, V. JOYCE PHELPS, APPELLEE.

477 N.W.2d 552

Filed December 6, 1991. No. 89-413.

1. **Child Support: Modification of Decree: Appeal and Error.** Modification of child support is an issue entrusted to the discretion of the trial court. Appellate review of such issues is de novo on the record, but absent an abuse of discretion by the trial court, its decision will be affirmed on appeal. The de novo review is also qualified by the fact that where there is a conflict in the evidence, weight is given to the fact that the trial court saw and heard the witnesses and accepted one version of the facts as opposed to the other.
2. **Child Support: Modification of Decree: Proof.** The party seeking to modify a child support order must show a material change in circumstances which occurred subsequent to the entry of the original decree and was not contemplated when the decree was first entered.
3. **Child Support: Modification of Decree: Rules of the Supreme Court.** The adoption of the Nebraska Child Support Guidelines effective October 1, 1987, constituted a material change of circumstances sufficient to justify consideration of proposed modification of child support orders entered before that date.
4. **Child Support: Rules of the Supreme Court.** In general, child support payments should be set according to the Nebraska Child Support Guidelines, which compute the presumptive share of each parent's child support obligation.
5. _____: _____. The court may deviate from the Nebraska Child Support Guidelines whenever the application of the guidelines in an individual case

would be unjust or inappropriate.

6. **Child Support.** The primary interest in determining the level of child support payments is the best interests of the children.
7. **Appeal and Error: Words and Phrases.** Plain error is error which was unasserted or uncomplained of at trial or on appeal, but is plainly evident from the record, which prejudicially affects a litigant's substantial right and which is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
8. **Child Support: Appeal and Error.** Under certain circumstances, an order that a part of child support payments be held in escrow while an appeal to the Supreme Court is pending is an abuse of discretion.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed in part, and in part reversed.

Paul M. Conley for appellant.

James A. Cada, of Bailey, Polsky, Cada, Cope & Wood, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

This is an action to modify a dissolution decree which was entered in 1977. On October 6, 1988, the appellee, Joyce Phelps, filed a petition to modify the decree to increase child support for the parties' minor child, born August 16, 1975. On March 2, 1989, the district court entered an order raising the appellant's child support obligation from $125 per month to $400 per month. Appellant's motion for new trial was overruled on March 31.

The appellant filed his notice of appeal on May 1, 1989. On the same day, he filed a motion in the district court asking the court to place the increased child support in escrow. In June 1989, pursuant to Neb. Rev. Stat. § 42-351(2) (Reissue 1988), the district court entered orders that a portion of the appellant's monthly child support payments be placed in escrow.

The appellant contends in this court that the district court erred in increasing his child support obligation to $400 per month. Modification of child support is an issue entrusted to the discretion of the trial court. Appellate review of such issues is de novo on the record, but absent an abuse of discretion by

the trial court, its decision will be affirmed on appeal. The de novo review is also qualified by the fact that where there is a conflict in the evidence, weight is given to the fact that the trial court saw and heard the witnesses and accepted one version of the facts as opposed to the other. *Dobbins v. Dobbins*, 226 Neb. 465, 411 N.W.2d 644 (1987).

The record shows that when the parties' marriage was dissolved in 1977, the appellant earned approximately $11,000 per year working as a firefighter for the city of Lincoln. He has remained in that position and now earns $28,000 per year, plus insurance and pension benefits, from that job. The appellant also receives approximately $200 per month net income from rental property. He and his present wife have also owned and operated an antique store in Lincoln for the past 8 years. The appellant testified that neither of them draws a salary from their antique business, but that they have reinvested their profits in the business. He testified that he did not know what his equity in the antique business was, that he did not know what his income from the antique business was, that he did not declare any income on his income tax returns from the antique business, and that he put between $10,000 and $20,000 back into the antique business in 1988.

The appellee worked as a receptionist after the 1977 decree, earning approximately $3 per hour, with several periods of unemployment. In May 1986, she had an accident and cut the tendons in her right hand. The wound became infected after surgery and the appellee was eventually diagnosed as having "RS dystrophy," which was described as the constricting of blood vessels and arteries in an injured limb. She also suffered a collapsed lung and pneumonia as a result of her treatment for RS dystrophy. As of the hearing date, the appellee was unemployed and her doctor had not released her for job training efforts.

We have held that a party seeking to modify a child support order must show a material change in circumstances which occurred subsequent to the entry of the original decree and was not contemplated when the decree was first entered. See *Schmitt v. Schmitt*, *post* p. 632, 477 N.W.2d 563 (1991). In this case, the appellant contends the district court erred in

concluding that "a raise of almost 150% was a material and substantial change in circumstance," brief for appellant at 12-13, and that "[i]n a modification of decree proceeding, an increase in child support award based solely upon the current income formula applied to the Nebraska Child Support Guidelines is an abuse of discretion," brief for appellant at 16. Our opinion in *Schmitt* disposes of these issues.

In *Schmitt v. Schmitt, supra*, the parties' marriage was dissolved in August 1987 and the husband was ordered to pay $100 per month per child for the first 36 months and $150 per month per child thereafter for the support of three minor children. The Nebraska Child Support Guidelines became operative on October 1, 1987, and the wife sought modification of the child support order due to a material change in circumstances, contending that the guidelines suggested a total child support obligation of approximately $880 per month. We noted in *Schmitt, supra* at 637, 477 N.W.2d at 566, that the implementation of certain federal and state statutes "may well render the concept of 'material change of circumstances' of much less concern," and held that the adoption of the Nebraska Child Support Guidelines effective October 1, 1987, constituted a material change of circumstances sufficient to justify consideration of proposed modification of child support orders entered before that date.

In general, child support payments should be set according to the Nebraska Child Support Guidelines, which compute the presumptive share of each parent's child support obligation. *Peterson v. Peterson, ante* p. 113, 474 N.W.2d 862 (1991); *Knippelmier v. Knippelmier*, 238 Neb. 428, 470 N.W.2d 798 (1991). See Neb. Rev. Stat. § 42-364.16 (Reissue 1988). The court may deviate from the guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate. *Knippelmier v. Knippelmier, supra*. The primary interest in determining the level of child support payments is the best interests of the children. *Schmitt v. Schmitt, supra*; *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991).

Despite the suggestion of the appellant that his child support obligation should not be increased because the appellee is now

married to a man who makes approximately $25,000 per year and because she "blew" a $3,000 settlement she received in an interim divorce, which is irrelevant, the appellant has offered no evidence tending to rebut the presumption that the child support guidelines should be applied in this case.

In our application of the guidelines, the record shows that the appellant has monthly net income of $2,208.46, even excluding the income generated by the antique business. In contrast, the appellee is disabled, has no income of her own, and has essentially no earning capacity. See *Knippelmier v. Knippelmier, supra*. Under the circumstances, the district court did not err in ordering the appellant to pay $400 per month child support, as calculated under the child support guidelines.

Finally, we consider whether it was plain error for the district court to enter the escrow orders referred to above. We have defined plain error as

> " 'error which was unasserted or uncomplained of at trial or on appeal, but is plainly evident from the record, which prejudicially affects a litigant's substantial right and which is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.' "

State on behalf of Garcia v. Garcia, 238 Neb. 455, 458, 471 N.W.2d 388, 390 (1991).

In this regard, the record shows that on May 1, 1989, the same day he filed his notice of appeal, the appellant filed a motion in the district court asking the court "to enter an Order directing the Clerk of the District Court to accept the increased child support but to place the money in escrow and not pay it to [appellee] during the pendency of Petitioner's appeal to the Nebraska Supreme Court." On June 2, 1989, the district court made the following ruling on the appellant's motion to escrow the increased child support:

> Pursuant to . . . § 42-351(2), pending appeal, Court's child support order of $450/month [sic] remains in effect; <u>however</u>, only $325 thereof is to be disbursed to [appellee] and the remaining $125 [sic], is to be held in an interest bearing account by the Clerk pending resolution of the appeal.

On the court's own motion, and following separate conversations with counsel for both parties, the court vacated and set aside its order of June 2, 1989, and entered the following order on June 7:

> Pursuant to . . . § 42-351(2), pending resolution of the plaintiff's appeal, the Court's child support order of $400 dated 3-2-89 is modified effective 5-31-89 so that the Plaintiff owes to the minor child the sum of $75/month, said sum to be paid through the Clerk of the District Court and to be held by the Clerk in an interest bearing account pending determination of the plaintiff's appeal.

Section 42-351(2) provides:

> When final orders relating to proceedings governed by sections 42-347 to 42-379 are on appeal to the Supreme Court and such appeal is pending, the district court that issued such orders shall retain jurisdiction to provide for such orders regarding custody, visitation, or support *or other appropriate orders in aid of the appeal process*.

(Emphasis supplied.)

Neither party has assigned any errors relating to the escrow orders; however, both parties sought guidance on the matter during oral arguments.

In this case, the appellant could have asked for an escrow arrangement at the time the modification order was entered. We believe the case does not present the type of situation contemplated by § 42-351(2). Although the district court retains jurisdiction to enter orders pertaining to custody, visitation, and support while an appeal is pending, the statute was meant to protect the interests of dependent children, not the parents' financial interests. In this case the order that a part of the child support payments be held in escrow while the appeal was pending was an abuse of discretion.

The district court's order increasing the appellant's child support obligation to $400 per month is affirmed. The clerk of district court is ordered to remit all payments held in escrow to the appellee.

AFFIRMED IN PART, AND IN PART REVERSED.

LARRY R. KAISER ET AL., APPELLANTS, ROBERT ISENBERG ET AL., APPELLEES, V. WESTERN R/C FLYERS, INC., ET AL., APPELLEES.

477 N.W.2d 557

Filed December 6, 1991. No. 89-486.

1. **Equity: Appeal and Error.** In the appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, however, that where the credible evidence is in conflict on a material issue of fact, the 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.
2. **Expert Witnesses: Rules of Evidence.** Expert testimony is relevant and admissible only if it tends to help the trier of fact understand the evidence or to determine a fact issue.
3. _____: _____. Generally, expert testimony concerning a question of law is not admissible in evidence.
4. **Property: Nuisances.** Mere ownership of real property imposes no responsibility for a nuisance on it unless the owner is instrumental in causing the nuisance.
5. **Zoning: Words and Phrases.** The term "commercial," as used in the law of zoning, denotes a use for profit.
6. **Nuisances.** Whether noise is sufficient to constitute a nuisance depends upon its effect upon an ordinary, reasonable man, that is, a normal person of ordinary habits and sensibilities.
7. **Nuisances: Presumptions.** To justify abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. It is presumed, in the absence of evidence to the contrary, that a plaintiff has ordinary sensibilities.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

James T. Gleason, of Stalnaker, Becker, Buresh, Gleason & Farnham, P.C., for appellants.

Norman F. Bradshaw for appellee Western R/C Flyers.

Deborah D. McLarney, of Erickson & Sederstrom, P.C., for appellees Startzer.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

In this action, the plaintiffs Larry R. and Katherine Kaiser, Margaret Schraeder, and Anthony and Helen Stepanek sought to permanently enjoin the defendants, Western R/C Flyers,

Inc., and Jay and Elaine Startzer, from operating a model airplane airfield near the village of Springfield, Sarpy County, Nebraska. In their amended petition, the plaintiffs alleged that the noise generated by the flying of the model airplanes violated Springfield zoning ordinances, was a nuisance, violated their statutory right to privacy, and constituted a continuing trespass. The district court found that the plaintiffs failed to meet their burden of proof regarding the alleged violation of zoning ordinances, that the defendants' activities did not constitute a nuisance, that the statutes relating to the right of privacy did not apply to the facts as alleged, that Western R/C Flyers was guilty of an unintentional continuing trespass which should be enjoined based upon the payment of fines for any future trespasses, and that each party should pay its own costs.

The plaintiffs, except Robert and Donna Isenberg, have appealed, contending the district court erred (1) in finding that they failed to meet their burden of proving the defendants were using the real estate in violation of applicable zoning ordinances, (2) in finding that using the premises for operation of model airplanes did not constitute a nuisance, (3) in finding that the use of the premises by the defendants did not violate plaintiffs' statutory right to privacy, (4) in failing to enjoin the defendants from using the premises for a radio-controlled scale model airplane airfield, and (5) in taxing costs to the plaintiffs.

An action for an injunction sounds in equity. In the appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. Spire v. Strawberries, Inc., ante* p. 1, 473 N.W.2d 428 (1991); *Burgess v. Omahawks Radio Control Org.*, 219 Neb. 100, 362 N.W.2d 27 (1985).

The record shows that defendants Startzers own approximately 160 acres of land located within the zoning jurisdiction of the village of Springfield. The plaintiffs own property adjacent to the Startzer property. On January 2, 1973,

the Startzer property was zoned "A Agricultural Residential District," pursuant to a Springfield village ordinance. When the ordinance was passed, the Startzers used the land primarily to raise row crops. An airstrip has also existed on the Startzer property for 20 to 25 years. The airstrip was used infrequently and ceased being used for full size aircraft for approximately 2 years during the mid-1970's.

Defendant Western R/C Flyers is a domestic nonprofit corporation organized to promote the recreational flying of radio-controlled model airplanes. On November 13, 1980, the club leased 1 acre of the Startzer property as an airfield and club site for flying radio-controlled model airplanes. They built a shed on the property in 1983. The club has maintained a leasehold interest in the Startzer property and now pays $500 per year in rent. Startzers have also given the club permission to fly planes within the boundaries of the entire Startzer property. The flight area is an oval shape approximately 600 feet long and 100 to 120 feet wide. The planes that are flown are replicas of real aircraft, powered by small gas engines and a gasoline-type fuel.

The planes occasionally fly beyond the border of the Startzer property and over the plaintiffs' property. Plaintiff Anthony Stepanek produced the remains of 4 model airplanes which crashed on his property between 1982 and 1988 and testified he was aware of approximately 12 more airplanes that had crashed on his property. Larry Kaiser testified that he observed one plane overfly his property and saw a plane crash across the road from Margaret Schraeder's house in 1987, on property not owned by any party to this lawsuit.

The plaintiffs first contend that the operation of radio-controlled model airplanes on the Startzer property violates the Springfield zoning ordinances. Under these ordinances, the "principal" uses permitted in the "A Agricultural Residential District" are (1) agricultural farms, truck gardens, greenhouses, plant nurseries, orchards, grain storage facilities, and the usual agricultural farm buildings and structures; (2) single-family dwellings; (3) roadside stands offering for sale agricultural products produced on the premises; (4) churches, seminaries, and convents, including

residences for pastors and teachers; (5) public and parochial schools and colleges; (6) publicly owned and operated buildings and facilities such as community centers, auditoriums, libraries, and museums; (7) fire stations; (8) public parks and recreation areas, playgrounds, and forest and conservation areas, including commercial uses and campgrounds under franchise of county or state governmental agencies; (9) *private recreation areas and facilities, including lakes, ponds, country clubs, golf courses, and swimming pools*; (10) public utility distribution systems, substations, terminal facilities, and reservoirs; (11) railroads; (12) irrigation facilities; and (13) hospitals and eleemosynary institutions. No special permit is required for these principal uses.

The conditional uses allowed in agricultural residential districts include (1) private and commercial kennels and facilities for raising, breeding, and boarding of dogs and other small animals; (2) confined feeding of livestock and feedlots; (3) sanitary landfills; (4) radio and television towers and transmitters; (5) airports (defined as "any area which is used or is intended to be used for the taking off and landing of aircraft, including helicopters, and any appurtenant areas which are used or are intended to be used for airport building or facilities, including open spaces, taxiways, and tie-down areas"; aircraft are defined as "any contrivance, now known or hereafter invented, for use or designed for navigation of or flight in the air or outer space, including missiles"); (6) mobile home parks; (7) nonfarm single-family dwellings; (8) home occupations; (9) extraction and processing of rock, gravel and sand, clay, and dirt; (10) temporary trailers; (11) *commercial recreational areas, including facilities for fishing, shooting, hunting, auto racing, cycle clubs, bridle clubs, etc.*; (12) churches, seminaries, and convents, including residences for pastors and teachers; (13) commercial camping areas; (14) public and parochial schools and colleges; (15) publicly owned and operated buildings and facilities such as community centers, auditoriums, libraries, and museums and privately owned noncommercial museums and historic areas; (16) hospitals, nursing homes, and eleemosynary institutions; (17) billboards; and (18) signs.

Conditional uses of land or buildings, as specified for each zoning district, are subject to the issuance of a special use permit with the following exception:

> Where a building or structure in the use thereof, or use of land lawfully exists on the effective date of this ordinance, then such use is classified by this ordinance as an allowable conditional use in the zoning district where it is located. The existing building or structure and its use thereof, or the use of land where no building or structure is involved comprising such a conditional use, shall be considered a lawful conditional use, except a special use permit shall be required for any expansion of physical development for such conditional use . . . .

The defendants have not applied for a special use permit to operate a model airplane airfield on the Startzer property. The plaintiffs contend the defendants are required to obtain a special use permit because the lease of 1 acre by Startzers to the club constituted a commercial recreation area as defined in the ordinance. The defendants contend that their use of the land is that of a private recreation facility, which is a principal permitted use, and that they are not required to have a special use permit.

At this point, we note that the parties rely heavily on the testimony of expert witnesses in support of their respective interpretations of the Springfield zoning ordinances. We commented in *Sasich v. City of Omaha*, 216 Neb. 864, 347 N.W.2d 93 (1984), that expert testimony is relevant and admissible only if it tends to help the trier of fact understand the evidence or to determine a fact issue and that expert testimony concerning the status of the law does not tend to accomplish either of these goals. Expert testimony concerning a question of law is generally not admissible in evidence. See, *Sasich v. City of Omaha, supra*; Neb. Rev. Stat. §§ 27-401, 27-402, and 27-702 (Reissue 1989). The interpretation of a zoning ordinance presents a question of law, and we decline to consider any expert testimony as to what constitutes a "commercial" or a "private" recreational use under the Springfield zoning ordinances.

The zoning ordinances at issue in this case regulate the actual

use of or activity on the land, not the ownership thereof. Similarly, this court has said:

> Mere ownership of real property imposes no responsibility for a nuisance on it, unless the owner is instrumental in causing the nuisance. A tenant in possession is liable for a nuisance by him created on the premises of his landlord, but the landlord is not liable for such a nuisance created by his tenant, unless the landlord authorized or contributed to the causing or maintaining of the nuisance.

City of Omaha v. Hugh Murphy Construction Co., 114 Neb. 573, 577, 208 N.W. 667, 668 (1926). The lease of 1 acre by Startzers to the club does not, in itself, constitute a "commercial recreation area" or a commercial use under the Springfield zoning ordinances. The use we are concerned with in this case involves the actual activities of members of the Startzers' tenant, Western R/C Flyers. The issue presented is whether the club is engaged in a private recreational activity or whether it is operating a commercial recreational area for purposes of the Springfield zoning ordinances.

The term "commercial," as used in the law of zoning, denotes a use for profit. See, e.g., *Imbergamo v. Barclay*, 77 Misc. 2d 188, 352 N.Y.S.2d 337 (1973). The record shows, however, that Western R/C Flyers is a nonprofit corporation and does not derive a financial profit from its use of the Startzer property. The Springfield zoning ordinances specifically include "private recreation areas and facilities, including lakes, ponds, country clubs, golf courses, and swimming pools" as uses permitted on the land in question as a matter of right. Interpreting a similarly worded ordinance, the court in *Henderson v. Zoning Appeals Bd. of Jefferson Parish*, 328 So. 2d 175, 178 n.5 (La. App. 1975), *cert. denied* 331 So. 2d 474 (La. 1976), noted that in this context, private recreational use was not limited "to use, for example, as a back yard swimming pool by an individual and members of his family and guests."

We conclude that Western R/C Flyers has been using the Startzer property for private recreational purposes and not for commercial profit. Under the Springfield zoning ordinances, the land may be used for such purposes as a matter of right, and the defendants were not required to obtain a special use permit.

Since the defendants were engaged in a private recreational activity, we need not address the plaintiffs' contentions that the defendants were operating an "airport" in violation of the zoning ordinances.

The plaintiffs next contend that the noise generated by the model airplanes constitutes a nuisance. In *Burgess v. Omahawks Radio Control Org.*, 219 Neb. 100, 101-02, 362 N.W.2d 27, 29 (1985), we said:

> The burden rests on the one complaining to establish that the use being made of the property must necessarily create a nuisance. . . . It is generally recognized that under certain circumstances noise may constitute a nuisance and be enjoined. Generally, noise is not a nuisance per se, but it may be of such a character as to constitute a nuisance in fact, which may serve as the basis of an action at law or in equity, even though it arises from the operation of a factory, industrial plant, or other lawful business or occupation. Whether noise is sufficient to constitute a nuisance depends upon its effect upon an ordinary, reasonable man, that is, a normal person of ordinary habits and sensibilities. Relief cannot be based solely upon the subjective likes and dislikes of a particular plaintiff, and must be based upon an objective standard of reasonableness. To justify abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. It is presumed, in the absence of evidence to the contrary, that a plaintiff has ordinary sensibilities.

On this issue, the plaintiffs testified that planes were flown over the Startzer property every day of the year, weather permitting, and that the planes made an irritating high-pitched "winding" [sic] noise. Apparently, anywhere from one to seven planes can be flown at any one time. The plaintiffs and one other witness testified that the noise caused them to become anxious or frustrated, thereby causing stomach problems, headaches, and/or loss of sleep. They also testified that the flying of model airplanes near or over their property prevented them from enjoying gardening, working in the home, or otherwise enjoying their property. Defendant Jay Startzer and four other

abutting property owners or neighbors testified, however, that they were not bothered by the airplanes or the noise. There was no evidence presented regarding the measurement of sound levels in decibels.

Having reviewed the record de novo, and taking into consideration the circumstances of this case and our decision in *Burgess v. Omahawks Radio Control Org., supra*, we conclude that the activities of Western R/C Flyers, although annoying to the plaintiffs, do not rise to the level of a private noise nuisance.

The plaintiffs finally contend that the defendants have violated their statutory right to privacy. Neb. Rev. Stat. § 20-203 (Reissue 1987) provides: "Any person, firm, or corporation that trespasses or intrudes upon any natural person in his or her place of solitude or seclusion, if the intrusion would be highly offensive to a reasonable person, shall be liable for invasion of privacy." This statute is similar to Restatement (Second) of Torts § 652 B at 378 (1977), which provides: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." The Restatement, *supra* at comment *a.* at 378, states that

> [t]he form of invasion of privacy covered by this Section does not depend upon any publicity given to the person whose interest is invaded or to his affairs. It consists solely of an intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.

The illustrations of invasions of privacy accompanying § 652 B encompass such situations as a reporter's entering a hospital room and taking the photograph of a person suffering from a rare disease; "window peeking" or wiretapping by a private detective; obtaining access to a person's bank records pursuant to a forged court order; or the continuance of frequent telephone solicitations. It does not appear that § 20-203 was designed to protect persons from the type of alleged intrusion involved in this case. In any event, the plaintiffs have failed to

establish that the defendants' activities constitute a nuisance or rise to the level of being "highly offensive to a reasonable person." The plaintiffs' assignment of error is without merit.

In its decree, the trial court found that there was evidence that the defendant Western R/C Flyers had allowed model airplanes to fly over the airspace of the plaintiffs, although the trespassing was infrequent and not done intentionally.

Notwithstanding that finding, the trial court enjoined the defendant Western R/C Flyers from causing *its* model airplanes to fly over the airspace immediately above the plaintiffs' property or to land on the plaintiffs' property. The trial court further provided that any future trespass by Western R/C Flyers would constitute a violation of the injunction, which might be enforced by any plaintiff upon the filing of an application to determine a fine. The trial court then ordered that "[t]he fine shall be $10.00 for each airspace violation and $25.00 for each time a plane has landed on any of Plaintiffs' property."

There is no cross-appeal, and the defendant Western R/C Flyers in its brief states that the remedy fashioned by the district court should be upheld. For that reason we do not consider or make any determination in regard to that part of the decree.

The judgment of the district court is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

HOWARD L. SCHMITT, APPELLANT, V. PEGGY JO SCHMITT, APPELLEE.

477 N.W.2d 563

Filed December 6, 1991. No. 89-722.

1. **Child Support: Modification of Decree: Appeal and Error.** The standard of review for modification of a child support order is de novo on the record, and the decision of the trial court will be affirmed absent an abuse of discretion.

2. **Child Support: Modification of Decree.** The paramount concern in modification of child support is the best interests of the children.
3. **Child Support: Modification of Decree: Proof.** The party seeking to modify a child support order must show a material change in circumstances which occurred subsequent to the entry of the original decree and was not contemplated when the decree was first entered.
4. **Child Support: Modification of Decree: Rules of the Supreme Court.** The adoption of the Nebraska Child Support Guidelines effective October 1, 1987, constituted a material change of circumstances sufficient to justify consideration of proposed modification of child support orders entered before that date.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Remanded with directions.

Vince Dowding, Arend R. Baack, and, on brief, Cathleen H. Snell, of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellant.

Kay E. Tracy, of The Legal Professional Corporation of Howard E. Tracy, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

Petitioner, Howard L. Schmitt, appeals from an order of the Hall County District Court increasing his child support payments. On appeal he alleges the district court erred in "finding that there had been a material or substantial change of circumstances since the original Decree was entered."

The marriage between petitioner and the respondent-appellee, Peggy Jo Schmitt, was dissolved on August 28, 1987. They have three children, born July 3, 1978, September 6, 1980, and May 15, 1984. Appellee wife agreed to a "Property Settlement Agreement." In part, the agreement provided that she received custody of the three children and that the appellant husband was responsible for support payments of $100 per month per child for the first 36 months and $150 per month per child thereafter. The property settlement agreement was approved by the court. There was no language in the decree indicating what the parties had considered in deciding on the amount of child support. The amount was less in the first 3

years to enable appellant to pay outstanding loans, including loans on his motor home. Other terms in the agreement provided for disposition of personal and real property of the parties. The agreement provided that neither party would pay alimony to the other.

Appellee was not present at the final hearing on August 19, 1987, nor was she represented by counsel. In 1985, the Nebraska Legislature authorized child support guidelines. The Nebraska Supreme Court adopted guidelines on September 10, 1987, to become operative on October 1, 1987. Appellee was not aware of the existence of the proposed guidelines at the time of the dissolution of her marriage. Whether appellant or his counsel knew of the proposed guidelines is not shown in the record. Appellee contends that the guidelines would suggest a total child support obligation for the appellant of approximately $880 per month.

Appellant's take-home pay has not increased since the original decree was entered, but his employer has covered the increased costs of appellant's health insurance, which coverage remains the same. Appellant sold the motor home awarded to him and used the proceeds to pay off loans and to buy a van, on which he is now making payments similar to those made on the motor home. Appellee's salary has increased. Appellant's living expenses have not changed substantially, but appellee testified that the children's expenses have increased to approximately $285 per month, including $150 in child care and $50 in increased utility bills. Appellant has voluntarily paid some of the children's increased expenses.

Appellee sought modification of the child support order because of a change in circumstances. The appellee alleged, inter alia, that the child support guidelines enactment, in itself, after the decree was entered herein constituted a change of circumstances sufficient to justify consideration of a request to modify the support. We agree with that position.

Appellee asked that the Supreme Court guidelines be used in determining the amount of support. A hearing was held on appellee's motion on May 26, 1989. On June 1, 1989, the court ordered appellant to increase his child support payments to $250 per month per child, commencing July 1, 1989. The court

did not state the basis for its decision. Appellant timely appealed.

The standard of review for modification of a child support order is de novo on the record, and the decision of the trial court will be affirmed absent an abuse of discretion. *Sanchez v. Sanchez*, 231 Neb. 963, 439 N.W.2d 82 (1989). When the evidence is conflicting in a child support modification hearing, this court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. See, *Dobbins v. Dobbins*, 226 Neb. 465, 411 N.W.2d 644 (1987); *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985).

The paramount concern in modification of child support is the best interests of the children. See *Wagner v. Wagner*, 224 Neb. 155, 396 N.W.2d 282 (1986). However, merely arguing that the original decree is not in the best interests of the children is not sufficient, as it would be if the action were a direct appeal from the original decree. See *Helgenberger v. Helgenberger*, 209 Neb. 184, 306 N.W.2d 867 (1981). This court does not treat an action to modify support as a retrial of the original case or a review of the equities of the original decree. See *Tworek v. Tworek*, 218 Neb. 808, 359 N.W.2d 764 (1984).

The party seeking to modify a child support order must show a material change in circumstances which occurred subsequent to the entry of the original decree and was not contemplated when the decree was first entered. See *Sanchez, supra*. In determining if a material change of circumstances has occurred, we have considered factors such as

> a change in the financial resources or ability to pay on the part of the parent obligated to pay support, needs of the child or children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction of income, and the duration of the change, namely, whether the change is temporary or permanent.

Morisch v. Morisch, 218 Neb. 412, 413, 355 N.W.2d 784, 786 (1984).

Appellant contends that the factors considered by the court in finding a change of circumstance are all "circumstances that the parties have some control over, unlike changes in the law."

Reply brief for appellant at 11. In *Babka v. Babka*, 234 Neb. 674, 452 N.W.2d 286 (1990), however, we held that a change in federal tax law constituted a material change of circumstances which would justify modification of a support order. In *Babka*, the parties agreed that the noncustodial parent would claim the children as dependents on his income tax returns, but this agreement was not made a part of the decree when they divorced in 1980. In 1984, Congress amended the tax code to give the deductions automatically to the custodial parent, unless the custodial parent signed a written waiver. In 1987, the custodial parent in *Babka* claimed the children as deductions on her returns, although she had signed the waivers in 1985 and 1986. The court ordered the custodial parent to sign the waiver, finding that the change in the tax law and the mother's refusal to sign the waiver constituted a material change of circumstances justifying the modification.

Even if a change is material, it will not justify modification unless it was not in the contemplation of the parties when the original decree was entered. "For instance, it obviously is in the contemplation of all of the parties in every case that the children involved will grow older and that their needs will therefore change. That fact, standing alone, is not sufficient to justify a modification . . . ." *Graber, supra* at 819, 374 N.W.2d at 10. The court has limited this language from *Graber* in subsequent decisions. In *Dobbins v. Dobbins, supra* at 468, 411 N.W.2d at 646, the court indicated that the above language from *Graber* was an overstatement and that "[t]he better view . . . is that 'evidence of the increased age of children alone will not furnish a satisfactory basis for modification of child support *unless* accompanied by competent evidence of the actual increase in the cost of maintaining the children.' " (Emphasis in original.) We held it was plain error for the trial court in *Dobbins* to refuse to allow evidence on the children's increased expenses due to increasing age.

Similarly, in *Wagner v. Wagner, supra*, we limited the requirement that anticipated changes had to be within the contemplation of the parties, by requiring that those anticipated changes be specifically noted on the record at the time of the original order.

In 1984, Congress required the states to develop guidelines for child support awards. See 42 U.S.C. § 667 (Supp. V 1987). Noncompliance resulted in the loss of federal funds for various programs. Nebraska complied with the federal requirements with the passage of Neb. Rev. Stat. § 42-364.16 (Reissue 1988), which required the Nebraska Supreme Court to create guidelines that would serve as a rebuttable presumption in setting child support. As stated above, the court created the guidelines, which became operative October 1, 1987.

Since that time, federal and state statutes have been passed which, when implemented, may result in a statutory approach to solving the problem of proposed modifications of child support payments. This statutory approach may well render the concept of "material change of circumstances" of much less concern.

In 1988, amendments to the Social Security Act were adopted by the U.S. Congress. These amendments generally provide that the child support guidelines be updated every 4 years and that the states implement procedures to ensure the updating. See 42 U.S.C. §§ 666(a)(10)(A) and 667(a) (1988).

In response to the federal mandate, the Legislature of Nebraska passed 1991 Neb. Laws, L.B. 715, effective September 6, 1991. That law provides, in part, that the Supreme Court of Nebraska shall provide, by rule, for modification of child support payments.

Child support modifications in the future, then, may well be controlled by statutes and rules. That leaves for disposition in this case modification of child support payments ordered before the child support guidelines became operative. We hold, as stated above, that the adoption of the Nebraska Child Support Guidelines effective October 1, 1987, constituted a material change of circumstances sufficient to justify consideration of proposed modification of child support orders entered before that date.

The primary interest in determining the level of child support payments is the best interests of the children. It cannot be said that the best interests of children are served if three children whose parents divorced before October 1, 1987, are to live on child support payments at one level, while three children of the

same age whose parents in a comparable financial situation were divorced after October 1, 1987, receive a substantially higher level of support.

Other jurisdictions have determined that the adoption of the guidelines is a material change of circumstances justifying a hearing on a possible modification. In those jurisdictions, the intent to treat the guidelines as a material change appears either in statutory language or in the guidelines themselves. See, *Wogoman v. Wogoman*, 44 Ohio App. 3d 34, 541 N.E.2d 128 (1989); *Charlesworth v. Child Support Enf. Div.*, 779 P.2d 792 (Alaska 1989); *Matter of Marriage of Edwards*, 804 S.W.2d 653 (Tex. App. 1991); *In re Marriage of Miller*, 790 P.2d 890 (Colo. App. 1990).

This decision will only affect decrees entered before the effective date of the child support guidelines in Nebraska. On the facts before us, the adoption of the child support guidelines constitutes a material change of circumstances in this case.

We have no evidence in the record, however, to show that the child support guidelines were applied in determining the amount ordered by the district court. If the guidelines constitute a material change of circumstances, the guidelines must be used to determine the new support amount.

Appellee contends that "[t]he Guidelines indicate that Appellant's total child support obligation for the three . . . children should be approximately . . . $880.00 . . . per month . . . ." Brief for appellee at 6. There is nothing more in the record to show the application of the guidelines to the parties' situation. We remand with directions to calculate the amount of child support in accordance with the Nebraska Child Support Guidelines.

REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. GEORGE L. SHEPARD, APPELLANT.

477 N.W.2d 567

Filed December 6, 1991. No. 90-673.

1. **Constitutional Law: Criminal Law: Right to Counsel.** A defendant has the right to represent himself if he voluntarily and intelligently elects to do so.
2. **Right to Counsel: Effectiveness of Counsel.** If a defendant chooses to represent himself he must be held responsible for his ineptness of counsel even though that counsel was himself.
3. **Criminal Law: Effectiveness of Counsel.** A criminal defendant who proceeds pro se is held to the same trial standard as if he or she were represented by counsel.
4. **Convictions: Appeal and Error.** In reviewing a criminal conviction, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence. Such matters are for the finder of fact, and the verdict must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.
5. **Judges: Recusal: Appeal and Error.** A motion requesting a judge to recuse himself on the grounds of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
6. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

George L. Shepard, pro se.

Don Stenberg, Attorney General, and Mark L. Ells for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

After jury trial, defendant was convicted of sexual assault in the first degree, in violation of Neb. Rev. Stat. § 28-319 (Reissue 1989), and of manufacturing child pornography, in violation of Neb. Rev. Stat. § 28-1463.03 (Reissue 1989). A posttrial hearing was held before the trial court, and the court found that defendant's conviction for first degree sexual assault was defendant's second conviction for that offense. After a

hearing, the trial court found defendant was not a mentally disordered sex offender. The court sentenced defendant to 40 years' imprisonment on the sexual assault charge, with the further provision that defendant would not be eligible for parole, pursuant to § 28-319(3), and to 10 years' imprisonment on the child pornography charge. The sentences were ordered to be served consecutively, and credit for jail time served was allowed.

Defendant, acting pro se, timely appealed. In this court defendant assigns 11 errors. As discussed below, we determine that none of the assigned errors have merit and that there is no plain error in the record. We affirm the convictions and sentences of defendant.

Difficulties were presented in the trial of this case, and in our review, because of defendant's insistence that he represent himself. The trial judge made every possible effort, without success, to persuade defendant to accept counsel, and exhibited great patience and impartiality in the face of defendant's ineptitude in defending himself and defendant's specific allegations that the judge had been bribed. Defendant voluntarily and intelligently elected to represent himself. In our review, we will deal with all of defendant's claims properly preserved, as best those claims may be discerned in defendant's wide-ranging, and in most instances inapposite, contentions.

We first note that a defendant has the right to represent himself if he voluntarily and intelligently elects to do so. See, Neb. Const. art. I, § 11; *State v. Kirby*, 198 Neb. 646, 254 N.W.2d 424 (1977); *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Defendant had some knowledge of the criminal process, since he had represented himself in a proceeding in this court. See *State v. Shepard*, 208 Neb. 188, 302 N.W.2d 703 (1981).

Once a defendant determines to represent himself, however, he assumes a great responsibility to himself to do so competently and properly and within rules and procedures set out for fully trained professional lawyers. As this court has said many times, "if a defendant chooses to represent himself he 'must be held responsible for his ineptness of counsel even though that counsel was himself.' " *State v. Stickney*, 222 Neb.

465, 467, 384 N.W.2d 301, 302 (1986), quoting from *State v. Brashear*, 201 Neb. 582, 270 N.W.2d 924 (1978). Or, as set out in *State v. Spotted Elk*, 227 Neb. 869, 876, 420 N.W.2d 707, 712 (1988), "a criminal defendant who proceeds pro se is held to the same trial standard as if he or she were represented by counsel."

Among the assignments of error is one contending that the evidence was insufficient to support a guilty verdict. In view of this allegation, we have examined the entire bill of exceptions, consisting of 752 pages. We have stated:

> In reviewing a criminal conviction, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence. Such matters are for the finder of fact, and the verdict must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.

State v. Thomas, 236 Neb. 84, 90, 459 N.W.2d 204, 209 (1990).

Viewed in that light, the record shows the following: At about 7 a.m. on December 7, 1989, the mother of the child victim took the child to her regular babysitter. At that time the child was approximately 3 years 10 months old. Later that day, the child was taken by the babysitter's daughter, Christine Babb, to defendant's residence for the purpose of taking pornographic photographs. Twelve photographs of the child, in various poses and all showing the child undressed from the waist down, were taken. Two of the photographs appear to show the naked defendant sexually penetrating the child.

The child was returned to the babysitter's house later and was picked up by the child's mother about 4:30 p.m. On the way home, the child told her mother that "George licked my butt" and that George had stuck "that thing in her butt" that her father and her brothers have. The child referred to her vaginal area as her "butt." The mother then returned to her home, and the child was taken to the hospital. The child repeated much the same story to the doctor at the hospital and later that evening, at about 10:15 p.m., to an investigator with the Douglas County sheriff's office.

The evidence, particularly the photograph of the naked defendant together with the child unclothed from the waist

down, establishes beyond any doubt that defendant is guilty of a violation of § 28-1463.03, forbidding child pornography. Defendant admitted as much when, in giving his final argument to the jury, he stated:

> I admit being guilty of manufacturing. I admit I was wrong. I made a mistake. I deserve to be punished for that, but I don't believe I should be punished for a crime I did not commit. . . . Those pictures were took to pay off a trailer who was within a week of being repossessed.

In a crafty approach to the defense of the more serious crime of sexual assault in the first degree, defendant seizes on what is probably the only possible defense available to him on that charge. Defendant contends that the State did not prove any sexual penetration of the child victim by defendant. In that allegation, defendant is in error.

First of all, one photograph admitted in evidence depicts defendant inserting his penis in the child's vagina, and one depicts defendant inserting his penis in the child's anus. Defendant contends the pictures do not reflect penetration, but only the simulation of penetration. In support of his theory, defendant called a certified photographer to testify. The photographer, as an expert, testified generally that by taking pictures at different angles, dimensions could be made to appear different than they actually were. The photographer did not testify as to the pictures of defendant and the child victim, except to note that the victim appeared to him to be about 8 years old rather than 3. Although the photographer's testimony might be used to support an argument that the photographs of defendant and the child did not show penetration, apparently the jury did not believe that contention.

Other evidence established penetration. Such evidence included the child victim's statements to her mother, a doctor, and a deputy sheriff concerning the recent startling events that had happened, and the testimony of one of defendant's female companions, who had taken some of the photographs, that one picture showed "his penis inserted into her butt." Further evidence, if believed, established that defendant was alone with the child for some time.

In addition, defendant ignores the fact that penetration need

not necessarily be penile penetration to constitute penetration sufficient to establish a violation of the criminal statute forbidding sexual assault in the first degree. See Neb. Rev. Stat. § 28-318(6) (Reissue 1989).

The evidence of defendant's guilt is overwhelming. Most of the legal points argued by defendant were not preserved at trial and need not be discussed herein.

Others of defendant's assignments may be discussed briefly. Defendant contends he was "[d]enied proper access to the Courts by refusing defendant access to the law library to prepare and research for an adequate hearing in the defense of his up and coming trial in pro se, thereby dening [sic] the defendant due process, and misconduct of legal advisor." There is nothing in the record to support defendant's contention in this regard. First of all, defendant had the services of an experienced criminal trial lawyer at all times throughout the trial. This lawyer was denominated a "technical advisor" and was available to defendant. Defendant's only mentions in his brief complaining of this arrangement were that "[t]he conduct of the Public defender was gross" and that the public defender had not filed a motion to suppress. Brief for appellant at 8. It epitomizes defendant's contentions that he specifically refused the services of an attorney and now complains of the attorney's failure to act.

With regard to the lack of access to a library, there is nothing in the record to support this allegation. The record shows that early in the proceedings defendant requested a 30-day continuance, which was granted. Then, on May 3, 1990, the trial court set the trial for June 4, 1990, without objection by defendant. Defendant was before the court on May 22 and 24, 1990, and did not give any indication he was having any difficulty preparing for trial, nor did he ask for a continuance. Defendant was before the court twice, on May 31 and again on June 1, and did not complain or seek a continuance.

On the first day of trial, defendant again confirmed he wanted to represent himself. On the same day, defendant did seek a continuance of the trial, but only for the purpose of seeking additional time to pursue his motion to disqualify the trial judge, a matter discussed below. After the jury was

selected, defendant asked for and received additional time to prepare his opening statement. There is no merit to defendant's assignment of error in this regard.

Among defendant's assignments of error is "Motion to recuse Judge was proper, so not to deny due process." In this connection, at a hearing on one of defendant's many motions, defendant sought recusal of the judge and told the trial judge that defendant had "received a statement of evidence that you, yourself [the trial judge], had received a pay-off." The trial court granted defendant two separate hearings on this issue and the record made does not support defendant's contentions in any way. We have held that a motion requesting a judge to recuse himself on the grounds of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. See, *State v. Thomas*, 236 Neb. 84, 459 N.W.2d 204 (1990); *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987). Further, a defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *State v. Bird Head, supra.*

Defendant's evidence on this issue did not present even a question of fact. His contention in this regard is without merit.

There is no basis to support any of defendant's wide-ranging contentions on this appeal. The judgment of convictions and the sentences imposed are affirmed.

AFFIRMED.

L.G.P., INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD R.G., APPELLANT, V. NEBRASKA DEPARTMENT OF SOCIAL SERVICES ET AL., APPELLEES.

477 N.W.2d 571

Filed December 6, 1991. No. 90-910.

1. **Habeas Corpus: Child Custody: Appeal and Error.** A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record.

2. **Habeas Corpus: Child Custody.** A question in every habeas corpus child custody case is the best interests of the child.
3. _____: _____. Proceedings in habeas corpus to obtain the custody of a child are governed by considerations of expediency and equity and should not be bound by technical rules.
4. **Habeas Corpus: Courts: Jurisdiction.** Nothing in the Nebraska Juvenile Code shall be construed to deprive the district courts of, inter alia, their habeas corpus jurisdiction.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Connie Kearney for appellant.

Don Stenberg, Attorney General, and Royce N. Harper for appellees.

James S. Jansen, Douglas County Attorney, and Elizabeth G. Crnkovich, and Thomas M. Kenney, Douglas County Public Defender, and Regina T. Makaitis, amici curiae.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

L.G.P., appellant, is the mother of R.G., born November 12, 1989. On August 10, 1990, appellant took R.G. and her sister to a day-care home, leaving two other small children at home alone. Authorities, alerted to the possibility that R.G. was endangered in her current surroundings through reports of bruising under her eyes on at least two occasions, took all four of appellant's children into custody.

Appellant returned home approximately 3 hours later to find a handwritten note signed by a police officer tagged to the door. The note stated that the children had been taken into protective custody and listed a phone number to call for further information.

On August 13, appellant filed a petition for writ of habeas corpus in the district court for Douglas County. A hearing was set for 3 days later. The district court determined at the hearing only that due process had been accorded appellant in the removal of her children, and ordered the county attorney to file a petition regarding R.G. in the separate juvenile court. The

district court made no determination as to the evidence regarding abuse or neglect, nor did it inquire into the best interests of the child. L.G.P. appeals that decision.

Appellant assigns that the district court erred in (1) denying her petition for writ of habeas corpus; (2) failing to find the ex parte order of the separate juvenile court invalid; (3) failing to find that she was denied due process; (4) failing to find Neb. Rev. Stat. §§ 43-253, 43-255, 43-256, and 43-275 (Reissue 1988) unconstitutional insofar as these sections apply to dependent children; (5) failing to find that reasonable efforts were not made to keep the child in the home, pursuant to Neb. Rev. Stat. § 43-254 (Reissue 1988); (6) failing to find that the child was not placed in the least restrictive environment, as required by Neb. Rev. Stat. § 43-250 (Reissue 1988); (7) failing to find that the minor child was not in imminent danger and that the child's removal, without a warrant, was unlawful and violated appellant's right to due process of law; and (8) failing to find that the child was unlawfully detained pursuant to a county attorney's "hold."

This is the second appearance of this case in this court, and with the exception of those issues surrounding the denial of the petition for writ of habeas corpus, we have previously considered and decided all other assignments of error in *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991).

As to the appropriateness of the district court's denial of appellant's petition for writ of habeas corpus, we affirm. As we held in *In re Interest of R.G., supra*, appellant was afforded due process in the juvenile court.

A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. *Yopp v. Batt*, 237 Neb. 779, 467 N.W.2d 868 (1991); *Gaughan v. Gilliam*, 224 Neb. 836, 401 N.W.2d 687 (1987).

The remaining question present in every habeas corpus case is the best interests of the child. *Reynolds v. Green*, 232 Neb. 60, 439 N.W.2d 486 (1989).

Proceedings in habeas corpus to obtain the custody of a child are governed by considerations of expediency and equity and should not be bound by technical rules. *McCormick v. State*, 218 Neb. 338, 354 N.W.2d 160 (1984).

Pursuant to Neb. Rev. Stat. § 43-245(3) (Cum. Supp. 1990), nothing in the Nebraska Juvenile Code shall be construed to deprive the district courts of, inter alia, their habeas corpus jurisdiction. The district court's denial of the petition was proper, even absent production of findings regarding the best interests of the child, as the court may, and appropriately did, defer to the judgment of the juvenile court on that issue.

The assignments of error are without merit, and we therefore affirm.

AFFIRMED.

IN RE INTEREST OF D.P.Y. AND J.L.Y., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. P.Y., APPELLANT.

477 N.W.2d 573

Filed December 6, 1991. No. 91-230.

1. **Juvenile Courts: Evidence: Appeal and Error.** An appeal from an order of adjudication made by a juvenile court is reviewed by the Supreme Court de novo on the record. In a de novo review we disregard inadmissible evidence.
2. **Trial: Evidence: Hearsay: Appeal and Error.** The determination as to the admissibility of an excited utterance is a matter within the discretion of the trial court that will not be disturbed on appeal absent an abuse of discretion.
3. **Trial: Evidence: Hearsay.** For a statement to qualify as an excited utterance, the following criteria must be established: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event. The key requirement is spontaneity, which requires a showing the statements were made without time for conscious reflection.

Appeal from the District Court for Sarpy County: WILLIAM D. STALEY, Judge. Affirmed.

S. Caporale for appellant.

Michael D. Wellman, Sarpy County Attorney, and Mary Margaret Zerse Stevens for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The appellant is the father of a son, born May 14, 1981, and a daughter, born May 15, 1986. On July 30, 1990, a petition was filed in the juvenile court, alleging that the children were in a situation or engaged in an occupation dangerous to life or limb or injurious to their health or morals. See Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988).

After an evidential hearing, the juvenile court found and adjudged on January 24, 1991, that the children were children within the meaning of § 43-247(3)(a) and continued the matter for a disposition hearing. From the order of adjudication, the father has appealed to this court.

The record shows that the appellant and the children's mother were divorced on February 14, 1989. The mother was granted custody of the children, and the appellant was granted reasonable rights of visitation.

An amended petition was filed on October 15, 1990, which alleged that the appellant had engaged in inappropriate sexual contact with the children by having taken their clothes off or instructing them to take their clothes off for him, and by having touched their intimate body parts during visitations. The amended petition alleged that the appellant had emotionally abused his children by intimidating them, by threatening them with death in the event of their disclosure of the above-mentioned abuse, by having told them to lie to their babysitter and their mother about the events that had taken place during visitation, and by humiliating them by engaging in such unnatural and immoral acts with them during visitation. The amended petition further alleged that the mother felt she could not protect the children from further abuse, intimidation, and humiliation by the appellant and that she had noticed a steady deterioration in their emotional well-being and stability, as well as dramatic anxiety in the children at the mention of the appellant.

Following the adjudication hearing, the juvenile court did not find the allegations referring to the threats made to the children, the mother's feelings of not being able to protect the children, and the steady deterioration of the children's emotional well-being and stability to be true.

At the adjudication hearing, Lynda Sallach Madison, a psychologist, testified that she had performed a psychological evaluation of the daughter. She testified that the daughter's behavior and test results were consistent with those of children who experience physical aggression as part of their lifestyle.

Madison's psychological evaluation summary states that the daughter's behavior and responses suggest a high probability that she has been in a chaotic environment in which she does not feel able to control events; that she is fearful, unprotected, and confused; and that her test results show her expectation that men will be violent against women and children and that women will be helpless to protect themselves.

As part of the evaluation, the child made drawings of herself, her mother, and the appellant. Madison stated that based on the sexual content of the drawings and the child's verbalizations as to what they depicted, it is highly probable that she has been exposed to sexual experiences beyond her developmental capacity to understand. Madison concluded that it is highly probable that the daughter has experienced physical aggression and sexual abuse from a man at some time in the past.

Madison also testified that it would not be in the daughter's best interests to testify at the adjudication hearing.

Julie Ann McKee, a psychologist, testified that she had performed a psychological evaluation of the son and that her findings indicated that he had been physically, sexually, and/or emotionally abused.

During McKee's interview with the son, he reported to her that the appellant had inappropriately touched him and his sister. McKee found his report of sexual abuse to be highly credible and believed it was unlikely that he had been coached to make a false allegation because his emotional tone upon disclosure was predominantly sad, which is characteristic of sexual abuse victims in his age range; because his account was matter-of-fact and in no way dramatized or embellished; because he reported the sexual abuse in simple, concrete terms consistent with his age and verbal abilities; and because his psychological testing was consistent with that of children who have suffered emotional, physical, and/or sexual abuse.

The son also drew pictures of himself and his family. His

pictures of the appellant and the appellant's girl friend, with whom the appellant lives, depict the male and female sexual organs. The pictures of himself, his sister, and his mother do not indicate any sexual organs.

McKee also testified it would be too traumatizing for the son to testify at the adjudication hearing.

Over the appellant's objection as to inadmissible hearsay, the children's babysitter was allowed to testify that on July 16, 1990, while she was babysitting the children, the daughter was sitting on the floor watching television when she suddenly hit her cat so hard that it flew across the room and hit the wall. After she had hit the cat, she said, "That's how my daddy hits me." The babysitter responded by asking, "Your daddy hits you like that?" and the daughter said the appellant slapped her and her brother across the face and kicked them in the head and legs. According to the babysitter, the daughter then went on for about 2 hours telling about the physical and sexual abuse the appellant had done to them. The babysitter testified that she did not ask any questions but listened as the daughter described the things the appellant had done to her and her brother.

The juvenile court admitted the babysitter's testimony on the theory that it fell within the excited utterance exception to the hearsay rule contained in Neb. Rev. Stat. § 27-803(1) (Reissue 1989).

The babysitter testified that she told the children's mother what the daughter had told her and that the mother later informed the Douglas County sheriff's office. Officer Bruce Decker of the LaVista Police Department was contacted to assist in investigating the sexual abuse allegations because some of the incidents described could have taken place at the appellant's apartment in LaVista.

Officer Decker was unable to interview the daughter because she would not talk to him. However, he was able to interview the son, who described how he had been abused by the appellant and his girl friend.

Officer Decker was allowed to testify as to this information at the adjudication hearing over the appellant's objection as to inadmissible hearsay. The juvenile court admitted this testimony for the limited purpose of showing that the statements had been made and not for the truth of the matter

asserted.

The appellant and his girl friend testified and denied that there had been any sexual abuse of the appellant's children. However, the appellant admitted that he had struck the children's mother in the children's presence and that he frequently lost his temper with the daughter because she was not yet toilet trained. The appellant's girl friend testified that the appellant used profanities in front of the children when he was angry. The appellant's girl friend also testified that she had observed a bruise on the daughter's face, but she did not know how it got there.

The appellant's principal assignments of error relate to the admission of hearsay testimony by the juvenile court. The testimony of the babysitter as to the statements made to her by the daughter was admitted under the excited utterance exception. The determination as to the admissibility of an excited utterance is a matter within the discretion of the trial court that will not be disturbed on appeal absent an abuse of discretion. *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987).

Section 27-803(1) excepts from the hearsay rule "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." This exception to the hearsay rule is based on the theory that " 'circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.' " *In re Interest of R.A. and V.A., supra* at 162, 403 N.W.2d at 362 (quoting 4 J. Weinstein & M. Berger, Weinstein's Evidence 803-33 (1985)).

For a statement to qualify as an excited utterance, the following criteria must be established: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event. *In re Interest of R.A. and V.A., supra*. The key requirement is spontaneity, which "requires a showing the statements were made without time for conscious reflection." *Id.* at 166, 403 N.W.2d at 364.

In this case, there is no indication as to when the alleged abuse of the children as reported to the babysitter by the

daughter occurred. While the time interval may not be controlling, see *In re Interest of R.A. and V.A., supra*, it should be considered with regard to whether the statements were made without time for conscious reflection. The statements made by the daughter do not appear to relate to a startling event that had recently occurred, but were made to explain why she hit the cat. Accordingly, there is no showing that the statements were made while she was under the stress of a startling event, and the trial court abused its discretion in admitting the testimony of the babysitter as to what the daughter told her on July 16, 1990.

The testimony of Officer Decker as to what the son told him during the course of his investigation was admitted for the limited purpose of showing that the statements had been made, and not for the truth of the matter asserted. If Officer Decker's testimony is not considered for the truth of the matter asserted, it is irrelevant, and therefore, we do not consider it in the determination of this matter.

The Supreme Court reviews this proceeding de novo on the record. *In re Interest of R.A. and V.A., supra*. "In such de novo review, we must disregard impermissible or improper evidence," *In re Interest of D.L.S.*, 230 Neb. 435, 440, 432 N.W.2d 31, 35-36 (1988), and consider whether the children come within the meaning of § 43-247(3)(a), as established by a preponderance of the admissible evidence.

Disregarding the testimony of the babysitter and Officer Decker as to the statements made to them, we conclude that the evidence is sufficient to establish that the children are in a situation dangerous to life or limb or injurious to their health or morals as provided in § 43-247(3)(a). Both psychologists testified that the children's behavior is consistent with children who have been abused physically, emotionally, and/or sexually. Exhibits 1 through 6, which include the psychologists' reports and the children's drawings, are persuasive. Thus, we find by a preponderance of the evidence that the children are within the meaning of § 43-247(3)(a) and that the decision of the juvenile court should be affirmed.

AFFIRMED.

CAPORALE, J., not participating.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. NEBRASKA ASSOCIATION OF PUBLIC EMPLOYEES, LOCAL 61 OF THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, APPELLEE AND CROSS-APPELLANT, AND NEBRASKA ASSOCIATION OF CORRECTIONAL EMPLOYEES/AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, APPELLANT.

477 N.W.2d 577

Filed December 13, 1991. No. 89-737.

1. **Constitutional Law: Contracts: Arbitration and Award.** Provisions in Neb. Rev. Stat. §§ 25-2601 et seq. (Reissue 1989) authorizing binding arbitration of future disputes, and clauses in contracts providing for binding arbitration of future disputes, violate Neb. Const. art. I, § 13.
2. **Constitutional Law: Courts.** All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without denial or delay.
3. **Declaratory Judgments: Judicial Construction: Statutes.** A declaratory judgment action is an appropriate method to obtain a judicial construction of a statute or determination of a statute's validity, including resolution of a challenge to the constitutionality of a statute.
4. **Declaratory Judgments: Injunction: Statutes.** A declaratory judgment that a legislative act is unconstitutional might be a basis for injunctive relief against enforcement of the act and, unrelated to a claim for damages, is more akin to relief through an equity action than to relief through a law action.
5. **Equity: Appeal and Error.** In an appeal of an equity action, this court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
6. **Constitutional Law: Statutes: Presumptions: Proof.** One claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional. A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
7. **Actions: Courts: Arbitration and Award.** An agreement to submit a future controversy to arbitration cannot be enforced, upon the theory that the powers of all the courts may always be invoked by every citizen for the protection of that citizen's rights, that the enforcement of a valid and subsisting cause of action is a substantial right, and that the citizen cannot be held to have bartered that away by any agreement made before a controversy arises.
8. **Contracts: Arbitration and Award: Public Policy.** Arbitration agreements entered into before a dispute arises oust the courts of jurisdiction and are thus against public policy and therefore void and unenforceable.
9. **Constitutional Law: Legislature.** The Legislature cannot lawfully act beyond the

limitations of the Constitution.

10. **Estoppel.** The doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand. The doctrine is to be applied with caution in such cases and only for the purpose of preventing manifest injustice.

11. _____. The elements of equitable estoppel are, as to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

J. Murry Shaeffer for appellant.

Dalton W. Tietjen, of Tietjen, Simon & Boyle, for appellee Nebraska Association of Public Employees.

Robert M. Spire, Attorney General, and Charles E. Lowe for appellee State.

Mark D. McGuire and Scott J. Norby, of Crosby, Guenzel, Davis, Kessner & Kuester, for amicus curiae Nebraska State Education Association.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Two labor unions, one a cross-appellant, appeal a trial court declaratory judgment holding unconstitutional (1) portions of the Nebraska Uniform Arbitration Act that purport to validate agreements to submit future disputes to binding arbitration and (2) clauses in two labor contracts which require the unions, their members, and the employer involved to submit future disputes to binding arbitration.

We hold that (1) provisions in Neb. Rev. Stat. §§ 25-2601 et

seq. (Reissue 1989) authorizing binding arbitration of future disputes, and (2) clauses in contracts providing for binding arbitration of future disputes, violate Neb. Const. art. I, § 13. That constitutional provision dictates that "[a]ll courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."

Accordingly, we affirm the judgment of the district court for Lancaster County.

FACTUAL BACKGROUND

This action for declaratory judgment was instituted by Nebraska's Attorney General. It names as defendants the Nebraska Association of Public Employees, Local 61 of the American Federation of State, County, and Municipal Employees (NAPE), and the Nebraska Association of Correctional Employees/American Federation of State, County, and Municipal Employees (NACE). NAPE is the certified exclusive collective bargaining representative of state employees in the health and human care nonprofessional bargaining unit; the engineering, science, and resources bargaining unit; the maintenance, trades, and technical bargaining unit; and the social services and counseling bargaining unit. NACE is the certified exclusive collective bargaining representative of state employees in the protective service bargaining unit. The employer involved is the State of Nebraska.

In 1987, the Legislature enacted the Uniform Arbitration Act (the Act). It provides in relevant part that "[a] provision in a written contract to submit to arbitration any controversy thereafter arising between the parties . . . is valid, enforceable, and irrevocable. . . ." § 25-2602.

On February 9, 1988, respective representatives of NAPE, NACE, and the State of Nebraska, as an employer, executed separate collective bargaining agreements effective for the period of July 1, 1988, through June 30, 1989. Both unions proposed that the contracts contain provisions for binding arbitration of certain disputes which might arise after execution of the contracts. The State agreed to those provisions only after

letters of agreement were executed by representatives of NAPE and NACE, acknowledging that Nebraska's Attorney General had issued an opinion declaring unconstitutional the Act's provisions for binding arbitration. NAPE's letter of agreement provided:

> It is understood by the parties that the Nebraska Attorney General has issued an opinion that final and binding arbitration is unconstitutional, and the parties also acknowledge that the Attorney General may file a legal action seeking to resolve the constitutionality issue. In such case the Union agrees to serve as defendant in such law suit and to pay the costs of defending such law suit.

The letter of agreement signed by NACE's representative is similar to the one signed by NAPE's representative.

The NAPE contract contains two provisions for final and binding arbitration between the State and the affected employees. Paragraph 1.6 contains provisions for final and binding arbitration regarding terms and conditions of employment. Paragraph 4.11 contains provisions for final and binding arbitration regarding resolution of employee grievances. The NACE contract contains a provision similar to paragraph 4.11 of NAPE's contract.

Before the State filed suit, NAPE invoked both paragraphs 1.6 and 4.11 of its contract. The State responded by refusing to submit to arbitration. Thereafter, Nebraska's Attorney General filed this declaratory judgment action. He asked the trial court to invalidate the final and binding arbitration clauses of the labor contracts and to declare provisions of the Act unconstitutional that authorize binding arbitration of future disputes.

ASSIGNMENTS OF ERROR

Combined, the errors assigned by NAPE and NACE challenge the district court rulings that (1) the portion of § 25-2602 of the Act which authorizes agreements to submit disputes to arbitration violates public policy and is contrary to Neb. Const. art. I, § 13; (2) § 25-2613(a) violates Neb. Const. art. I, § 13, in that it does not provide for meaningful review of an arbitrator's decision; (3) clauses of the labor contracts

between the State and NAPE and NACE which provide for final and binding arbitration are unconstitutional; and (4) the State is not equitably estopped from challenging the validity and enforceability of the labor contract provisions regarding arbitration.

STANDARD OF REVIEW

Under Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1989), a declaratory judgment action is an appropriate method to obtain a judicial construction of a statute or determination of a statute's validity, including resolution of a challenge to the constitutionality of a statute. See *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989). A declaratory judgment that a legislative act is unconstitutional might be a basis for injunctive relief against enforcement of the act and, unrelated to a claim for damages, is more akin to relief through an equity action than to relief through a law action. *Id.* Consequently, in the present appeal we apply the standard for review of an equity appeal:

> In an appeal of an equity action, this court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

State ex rel. Spire v. Strawberries, Inc., ante p. 1, 4, 473 N.W.2d 428, 432 (1991). One claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional. *Id.* A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.*

CONSTITUTIONALITY OF § 25-2602

The earliest Nebraska case to address the validity of contract provisions which compel parties to arbitrate future disputes was *German-American Ins. Co. v. Etherton*, 25 Neb. 505, 41 N.W. 406 (1889). This court held void a clause in an insurance policy which required arbitration of the amount of the claim as a condition precedent to bringing an action in court against the

company. "Where a policy provides that the whole matter in controversy between the parties, including the right to recover at all, shall be submitted to arbitration, the condition is void. The effect of such a provision is to oust the courts of their legitimate jurisdiction, which the parties cannot do." *Id.* at 508, 41 N.W. at 406.

In a line of decisions that followed *German-American Ins. Co.*, this court reiterated its concern that such clauses in a contract would oust the courts of their jurisdiction. See, e.g., *National Masonic Accident Association v. Burr*, 44 Neb. 256, 62 N.W. 466 (1895); *Schrandt v. Young*, 62 Neb. 254, 86 N.W. 1085 (1901). In two cases decided in 1902, this court explicitly grounded this policy in Neb. Const. art. I, § 13.

The question presented in *Hartford Fire Ins. Co. v. Hon*, 66 Neb. 555, 92 N.W. 746 (1902), was the validity of a provision in an insurance contract which required that the question of the amount of loss be submitted to arbitrators. This court held that such a provision was an unenforceable violation of Neb. Const. art. I, § 13, because it ousted the courts of jurisdiction. The court stated that an agreement to submit a future controversy to arbitration cannot be enforced, upon the theory that the powers of all the courts may always be invoked by every citizen for the protection of that citizen's rights, that the enforcement of a valid and subsisting cause of action is a substantial right, and that the citizen cannot be held to have bartered that away by any agreement made before a controversy arises. *Id.*

The text of Neb. Const. art. I, § 13, was quoted by this court in *Phoenix Ins. Co. v. Zlotky*, 66 Neb. 584, 92 N.W. 736 (1902). There this court reiterated that "whenever we say that the jurisdiction of courts may be contracted away in advance on any question, we open a leak in the dyke of constitutional guarantees which might some day carry all away." *Id.* at 588, 92 N.W. at 737.

This court has since frequently stated the rule that arbitration agreements entered into before a dispute arises oust the courts of jurisdiction and are thus against public policy and therefore void and unenforceable. See, e.g., *Babb v. United Food & Commercial Workers Local 271*, 233 Neb. 826, 448 N.W.2d 168 (1989); *Overland Constructors v. Millard School*

Dist., 220 Neb. 220, 369 N.W.2d 69 (1985). In restating this policy, the court has only infrequently explicitly cited Neb. Const. art. I, § 13. See, e.g., *Poppert v. Brotherhood of R. R. Trainmen*, 187 Neb. 297, 189 N.W.2d 469 (1971); *Rentschler v. Missouri P. R. Co.*, 126 Neb. 493, 253 N.W. 694 (1934). Nonetheless, it is clear that the public policy consistently relied upon by this court is grounded in Neb. Const. art. I, § 13. Thus, NAPE's contention that the Legislature's enactment of the arbitration Act is a declaration of public policy in favor of arbitration is irrelevant. The Legislature cannot lawfully act beyond the limitations of the Constitution. *State ex rel. Caldwell v. Peterson*, 153 Neb. 402, 45 N.W.2d 122 (1950). Therefore, to the extent it provides for arbitration of future disputes, § 25-2602 violates Neb. Const. art. I, § 13, as do the binding arbitration clauses of the labor contracts involved here.

NACE assigns as error the trial court's holding that the State is not equitably estopped from challenging the validity and enforceability of the arbitration clauses in the contract. The doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand. The doctrine is to be applied with caution in such cases and only for the purpose of preventing manifest injustice. *Jennings v. Dunning*, 232 Neb. 366, 440 N.W.2d 671 (1989). The facts in this litigation do not justify application of the doctrine of equitable estoppel against the State.

The elements of equitable estoppel are, as to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the

party claiming the estoppel, to his injury, detriment, or prejudice. *Wheat Belt Pub. Power Dist. v. Batterman*, 234 Neb. 589, 452 N.W.2d 49 (1990).

The record reveals that there were no false representations or concealment of material facts on the part of the State. On the contrary, the State agreed to the inclusion of the arbitration clauses in the contracts only after securing the signatures of representatives of both NAPE and NACE on the letters of agreement. Those letters of agreement clearly establish the State's reservations regarding the constitutionality of the arbitration clauses. Both unions were fully informed of the State's position in that regard. Because the first element of equitable estoppel is not present in the case, this assignment of error is without merit.

It is unnecessary for us to consider the remaining assignment of error. Having held that agreements to arbitrate future disputes are unconstitutional, we need not address the sufficiency of the judicial review provisions contained in § 25-2613(a) of the Act.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KEVIN R. GROVES, APPELLANT.

477 N.W.2d 789

Filed December 13, 1991. No. 90-283.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, this court will uphold a trial court's findings of fact unless those findings are clearly erroneous.
2. _____: _____. In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion.
3. **Search Warrants: Affidavits.** This court has adopted the "totality of the circumstances" test set forth by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), to determine the sufficiency of an affidavit used to obtain a search warrant.

4. **Search Warrants: Probable Cause.** It is only the probability, and not a prima facie showing, of criminal activity which is the standard of probable cause for issuance of a search warrant.
5. _____: _____. In evaluating probable cause for the issuance of a search warrant, the magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
6. **Search Warrants: Probable Cause: Appeal and Error.** The duty of the reviewing court is to ensure that the issuing magistrate had a substantial basis for determining that probable cause existed.
7. **Search Warrants.** An error in the street address of the place to be searched is not per se fatal to the validity of a warrant.
8. **Search Warrants: Police Officers and Sheriffs.** The test to determine the sufficiency of a search warrant's description is whether the place to be searched is described with sufficient particularity so as to enable the executing officer to find and identify the location with reasonable effort, and whether there is any reasonable probability that another site might mistakenly be searched.
9. **Search Warrants.** Factors to be considered in determining the validity of a warrant inaccurately describing the place to be searched are whether the place which was intended to be searched has previously been under surveillance or was being surveilled while the warrant was obtained and whether other parts of the description which are correct limit the property to be searched to one place.
10. _____. Evidence which emerges after the warrant is issued has no bearing on whether a warrant was validly issued.
11. **Motions to Suppress: Search Warrants: Police Officers and Sheriffs.** Evidence seized pursuant to a defective search warrant is not subject to being suppressed where the warrant is executed by officers who acted in good faith and reasonably believed that they were executing a valid warrant.
12. **Search Warrants: Probable Cause: Proof: Time.** Proof of probable cause justifying the issuance of a search warrant generally must consist of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time. However, whether the proof satisfies this test is determined by the circumstances of each case.
13. **Search Warrants: Time.** In general, no more than a reasonable time may have elapsed between the occurrence of facts and the issuance of a search warrant based thereon.
14. **Motions for Mistrial: Appeal and Error.** The decision as to whether to grant a motion for mistrial is a matter within the discretion of the trial court, and such a ruling will be upheld absent an abuse of that discretion.
15. _____: _____. Ordinarily, error cannot be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material.
16. **Proof: Appeal and Error.** The defendant must prove that the alleged error actually prejudiced him, rather than creating only the possibility of prejudice.

17. **Rules of Evidence: Other Acts: Proof.** Neb. Rev. Stat. § 27-404(2) (Reissue 1989) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
18. _____: _____: _____. Neb. Rev. Stat. § 27-404(2) (Reissue 1989) is an inclusionary rule permitting the use of relevant other crimes or acts for all purposes except proving that the defendant acted in conformity with his character.
19. **Controlled Substances: Evidence: Weapons.** In drug-related prosecutions, evidence relating to guns in a defendant's possession is relevant.
20. **Prior Convictions: Habitual Criminals: Proof: Right to Counsel: Waiver.** To prove a prior conviction for enhancement purposes and for habitual criminal proceedings, the State need only establish that at the time of the prior conviction, the defendant had or waived counsel.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Robert M. Spire, Attorney General, and Kimberly A. Klein for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The defendant, Kevin R. Groves, was convicted by a jury of unlawful possession with intent to deliver methamphetamine and possession of a firearm by a felon. He was sentenced to a term of imprisonment of 2 to 4 years on the drug charge and to 13 months on the firearm charge. He has appealed and makes four assignments of error.

In his first assignment of error, the defendant contends that the trial court erred in overruling his motion to suppress evidence discovered during the search conducted on April 29, 1989, at 8104 Bedford Plaza, a claim he preserved by making proper objections at the time of trial. See *State v. Britt*, 237 Neb. 163, 465 N.W.2d 466 (1991).

On April 20, 1989, Deputy Sheriff William Jackson applied for a warrant to search for methamphetamine; various items

associated with the use, manufacture, and sale of drugs; and a 12-gauge pump-action shotgun, cut off at both the barrel and the stock to make it shorter than the legal dimensions. The items to be seized were alleged to be under the control or custody of Groves and concealed or kept at "8032 Bedford Plaza, Omaha, Douglas County, Nebraska, a single story, wood frame, single family dwelling, white in color, and any out buildings on the curtilage, and any vehicles on this property . . . ."

Deputy Jackson's affidavit set forth the grounds in support of issuance of the search warrant, alleging that he had been provided information by a confidential informant regarding Groves and the address to be searched. Deputy Jackson checked this information and found it to be true.

The informant had advised Deputy Jackson that he had been inside the residence described as 8032 Bedford Plaza and had observed Groves in possession of more than 2 grams of methamphetamine and a sawed-off 12-gauge shotgun. The informant further advised that Groves was a convicted felon and currently wanted for an active felony arrest warrant. The informant was able to pick out Groves from numerous booking photographs the informant was shown.

Deputy Jackson checked and found that Groves was a convicted felon with prior arrests for drug-related offenses, weapons-related offenses, and assault. Furthermore, Deputy Jackson found that Groves was currently wanted on 10 active warrants, 1 of which was for a felony.

On the basis of Deputy Jackson's affidavit, a judge of the county court issued the requested search warrant. The search warrant authorized a search of "8032 Bedford Plaza, Omaha, Douglas County, Nebraska, a single story, wood frame single family dwelling, white in color, and any out buildings on the curtilage, and any vehicles on this property . . . ."

On April 29, 1989, Deputy Jackson and several other officers executed the search warrant. The defendant was found asleep on a couch in the basement, and during the search of the basement, the officers discovered various items of contraband and a number of loaded weapons in the area immediately surrounding the defendant. The defendant was arrested, and

the warrant was returned along with an inventory to the county court on April 29.

The defendant filed a motion to suppress the items seized, alleging, among other things, that the affidavit in support of the search warrant did not state sufficient facts to show probable cause for issuance of the warrant and that the warrant violated the particularity clause of the fourth amendment to the U.S. Constitution because it contained an incorrect address.

The correct street address of the house where the defendant was found and from which the items were seized is 8104 Bedford Plaza. This was not discovered until after the warrant was executed.

At the suppression hearing, Deputy Jackson testified that the confidential informant had shown him the house that was later searched. Deputy Jackson had conducted surveillance of this house for approximately a week prior to obtaining the warrant to search, and he had observed the defendant outside the residence on several occasions.

The residence which was searched is located west of 80th Street on Bedford Plaza, which is a dead-end street with houses located only on the north side of the street. It is a white single-story, wood frame, single-family residence and is the last house on the street.

Deputy Jackson was unable to ascertain the numerical address from his surveillance of the house.

To get the house's street address which was used in the affidavit, Deputy Jackson used a computer-listed property file. The last house on the street was listed as number 8032.

The house that had been under surveillance and that Deputy Jackson searched was not 8032 Bedford Plaza. The residence at 8032 Bedford Plaza is located directly east of 8104 Bedford Plaza, the residence that was searched, and is a small, one-story, wood frame, green-colored house. The record does not show whether there is a street address posted on the house located at 8032 Bedford Plaza.

Deputy Jackson testified that there was no confusion as to the house where he was going to serve the search warrant. The white one-story house that had been under surveillance was the only house where the officers went to serve the warrant.

The defendant contends that the district court erred in overruling his motion to suppress because Deputy Jackson's affidavit requesting the search warrant was insufficient to establish probable cause for issuing the search warrant and because the search warrant contained an inaccurate description of the place to be searched.

The defendant alleges that the affidavit was insufficient because the reliability of the informant was not established by the affidavit.

In determining the correctness of a trial court's ruling on a motion to suppress, this court will uphold a trial court's findings of fact unless those findings are clearly erroneous. *State v. Sneed and Smith*, 231 Neb. 424, 436 N.W.2d 211 (1989). In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion. *Id.*

This court has adopted the "totality of the circumstances" test set forth by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), to determine the sufficiency of an affidavit used to obtain a search warrant. *Sneed and Smith, supra.* It is only the probability, and not a prima facie showing, of criminal activity which is the standard of probable cause for issuance of a search warrant. *Id.*

In evaluating probable cause for the issuance of a search warrant, the magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.* The duty of the reviewing court is to ensure that the issuing magistrate had a substantial basis for determining that probable cause existed. *Id.*

In this case, the affidavit, under the totality of the circumstances, was sufficient to establish that the magistrate had probable cause for issuance of the search warrant because the informant had seen illegal narcotics at the residence where

the defendant was located. The reliability of the confidential informant's statements was established independently by Deputy Jackson. Deputy Jackson observed the defendant entering and leaving the residence that the informant had shown him. Deputy Jackson verified the informant's statement that the defendant was a convicted felon and wanted on a felony arrest warrant. Also, Deputy Jackson had the informant identify a photo of the defendant from a number of booking photographs.

The defendant also argues that the trial court erred in overruling his motion to suppress because the search warrant contained an inaccurate description of the premises to be searched, in violation of the fourth amendment's requirement of a particular description of the place to be searched and the persons to be seized.

It is not disputed by either party that the street address contained in the affidavit and search warrant is not the correct street address of the house that was actually searched. The address listed in the affidavit and search warrant is 8032 Bedford Plaza, and the correct address of the residence that was searched is 8104 Bedford Plaza. However, an error in the street address of the place to be searched is not per se fatal to the validity of a warrant. See *People v. Fragoso*, 68 Ill. App. 3d 428, 386 N.E.2d 409 (1979).

The test to determine the sufficiency of a search warrant's description is whether the place to be searched is described with sufficient particularity so as to enable the executing officer to find and identify the location with reasonable effort, and whether there is any reasonable probability that another site might mistakenly be searched. *United States v. Clement*, 747 F.2d 460 (8th Cir. 1984); *United States v. Gitcho*, 601 F.2d 369 (8th Cir. 1979). See, also, *State v. Walters*, 230 Neb. 539, 432 N.W.2d 528 (1988). Factors to be considered in determining the validity of a warrant inaccurately describing the place to be searched are: (1) that the address provided by the warrant, although incorrect, still describes the same piece of property; (2) that property intended to be searched is adjacent to that described in the search warrant and both are under the control of the defendant; (3) that the incorrect address describes a place

not in existence; (4) that other parts of the description which are correct limit the property to be searched to one place; and (5) that the place which was intended to be searched had previously been under surveillance or was being surveilled while the warrant was obtained. *United States v. Gitcho, supra*. See, also, *United States v. Clement, supra*; *State v. Walters, supra*.

In *Gitcho*, officers obtained a warrant for 4144 Geraldine, Apt. 7, Park Chalet Apartments, St. Louis County, Missouri. The address was incorrect. The address of the property that was searched was 4146 Park Chalet, Apt. 7, St. Louis County, Missouri, which property had been under surveillance by the executing officers prior to the search.

The U.S. Court of Appeals for the Eighth Circuit reversed the trial court's order suppressing any and all evidence gathered as a result of the search, finding that while the address in the warrant for the place that was searched was incorrect, it was reasonable for the location intended. The appellate court, in upholding the search, placed special importance on the facts that the officers executing the warrant personally knew which premises were intended to be searched because of their previous surveillance and that the premises which were intended to be searched were, in fact, those that were actually searched.

In *State v. Petta*, 354 So. 2d 563 (La. 1978), the Louisiana Supreme Court upheld a search where there was a discrepancy between the street number of the residence searched and that described by the search warrant. In that case, the evidence was discovered as the result of a warrant obtained to search property located at 1433 Crete Street, Apt. C. The residence was further described as a two-story pink stucco house trimmed in white.

The building was not marked with a street number. It was separated only by an alley from an adjacent residence numbered 1431. There was no 1433 Crete Street, and the correct street address of the pink stucco residence that was searched was 1435.

The Louisiana Supreme Court held that a description in a search warrant of property to be searched is sufficient when it reasonably enables the searching officers to ascertain and identify the place which alone was intended to be searched. The

court upheld the search because the place to be searched was described in sufficient detail to enable the officers to locate it with reasonable certainty and with the reasonable probability that they would not search the wrong premises.

The U.S. Court of Appeals for the 11th Circuit reversed a trial court's suppression of evidence and held that a search warrant described the premises to be searched with sufficient particularity because it directed the officers to the correct apartment number, because it confined their examination to that apartment, and because it placed the occupants of the apartment on sufficient notice of the officers' authority to search the premises. *United States v. Burke*, 784 F.2d 1090 (11th Cir. 1986). In that case, the warrant had the wrong building number, and the named street did not exist. The only correct information in the warrant was the number of the apartment to be searched. The court upheld the search because the warrant contained a detailed physical description of the building, minimizing the possibility that an apartment in any building other than the one described would be searched, and because the officer who pointed out the correct apartment to the officer executing the warrant knew precisely which premises were to be searched because he had previously been to that building with the confidential informant who provided the information supporting the request for the search warrant.

In *State v. Trasvina*, 16 Wash. App. 519, 557 P.2d 368 (1976), the Washington Court of Appeals upheld a search pursuant to a warrant that described the premises to be searched as " 'a two-story, white frame house with green trim, located geographically directly behind and East of 6604 Northeast 94th Avenue, Vancouver,' " although the correct description of the place that was searched " 'was a "two-story, white frame house with green trim located geographically directly behind and east of 6513 N.E. 94th Avenue . . . ." ' " *Trasvina, supra* at 521, 557 P.2d at 369. The defendants argued that the search was unlawful because the warrant did not particularly describe the premises because there could have been more than one house in the area that fit the description. In response to the defendants' argument, the court stated:

No evidence appears in the record that there were any

> other 2-story, white frame houses with green trim located near the 6600 block of 94th Avenue N.E. in Vancouver. Nor is there any evidence that the premises searched failed to conform to the description except for the address. The burden of proof as to a motion to suppress evidence is upon the movant. . . . In this case, Trasvina and Martin had the burden of showing the premises were not reasonably identified. That is, they had to show whether the house searched reasonably could have been confused with another house in the area described by the original warrant. They did not do so, and mere speculation will not suffice. Therefore, we hold that the premises were described with sufficient particularity in the original warrant.

Trasvina, supra at 523, 557 P.2d at 370-71.

In the present case, the defendant argues that the search was unlawful because the executing officers would have searched the wrong house if they had gone to 8032 Bedford Plaza. This argument lacks merit because the defendant failed to prove that 8104 Bedford Plaza could reasonably have been confused with 8032 Bedford Plaza or any other house in the area described by the warrant. Furthermore, there are additional circumstances to support the trial court's decision to uphold the search.

The record shows that the house at 8104 Bedford Plaza had been under surveillance by the officer executing the search warrant for a week prior to the obtaining of the search warrant. Deputy Jackson was not confused as to which house to search. The house that was searched matched the description in the warrant and was the residence that was intended to be searched. It is a single-story, wood frame, single-family dwelling, white in color. The house at 8032 Bedford Plaza is a green single-story, wood frame, single-family residence, and there is nothing in the record to show whether there are any other white single-story, wood frame, single-family homes on Bedford Plaza in the area west of 80th Street.

The description in the search warrant was reasonable for the location intended. The warrant describes the place to be searched with sufficient detail to enable the executing officer (in this case, Deputy Jackson) to locate it with reasonable certainty,

and there is no reasonable probability that the executing officer would mistakenly search another residence. Accordingly, the trial court did not err in overruling the defendant's motion to suppress the items seized pursuant to the search warrant.

There are additional reasons why the motion to suppress was properly overruled. In the present case, at the time Deputy Jackson requested the warrant, the information available to him indicated that the address of the premises he sought to search was 8032 Bedford Plaza. Under the circumstances, this was a reasonable address for that location, and Deputy Jackson had no reason to suspect that the warrant or the supporting affidavit was invalid because of an incorrect address. It was not until after the warrant was executed that it was discovered the address it listed was incorrect.

In *Maryland v. Garrison*, 480 U.S. 79, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987), the U.S. Supreme Court held that evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.

In *Garrison*, Baltimore police officers obtained and executed a warrant to search the person and third-floor apartment of Lawrence McWebb for controlled substances and paraphernalia. The officers correctly stated the address and location of McWebb's apartment and reasonably believed that there was only one apartment on the described premises. However, the third floor was divided into two apartments, one occupied by McWebb and one by the defendant, Garrison. Before the officers discovered that the third floor contained two apartments, they saw and seized contraband in Garrison's apartment. The court held that the validity of the search depended on whether the executing officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable. The court found the officers' failure to realize the warrant's overbreadth was reasonable because the objective facts available to the officers at the time the warrant was sought suggested no distinction between the apartment requested to be searched and the third-floor premises.

The Court stated that if the officers had known, or if they should have known, that there were two separate apartments on the third floor of the address listed in the warrant, they

would have been obligated to exclude Garrison's apartment from the scope of the requested warrant. The constitutionality of the police officers' conduct was judged in light of the information available to them at the time they acted.

The Court stated:

> But we must judge the constitutionality of their conduct in light of the information available to them at the time they acted. Those items of evidence that emerge after the warrant is issued have no bearing on whether or not a warrant was validly issued. Just as the discovery of contraband cannot validate a warrant invalid when issued, so is it equally clear that the discovery of facts demonstrating that a valid warrant was unnecessarily broad does not retroactively invalidate the warrant. The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate. On the basis of that information, we agree with the conclusion of all three Maryland courts that the warrant, insofar as it authorized a search that turned out to be ambiguous in scope, was valid when it issued.

Garrison, supra at 480 U.S. at 85-86.

In *State v. Kleinberg*, 228 Neb. 128, 421 N.W.2d 450 (1988), we held that evidence seized pursuant to a defective search warrant is not subject to being suppressed where the warrant was executed by officers who acted in good faith and reasonably believed that they were executing a valid warrant.

In circumstances similar to those in the present case, the U.S. Court of Appeals for the Fifth Circuit held that evidence obtained during a search pursuant to a warrant which contained an incorrect street name was admissible under the good faith exception to the exclusionary rule. *U.S. v. Gordon*, 901 F.2d 48 (5th Cir. 1990). The court found that the incorrect street name in the search warrant was not a facial defect, which would prevent admission of evidence discovered during the search under the good faith exception to the exclusionary rule, because looking at the warrant or at both the warrant and the supporting affidavit, one would not suspect that the warrant was invalid.

The defendant also argues that because the warrant was not executed until 9 days after it was issued, the search was unconstitutional because the information contained therein was stale.

Proof of probable cause justifying the issuance of a search warrant generally must consist of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time. However, whether the proof satisfies this test is determined by the circumstances of each case. *State v. Eary*, 235 Neb. 254, 454 N.W.2d 685 (1990). In general, no more than a reasonable time may have elapsed between the occurrence of facts and the issuance of a search warrant based thereon. *State v. Kallos*, 193 Neb. 113, 225 N.W.2d 553 (1975).

In this case, the application for the warrant was based in part upon information received from the confidential informant, who had been inside the residence in question within the previous 72 hours. Under all of the circumstances in this case, we believe the facts justifying the issuance of the warrant were sufficiently closely related to the time of the issuance of the warrant to justify the finding of probable cause.

The warrant was issued on April 20, 1989. It was executed and returned on April 29, 1989.

Neb. Rev. Stat. § 29-815 (Reissue 1989) requires a warrant to be executed and returned within 10 days after its date of issuance. Since the warrant was executed within the statutory limits, the defendant's argument is without merit.

Among the items that were seized pursuant to the search and admitted into evidence at the defendant's trial were a "belt knife"; a 12-gauge shotgun and the shells that it was loaded with; a leather holster, a "High Standard" pistol that was contained within it, and the ammunition that was loaded into the weapon; a leather holster that had been fastened underneath a coffee table, a semiautomatic Beretta .22-caliber pistol that was contained within the holster, and the rounds of ammunition the pistol contained; an ankle holster used to hold the Beretta pistol; an assault pistol and the violin case in which it was contained; a toolbox containing numerous plastic bags, a homemade scoop, a triple-beam scale, a sifter, and a cutting

agent; a bag containing methamphetamine; syringes; and a spoon with traces of methamphetamine.

Deputy Jackson testified about the arrest of the defendant and the search of the basement area where the defendant was discovered. On direct examination, Deputy Jackson volunteered that the 12-gauge shotgun found near the defendant's head turned out to be stolen.

Counsel for the defendant objected to this testimony and moved for a mistrial out of the presence of the jury. The trial court overruled the defendant's motion, and upon bringing the jury back into the courtroom, the trial court instructed the jury that they should disregard the evidence that the shotgun was stolen.

For his second assignment of error, the defendant contends that the trial court erred by failing to grant a mistrial because Deputy Jackson's statement that the shotgun had been stolen was unfairly prejudicial to the defendant. The defendant argues that his credibility, which was a critical issue in this case, was damaged by the injection of Deputy Jackson's statement and that the damaging effect of the statement was not cured by the trial court's instruction to the jury.

The decision as to whether to grant a motion for mistrial is a matter within the discretion of the trial court, and such a ruling will be upheld absent an abuse of that discretion. *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987); *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986). This court stated in *Borchardt* at 56, 395 N.W.2d at 557-58:

> A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of other incompetent matters are examples of occurrences which may constitute such events. . . . Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such

material.

(Citations omitted.)

In *Jacobs*, this court upheld the trial court's refusal to grant a mistrial when the sheriff who testified "demonstrated a remarkable inability, or unwillingness, to focus upon and limit his responses to the questions asked of him." *Jacobs, supra* at 193, 410 N.W.2d at 475. We found the questions asked were not improper and there was no showing that the prosecutor was responsible for the sheriff's wanderings. When the defendants objected, the trial court instructed the jury to disregard the sheriff's responses, and in that case, the responses were cut off before any prejudicial statements were made.

The defendant in this case argues that unlike the situation in the *Jacobs* case, Deputy Jackson was not cut off before he made his prejudicial statement which was damaging to the defendant's credibility. The defendant contends that this prejudiced his case and prevented him from receiving a fair trial.

The defendant must prove that the alleged error actually prejudiced him, rather than creating only the possibility of prejudice. *State v. Gore*, 212 Neb. 287, 322 N.W.2d 438 (1982). While the credibility of the defendant was an important issue, there was an abundance of evidence that the jury had to disregard before it could find the defendant was not guilty.

The prosecutor's question to Deputy Jackson was not improper. There was no showing that the prosecutor was responsible for Deputy Jackson's response. The trial court instructed the jury to disregard Deputy Jackson's statement that the gun had been stolen, and the defendant has failed to show how that statement actually prejudiced the outcome of his trial. Under these circumstances, it was not an abuse of discretion for the trial court to refuse to declare a mistrial.

Prior to the trial, the defendant filed a motion in limine asking the court to exclude the 12-gauge shotgun, the knife, and the three 12-gauge shotgun shells which were loaded in the shotgun. The motion in limine further requested the court to order the State to elect which of the three weapons with barrels under 18 inches in length would be offered as evidence of the defendant's felon in possession of a firearm charge and

requested that evidence of the other two firearms be excluded. The trial court denied the defendant's motion.

For his third assignment of error, the defendant alleges that the trial court erred by denying the defendant's motion in limine regarding the introduction of the various weapons found at the time of the defendant's arrest and in failing to order the prosecution to elect which of the three firearms would be offered as evidence of the defendant's felon in possession of a firearm charge. The defendant argues that the evidence of the three guns with barrels less than 18 inches in length was irrelevant in that they have no connection to either count with which the defendant was charged and that even if the guns were relevant, they should have been excluded because their probative value was substantially outweighed by the danger of unfair prejudice.

Neb. Rev. Stat. § 27-404(2) (Reissue 1989) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. It is well established that § 27-404(2) is an inclusionary rule permitting the use of relevant other crimes or acts for all purposes except to prove that the defendant acted in conformity with his character. *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986). The trial court did not abuse its discretion in admitting all of the firearms found in the immediate vicinity of the defendant, as there was a legitimate purpose for admission of all the firearms under each of the counts of the information.

The defendant was charged with possession with intent to distribute methamphetamine and with being a felon in possession of a firearm of less than 18 inches in barrel length. The evidence of weapons with barrels less than 18 inches in length was relevant to both charges, and the evidence was not unfairly prejudicial to the defendant's case.

In drug-related prosecutions, evidence relating to guns in a defendant's possession is relevant. *United States v. Milham*, 590 F.2d 717 (8th Cir. 1979). See, also, *United States v. LaGuardia*, 774 F.2d 317 (8th Cir. 1985). " 'Experience on the

trial and appellate benches has taught that substantial dealers in narcotics keep firearms on their premises as tools of the trade almost to the same extent as they keep scales, glassine bags, cutting equipment and other narcotics equipment.' " *Milham, supra* at 721 (quoting *United States v. Wiener*, 534 F.2d 15 (2d Cir. 1976), *cert. denied* 429 U.S. 820, 97 S. Ct. 66, 50 L. Ed. 2d 80).

The defendant also argues that the State should have been required to elect which of three weapons with barrels less than 18 inches in length it would use in proving the felon in possession charge. The defendant claims that he was prejudiced in preparing for trial because he did not know which of the firearms would be used as evidence against him.

The defendant's argument is without merit. The defendant knew which firearms were found, where they were found, and the circumstances of the finding. The guns were relevant to each charge. The fact that the State had alternate ways of proving each charge did not prejudice the defendant in preparing his defense in this case.

The defendant's fourth and final assignment of error pertains to the trial court's denial of his motion in limine regarding the admission of evidence that he had a prior conviction for burglary, which claim he preserved by making proper objections at trial. See *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990). The defendant argues that his prior conviction for burglary should have been excluded because the record in that case failed to affirmatively reflect that he was represented by counsel, that he waived counsel, or that he was advised of each and all of the constitutional rights set forth in *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

This court has held that to prove a prior conviction for enhancement purposes and for habitual criminal proceedings, the State need only establish that at the time of the prior conviction, the defendant had or waived counsel. *State v. Johns*, 233 Neb. 477, 445 N.W.2d 914 (1989). This rule is equally applicable to use of a prior conviction as proof that the defendant is a convicted felon.

The record in this case shows that the defendant had his

attorney present with him at each court appearance up to and including sentencing on the burglary charge. Accordingly, the prior conviction was properly admitted by the trial court.

The judgment is affirmed.

AFFIRMED.

SHANAHAN, J., concurring.

Although I concur that Groves' convictions must be affirmed, the majority has failed to address Groves' contention that probable cause was lacking for the search warrant, when executed, because the information on which the warrant was based had become "stale" and thereby rendered the search unreasonable. That contention deserves the court's attention.

Probable cause to search must exist for issuance of a search warrant and at the time the search warrant is executed. See *United States v. Lemmons*, 527 F.2d 662 (6th Cir. 1975). As the court pointed out in *United States v. Bedford*, 519 F.2d 650, 655 (3d Cir. 1975):

> The element of time can admittedly affect the validity of a search warrant. Since it is upon allegation of presently existing facts that a warrant is issued, it is essential that it be executed promptly, "in order to lessen the possibility that the facts upon which probable cause was initially based do not become dissipated." If the police were allowed to execute the warrant at leisure, the safeguard of judicial control over the search which the fourth amendment is intended to accomplish would be eviscerated. Thus, a search pursuant to a "stale" warrant is invalid.

In *Bedford*, the court further observed:

> Timeliness of execution should not be determined by means of a mechanical test with regard to the number of days from issuance, nor whether any cause for delay was per se reasonable or unreasonable. Rather it should be functionally measured in terms of whether probable cause still existed at the time the warrant was executed.

Id.

Although neither the fourth amendment to the U.S. Constitution nor article I, § 7, of the Nebraska Constitution prescribes a specific period for execution of a search warrant,

both Constitutions prohibit "unreasonable searches and seizures." Therefore, reasonableness, based on probable cause and required for a search, does place some constitutional limitation on the time for execution of a search warrant. A delay in executing a search warrant is constitutionally permissible only when the probable cause recited in the affidavit continues until the time of execution. *United States v. Nepstead*, 424 F.2d 269 (9th Cir. 1970). See, also, *United States v. Lemmons, supra*; *State v. Edwards*, 98 Wis. 2d 367, 297 N.W.2d 12 (1980); *State v. Yaritz*, 287 N.W.2d 13 (Minn. 1979).

Accordingly, a constitutionally impermissible delay in executing a search warrant may occur notwithstanding execution of the warrant within the time prescribed by Neb. Rev. Stat. § 29-815 (Reissue 1989): "The warrant must be executed and returned within ten days after its date [issuance]." The majority mistakenly applies § 29-815 as a per se rule and states that "[s]ince the warrant was executed within the statutory limits," Groves' contention that probable cause for the warrant had disappeared "is without merit."

Section 29-815 sets forth a ministerial procedure for return of an executed search warrant. See, *Commonwealth v. Cromer*, 365 Mass. 519, 313 N.E.2d 557 (1974); *United States v. Kennedy*, 457 F.2d 63 (10th Cir. 1972); *People v. Schmidt*, 172 Colo. 285, 473 P.2d 698 (1970); *State v. Hunt*, 454 S.W.2d 555 (Mo. 1970); *United States v. Haskins*, 345 F.2d 111 (6th Cir. 1965). However, § 29-815 also specifies the time within which an officer must execute a search warrant, namely, within 10 days after issuance of the search warrant. The 10-day limit for execution of a search warrant is not mandated by the U.S. Constitution or Nebraska Constitution, but is a legislatively expressed time limit for execution of a search warrant and does not, and constitutionally cannot, substitute a statutory per se rule of reasonableness in place of judicial review to determine whether a search is supported by probable cause when that warrant is executed. As construed and applied by the majority today, the determination of whether a search warrant has been executed within the duration of probable cause as the basis for a reasonable search and seizure is relinquished to the Legislature for expression in a statutory prescription, the per se rule of

reasonableness of time recognized by the majority in Groves' case, notwithstanding the constitutionally conferred power and corresponding obligation that only the judiciary may determine whether a search or seizure is reasonable and, therefore, permissible in light of the constitutional safeguards against an unreasonable search and seizure. In *People v. Hernandez*, 43 Cal. App. 3d 581, 588, 118 Cal. Rptr. 53, 58 (1974), the court rejected existence of a statutory per se rule of reasonableness found in a California statute which provided that " '[a] search warrant executed within the 10-day period shall be deemed to have been timely executed and no further showing of timeliness need be made.' " In *Hernandez*, the court concluded that a statute "which forecloses any inquiry into the continued existence of probable cause, [which inquiry] would prevent executions of search warrants in situations in which such an inquiry would reveal that the probable cause which existed at the time of the issuance had, in fact, completely disappeared at the time of the execution," would preclude judicial inquiry whether execution of the search warrant was reasonable and would, consequently, be unconstitutional. *People v. Hernandez, supra* at 589, 118 Cal. Rptr. at 58. See, also, *State v. Edwards, supra* (probable cause can disappear within the 5-day statutory period allowed for execution of a search warrant); *Donaldson v. State*, 46 Md. App. 521, 420 A.2d 281 (1980) (rejecting contention that a search warrant executed within the statutory 15-day period is, per se, timely in conformity with the constitutional safeguard against an unreasonable search and seizure).

Therefore, the proper inquiry for a reviewing court is whether probable cause dissipated into extinction during the interval between issuance of a warrant and its execution. See, *United States v. Lemmons*, 527 F.2d 662 (6th Cir. 1975); *U.S. v. Whitworth*, 856 F.2d 1268 (9th Cir. 1988). Pursuant to the preceding standard, the inquiry into probable cause for execution of a search warrant is the same as the inquiry for issuance of a search warrant, namely, whether there is probable cause to search.

We have stated:

> It is a general and well-established rule that the proof of

> probable cause which must be made before a search warrant may be issued must be of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time, and whether the proof meets this test must be determined by the circumstances of each case. Generally, it may be said that no more than a "reasonable" time may have elapsed, and the recital must be of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at the time.

State v. Kallos, 193 Neb. 113, 117, 225 N.W.2d 553, 556 (1975). See, also, *State v. Eary*, 235 Neb. 254, 454 N.W.2d 685 (1990) (probable cause involves the fair probability that contraband or evidence of a crime will be found in a particular place).

> The ultimate criterion in determining the degree of evaporation of probable cause, however, is not case law but reason. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc. The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later. The hare and the tortoise do not disappear at the same rate of speed.

Andresen v. State, 24 Md. App. 128, 172, 331 A.2d 78, 106 (1975).

> Where the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant.

United States v. Johnson, 461 F.2d 285, 287 (10th Cir. 1972). See, also, *State v. Eary, supra*.

In Groves' case, the search warrant was obtained on April 20, 1989, and executed 9 days later, on April 29, in the search for 2 grams of methamphetamine and a sawed-off 12-gauge shotgun. Therefore, the proper review is an inquiry to determine whether the probable cause at issuance of the warrant had disappeared by the time the search warrant was executed. After issuance of the search warrant, police, hoping to tie Groves to narcotics traffic, undertook surveillance of the residence where Groves was staying, but the record does not reflect what, if any, information the police gained during their surveillance.

We have stated:

> In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the "trier of fact" and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress. *State v. Blakely, supra*.

State v. Abdouch, 230 Neb. 929, 930, 434 N.W.2d 317, 319 (1989). Accord *State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202 (1989).

Some courts have determined that probable cause dissipates rather rapidly when small, or unspecified, amounts of narcotics or controlled substances are involved. See, *State v. Boneventure*, 374 So. 2d 1238 (La. 1979) (when the search warrant affidavit stated that 2 days before issuance of the warrant, "a quantity" of marijuana was offered for consumption in defendants' residence, there was no basis for a reasonable belief that the marijuana was still in the defendants' residence at the time the warrant was issued, because the amount described in the affidavit was a "consumable" amount; hence, no probable cause); *People v David*, 119 Mich. App. 289, 326 N.W.2d 485 (1982) (when only a single marijuana sale

was involved and described in the search warrant affidavit without further allegation of other criminal activity involving a controlled substance, 3 days between the observation described in the search warrant and issuance of the warrant prevented probable cause for the search warrant). Other courts have been more lenient regarding the interval between an observation recounted in a search warrant affidavit as probable cause and issuance of the warrant; for example, notwithstanding the interval, probable cause existed for a search warrant in the following decisions: *People v. Mesa*, 14 Cal. 3d 466, 535 P.2d 337, 121 Cal. Rptr. 473 (1975) (an informant's observations, which occurred 6 days before issuance of the search warrant, were contained in the search warrant affidavit); *Grant v. State*, 130 Ga. App. 237, 202 S.E.2d 675 (1973) (according to the search warrant affidavit, an informant saw marijuana on the premises 5 days before issuance of the search warrant); *State v. Welsh*, 371 So. 2d 1314 (La. 1979) (an informant observed red and white capsules, LSD tablets, and an undetermined amount of marijuana 4 days before issuance of the search warrant); *State v. Iverson*, 364 N.W.2d 518 (S.D. 1985) (the informant saw a controlled substance in defendant's apartment 3 days before issuance of the warrant); *State v. Bruno*, 427 So. 2d 1174 (La. 1983) (informant's observations 4 days before issuance of the warrant, which was executed 7 days later, pertained to ongoing activity in controlled substances); and *State v. Yaritz*, 287 N.W.2d 13 (Minn. 1979) (6-day interval was permissible when the search warrant affidavit indicated continual sales of controlled substances).

Courts have had little difficulty with probable cause regarding an observation or information concerning a weapon or other articles and instruments used for commission of a crime. *United States v. Steeves*, 525 F.2d 33 (8th Cir. 1975), involved a search warrant for clothing, a ski mask, a handgun and a moneybag, all of which were sought as evidence pertaining to a bank robbery which had occurred 3 months earlier. The court stated in *Steeves*:

> Obviously, a highly incriminating or consumable item of personal property is less likely to remain in one place as long as an item of property which is not consumable or

> which is innocuous in itself or not particularly incriminating. . . .
>
> Let it be assumed for purposes of discussion that the defendant in fact robbed the bank on June 22 and that he immediately repaired to his home with his loot and its container, his weapon and his disguise. We think that it may be conceded to the defendant that as late as September 17 there was little reason to believe that any of the bank's money or the money bag would still be in the home. But, the same concession cannot be made with respect to the revolver, the ski mask, and the clothing. The ski mask and the clothes were not incriminating in themselves, and apart from his prior felony record possession of the pistol was not unlawful in itself or particularly incriminating. Moreover, people who own pistols generally keep them at home or on their persons.

United States v. Steeves, supra at 38. Other courts have reached a conclusion similar to that in *Steeves* concerning existence of probable cause; for instance, *United States v. Gann*, 732 F.2d 714 (9th Cir. 1984) (observations some 3 weeks before issuance of a search warrant were not too far removed for issuance of a search warrant concerning clothes worn and weapons used in a robbery); *Bastida v. Henderson*, 487 F.2d 860 (5th Cir. 1973) (observations 10 days before issuance of the search warrant for firearms used in a robbery); *Blount v. State*, 511 A.2d 1030 (Del. 1986) (observations 10 days before issuance of a search warrant for clothing and a firearm used for a homicide); *Jensen v. State*, 482 A.2d 105 (Del. 1984) (observations 27 days before issuance of the warrant for clothing and a firearm associated with a sexual assault); and *State v. Friel*, 508 A.2d 123 (Me. 1986) (observations 13 days before issuance of the search warrant for a firearm).

The district court's overruling Groves' motion to suppress was not clearly erroneous under the circumstances. Admittedly, the question whether probable cause existed to search for methamphetamine is rather close, when one considers the relatively small quantity of methamphetamine observed by the informant and mentioned in the officer's affidavit. However, the interval between issuance of the warrant and its execution is

insufficient to compel the conclusion that the information which was the basis for issuance of the search warrant had become stale and, therefore, negated existence of probable cause when the warrant was executed. Moreover, probable cause existed to search for the sawed-off shotgun because police officers had a reasonable belief that the shotgun was still in the residence 9 days after the search warrant was issued. See, *U.S. v. Williams*, 897 F.2d 1034 (10th Cir. 1990) (information, as a basis for the search warrant, was not so stale as to render officers' reliance on the warrant unreasonable); *State v. One 1987 Toyota Pickup*, 233 Neb. 670, 447 N.W.2d 243 (1989) (although the search warrant affidavit contained illegally obtained information, the search warrant was valid because the affidavit also contained lawfully obtained information which, considered alone, established probable cause). See, also, *State v. Guilbeault*, 214 Neb. 904, 336 N.W.2d 593 (1983); *State v. Welsh*, 214 Neb. 60, 332 N.W.2d 685 (1983). Accordingly, police conducted a valid search of the residence where Groves was staying; therefore, the contraband discovered pursuant to that search was admissible in Grove's trial. Thus, the district court was not clearly erroneous in overruling Groves' suppression motion.

Although the majority correctly affirms Groves' convictions, application of § 29-815 as a per se rule for subsistence of probable cause concerning a search warrant executed within the statutorily allowed 10-day period is clearly contrary to the U.S. Supreme Court's instruction that a constitutional question regarding "staleness" of information used for probable cause "must be determined by the circumstances of each case." *Sgro v. United States*, 287 U.S. 206, 211, 53 S. Ct. 138, 77 L. Ed. 260 (1932). Therefore, adoption of a per se statutory rule for determining reasonableness in execution of a search warrant is constitutionally unsound and results in the unconstitutional relinquishment of judicial authority and responsibility to examine and determine whether probable cause existed for execution of a search warrant.

CAPORALE, J., joins in this concurrence.

GARY A. KEITHLEY, APPELLANT, V. CHARLES J. BLACK ET AL., APPELLEES.

477 N.W.2d 806

Filed December 20, 1991. No. 89-331.

1. **Appeal and Error.** The purpose of an appellant's reply brief is to respond to the arguments the appellee has advanced against the errors assigned in appellant's initial brief; errors not assigned in an appellant's initial brief are waived and may not be asserted for the first time in a reply brief.
2. **Pleadings: Time.** Generally, the granting or withholding of permission to file a late pleading rests in the discretion of the trial court.
3. **Judgments: Demurrer: Appeal and Error.** Since a correct result will not be set aside merely because it is based upon reasons which may be incorrect, an order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken, even though the ground on which the ruling is based is not well taken or the order is general and does not indicate the ground on which it is based.
4. **Motions for Continuance.** A motion for continuance is addressed to the discretion of the trial court.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Gary A. Keithley, pro se.

Robert M. Spire, Attorney General, and Lynn A. Melson for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Plaintiff-appellant, Gary A. Keithley, asserts defendants-appellees, Charles J. Black, John P. Eggers, and one Officer Bittinger, acting jointly and while employees of the state, negligently failed to prevent the theft of Keithley's property from his prison cell. Defendants demurred on the grounds the petition is time barred and contains a defect in parties. The district court sustained the demurrer and dismissed the suit. In his initial brief, Keithley assigned as operative errors the district court's (1) permitting defendants to demur out of time, (2) failing to state the ground on which it sustained the demurrer, and (3) failing to conduct a purportedly scheduled trial. Keithley attempted to assign additional substantive errors in his

reply brief; however, the purpose of an appellant's reply brief is to respond to the arguments the appellee has advanced against the errors assigned in appellant's initial brief. Thus, errors not assigned in an appellant's initial brief are waived and may not be asserted for the first time in a reply brief. See *De Lair v. De Lair*, 146 Neb. 771, 21 N.W.2d 498 (1946). Keithley's additional claim that the State's brief does not conform to the requirements of our rules is simply wrong. The record failing to sustain Keithley's operative assignments of error, we affirm.

Keithley filed his petition on April 21, 1988, but did not file a praecipe seeking issuance of summonses until December 7 of that year. Although the record does not tell us when the summonses were served, it does tell us that they were not signed and sealed by the deputy clerk of the district court until December 8, 1988. In the meantime, on November 22, the district court had issued an order directing Keithley to show cause on or before December 22 why the case ought not be dismissed for want of prosecution. The case was dismissed on December 28, 1988, and reinstated on January 11, 1989. On February 7, 1989, defendants sought leave to answer Keithley's petition out of time, which was granted. Defendants then demurred on February 22, 1989, within the time allotted.

Keithley's first operative assignment of error is without legal support. The general rule is that the granting or withholding of permission to file a late pleading rests in the discretion of the trial court. See, *W & K Farms v. Hi-Line Farms*, 226 Neb. 895, 416 N.W.2d 10 (1987), *on subsequent appeal*, *W & K Farms v. Walter*, 235 Neb. 952, 458 N.W.2d 230 (1990); *Anest v. Chester B. Brown Co.*, 169 Neb. 330, 99 N.W.2d 615 (1959); Neb. Rev. Stat. § 25-822 (Reissue 1989). Given Keithley's delay in requesting the issuance of summonses and the temporary dismissal of his suit, it cannot be said the district court abused its discretion in permitting defendants to demur out of time.

The second operative assignment of error is equally meritless. Since a correct result will not be set aside merely because it is based upon reasons which may be incorrect, *Logan Ranch v. Farm Credit Bank*, 238 Neb. 814, 472 N.W.2d 704 (1991), an order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken, even

though the ground on which the ruling is based is not well taken or the order is general and does not indicate the ground on which it is based, *Harmon Care Centers v. Knight*, 215 Neb. 779, 340 N.W.2d 872 (1983), and *Morse v. Mayberry*, 183 Neb. 89, 157 N.W.2d 881 (1968).

Nor does the law support the third and final operative assignment of error. The record reflects only that on February 6, 1989, Keithley filed a "Notice of Hearing" which recites that "trial . . . will be called for a telephonic hearing . . . at 11:00 am, Feburary [sic] 7, 1989, or as soon thereafter as this matter may be heard." While Keithley contends that this was the trial date assigned by the district court, there is nothing in the record which supports the claim. Even if that was the case, however, it was within the trial court's discretion to postpone any previously scheduled trial. See *In re Interest of M.*, 215 Neb. 383, 338 N.W.2d 764 (1983) (motion for continuance addressed to discretion of trial court).

AFFIRMED.

FORREST BOOKER, APPELLEE, V. NEBRASKA STATE PATROL, APPELLANT.

477 N.W.2d 805

Filed December 20, 1991. No. 89-501.

1. **Motions for New Trial: Courts.** A motion for new trial may appropriately be filed only in a trial court.
2. **Motions for New Trial: Courts: Administrative Law: Appeal and Error.** It is improper to move for a new trial in a court which reviewed the decision of a lower court or administrative agency and thus functioned not as a trial court but as an intermediate court of appeals.
3. **Motions for New Trial: Courts: Time: Appeal and Error.** The filing of a motion for new trial in a court which functioned as an intermediate court of appeals does not stop the running of the time within which to perfect an appeal from the reviewing court.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Appeal dismissed.

Robert M. Spire, Attorney General, Frederick R. King, and, on brief, Douglas J. Peterson for appellant.

Allen L. Fugate for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

The Nebraska Equal Opportunity Commission found that, in violation of the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 et seq. (Reissues 1984 & 1988), the respondent-appellant, Nebraska State Patrol, discriminated against the complainant-appellee, Forrest Booker, by constructively discharging him from employment because of his physical disability. The commission thereupon ordered, among other things, that the patrol reinstate Booker to employment. The patrol then appealed to the district court, which, on March 23, 1989, affirmed the commission's order. The patrol next sought a new trial, which the district court denied on April 24, 1989. The patrol thereafter, on May 19, 1989, filed its notice of appeal to this court.

Booker correctly asserts this court lacks authority to consider the issues presented by the patrol's various assignments of error.

It is true that the patrol filed its notice of appeal within 30 days of the district court's order overruling the patrol's request for a new trial, as contemplated by Neb. Rev. Stat. § 25-1912 (Reissue 1989). However, we have held that a motion for new trial may appropriately be filed only in a trial court. See *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990). It is improper to move for a new trial in a court which reviewed the decision of a lower court or administrative agency and thus functioned not as a trial court but as an intermediate court of appeals. See *Interstate Printing Co., supra*. It necessarily follows then that the filing of a motion for new trial in a court which functioned as an intermediate court of appeals does not stop the running of the time within which to perfect an appeal from the reviewing court. *Id.*

The patrol had 30 days from the entry of the district court's affirmance of the commission's order within which to file its notice of appeal to this court. See § 25-1912. The patrol having failed to meet this deadline, we acquire no jurisdiction to do anything other than dismiss the appeal. See, *Williams v. Gering Pub. Schools*, 236 Neb. 722, 463 N.W.2d 799 (1990); *Giangrasso v. Eagle Distributing Co.*, 185 Neb. 406, 176 N.W.2d 16 (1970).

APPEAL DISMISSED.

CAROL J. STROHMYER, APPELLEE, V. EDDIE L. STROHMYER, APPELLANT.

477 N.W.2d 584

Filed December 20, 1991. No. 89-664.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Affirmed.

Hal W. Anderson, of Berry, Anderson, Creager & Wittstruck, P.C., for appellant.

Leonard P. Vyhnalek for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

This is an appeal in a proceeding for the dissolution of a marriage. The trial court dissolved the marriage; divided the marital property; and awarded custody, child support, alimony, and attorney fees to the petitioner. The respondent appeals.

We have reviewed the record de novo, as we are required to do, and determine that the trial court did not abuse its discretion. See *Dinovo v. Dinovo*, 238 Neb. 285, 470 N.W.2d 174 (1991). The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JUDSON SACK, APPELLANT.

477 N.W.2d 921

Filed December 20, 1991. No. 90-747.

1. **Constitutional Law: Right to Counsel: Presumptions: Waiver.** The burden is on the State to establish a valid waiver of an accused's sixth amendment right to counsel, and every reasonable presumption against the waiver is indulged.
2. **Constitutional Law: Waiver: Records.** A waiver must appear affirmatively from the record before a court may conclude that an accused has waived a constitutional or statutory right.
3. **Constitutional Law: Right to Counsel.** Although an accused has the right to counsel, he or she also has a right under the sixth amendment and Neb. Const. art. I, § 11, to conduct his or her own defense.
4. **Right to Counsel: Waiver.** An accused may by express words or by conduct waive the right to counsel, so long as such is done voluntarily, understandingly, and intelligently, and so long as the accused is able and willing to abide by the rules of procedure and courtroom protocol.
5. **Right to Counsel.** An indigent accused does not have the right to appointed counsel of the accused's choice nor to be represented by an attorney the accused likes or with whom the accused has rapport.
6. **Right to Counsel: Waiver: Effectiveness of Counsel.** Once counsel has been appointed for an indigent accused, the accused must remain with the appointed counsel unless one of the following conditions is met: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and chooses to proceed pro se, (2) appointed counsel is incompetent, in which case new counsel is to be appointed, or (3) the accused chooses to retain private counsel.
7. **Right to Counsel: Motions for Continuance.** Retaining private counsel as a substitute for appointed counsel does not compel the granting of a continuance.
8. **Pleas: Right to Counsel: Waiver.** A plea of guilty cannot be said to have been entered freely, intelligently, voluntarily, and understandingly unless the accused either was represented by counsel or freely, voluntarily, and understandingly waived the right thereto.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Reversed and remanded for further proceedings.

John R. Brogan for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ.

CAPORALE, J.

In accordance with his plea, defendant-appellant, Judson Sack, was adjudged guilty of second degree forgery, in violation of Neb. Rev. Stat. § 28-603 (Reissue 1989). He was thereafter sentenced to imprisonment for a period of not less than 6 nor more than 20 years. On appeal, he asserts the trial judge erred in, among other things, permitting the withdrawal of court-appointed counsel without appointing another and in finding the subsequent guilty plea to have been entered freely, voluntarily, and understandingly. Those claims being meritorious, we reverse, and remand the cause for further proceedings.

Prior to his arrest, Sack had lived in York at an apartment contained in a building owned by his grandfather, in which building the grandfather occupied a separate apartment. The relationship between the two had become strained even before Sack, on or about September 15, 1989, took the grandfather's automobile and, without the latter's consent, drove it to Lincoln, where he damaged it in an accident. According to the prosecutor, when Sack admitted to his grandfather the following day that he had taken the automobile, the grandfather told Sack to move out of his apartment. Sack, however, denies that the grandfather ordered him to leave.

On September 21, 1989, Sack, accompanied by two friends, Katrina Jackson and Erik Meyle, drove from Lincoln to York, arriving at around midnight. The three first went to the grandfather's apartment building, where they stayed for a few minutes before leaving to visit Jackson's aunt. After approximately an hour to an hour and a half, the three returned to Sack's former apartment, where Meyle and Jackson slept. When they awoke at 9 a.m. on September 22, 1989, they found that Sack's suitcase and belongings had been transferred to his grandfather's apartment.

Sack reported to York police officer Kim Christensen that he went to his grandfather's apartment around 7:30 on the morning of September 22, saw that the newspaper was gone from in front of the door, tried the door, and, finding it unlocked, let himself in. However, Berry Redfern, an employee of the York State Bank, where the grandfather served as board

chairman, told Christensen that Gloria Stett, a housekeeper who lived in the building and also worked at the bank, said Sack asked her to let him into the grandfather's apartment, but she would not open the door. Sack, on a different occasion, also told Christensen that during the evening of September 21, Stett had let Sack into his former apartment. Consequently, it is unclear how Sack got into either his former apartment or his grandfather's.

In any event, at some time on September 22, Sack invited Meyle and Jackson to his grandfather's apartment, where they ate and watched television and where Jackson took a shower. At approximately 10:30 a.m., the grandfather and Redfern arrived, and after an exchange of words between the grandfather and Sack, the three were ordered out. Shortly thereafter, the police were notified of the incident.

After leaving the grandfather's apartment, Sack, Jackson, and Meyle traveled to Bradshaw, Nebraska, where Sack used a $100 bill to buy lunch for everyone. They then returned to York and went to a branch of the York bank, where Sack attempted to cash a check purportedly written by the grandfather to Sack in the sum of $3,700. The teller, being concerned about the large amount of the check, called the main office of the bank and talked to John Strong. Strong in turn contacted the grandfather, who stated that the check was forged and that Sack should be sent to the main office. Instead of going to the main office, however, Sack went to another branch office. That branch had already been warned by Strong that Sack might try to cash a check there, and, thus, when Sack presented the check, the teller contacted Strong. Sensing trouble, Sack attempted to get the check back, but was arrested shortly thereafter.

The grandfather later indicated that the $100 bill and the blank check, which was then completed by Sack, had been taken from the pocket of a coat which had been at the grandfather's apartment. The grandfather estimated that the money and check were taken sometime between 10:30 p.m. September 21, 1989, and 8 a.m. the following day.

On September 29, James Truell was appointed counsel for Sack because of the latter's indigent status. On November 1,

Truell filed notice that Sack would assert an insanity defense. Truell represented Sack at the subsequent arraignment held on November 7 and at a hearing on a discovery motion on December 5. On January 19, 1990, Truell filed a motion for continuance because Sack was "currently undergoing private psychological evaluation . . . ." On February 1, 1990, Truell filed a motion to withdraw, asserting Sack had been uncooperative and dissatisfied with the representation he was receiving and had expressly discharged Truell. At the February 13, 1990, hearing on that motion, Truell stated Sack felt that "the communication between us and the nature of my representation has been insufficient or does not meet his standards." Sack, however, stated he was not asking Truell to withdraw because of his incompetence but, rather, because

> I would like an opportunity to seek counsel on my own. I don't think that — Well, actually I have — I have a list prepared. I don't intend to make a show out of it. I just feel that there's been a number of issues that I'm concerned about and would like an opportunity to obtain counsel on my own. If unable to do that then I would — I would appreciate an opportunity to have someone else appointed.

The trial judge stated that Truell was a competent attorney whose abilities met the standard of the community and told Sack that "if I allow him to withdraw, then your only option would be to retain your own counsel. Because I will find that you elect to proceed pro se, that is without counsel, and will not make a substitute appointment." The trial judge then asked Sack if he still wanted Truell to withdraw. Sack responded that he wanted 7 days to "[f]ind out if I can obtain a counsel on my own. At that time I will know for sure. . . . [B]ut I think it might be a little imprudent to just let him go if — if there's going to be no other opportunity provided to seek court appointed." The trial judge then stated that if Sack believed Truell should be discharged, the employment of substitute counsel would not be a good reason for a continuance of the trial, scheduled for March 19, 1990. The trial judge concluded by saying that the matter would be continued for 7 days, "at which time if . . . Truell does not withdraw his motion to withdraw, then I will

grant his withdrawal and we will then proceed accordingly . . . ."

On March 2, 1990, long after the 7 days mentioned on February 13 had elapsed, the trial judge sustained Truell's motion to withdraw. In a communication filed March 13, 1990, Sack asked to see the trial judge about the "attorney issue" and requested the appointment of John Brogan as his attorney. The document went on to say that Sack, not wishing to run up a bill for his grandfather, would pay "full restitution for attorney fees."

On the scheduled trial date, March 19, 1990, a hearing was held on Sack's written motion for a continuance. Sack declared therein that he had no attorney and had no resources to employ one. In arguing the motion, however, he said that he had an attorney but that the attorney was booked up on the scheduled day of the trial and would represent Sack if a continuance were granted. Notwithstanding that Sack had been found indigent, had declared in his motion for continuance that he had no funds with which to employ counsel, and had earlier offered only to pay restitution of attorney fees, he now announced that if the court did not appoint Brogan, he would hire Brogan himself. Sack did not, however, advise the trial judge how he would manage this. The trial judge overruled Sack's motion for continuance and ordered the trial to proceed.

During the half-hour recess which followed, Sack and the prosecutor negotiated an agreement whereby Sack would plead guilty to forgery, and the State would dismiss the burglary charge it had lodged. The trial judge explained some rights of Sack and had Sack acknowledge he understood that by pleading guilty he would be waiving (1) the presumption that he is innocent, (2) the right to trial, (3) the right to subpoena witnesses, (4) the right to face his accusers, (5) the right to challenge any admissions, statements, or confessions as not being voluntarily given, and (6) the right to suppress evidence. Sack agreed to forfeit these rights, and confessed to committing forgery. Although the trial judge did not at this time discuss Sack's lack of counsel, he found

> beyond a reasonable doubt that [Sack] fully understands all of his statutory and constitutional rights, has made those — and waived those rights freely, voluntarily,

> knowingly, and intelligently, fully understanding the nature of the charge and the consequences of his plea, which the Court specifically finds is made freely, voluntarily, knowingly and intelligently....

The fundamental issue presented by the first summarized assignment of error, which challenges the district court's sustainment of appointed counsel's motion to withdraw, without appointing a replacement attorney, is whether the record demonstrates that Sack, either by words or by conduct, knowingly, intelligently, and voluntarily waived his right to counsel.

We begin our analysis by recalling that the burden is on the State to establish a valid waiver of an accused's sixth amendment right to counsel, *Michigan v. Jackson*, 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986), and that every reasonable presumption against the waiver is indulged, *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991). A waiver must appear affirmatively from the record before a court may conclude that an accused has waived a constitutional or statutory right. *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990).

Although an accused has the right to counsel, he or she also has a right under the sixth amendment, *State v. Green*, 236 Neb. 33, 458 N.W.2d 472 (1990), and Neb. Const. art. I, § 11, to conduct his or her own defense, *State v. Shepard, ante* p. 639, 477 N.W.2d 567 (1991). Thus, an accused may by express words waive the right to counsel, so long as such is done voluntarily, understandingly, and intelligently, and so long as the accused is able and willing to abide by the rules of procedure and courtroom protocol. *State v. Green*, 236 Neb. 33, 458 N.W.2d 472 (1990). See, also, *State v. Clark*, 216 Neb. 49, 342 N.W.2d 366 (1983). An accused may also waive the right to counsel by conduct. E.g., *State v. McCoy*, 228 Neb. 178, 421 N.W.2d 780 (1988) (accused's second request that appointed counsel be permitted to withdraw and protest of appointment of standby counsel waived right to counsel).

The facts in *State v. Moore*, 203 Neb. 94, 277 N.W.2d 554 (1979), are not unlike those now before us. Moore had been charged with refusing to submit to a blood, breath, or urine

test. He was arraigned and informed of his right to an attorney, but Moore told the trial court of his desire to retain his own attorney. Eight days before trial, Moore was arrested for violating parole. He testified that neither he nor his wife was successful in hiring an attorney. Moore appeared at trial without counsel, at which time the trial court inquired whether Moore had been informed of his right to counsel. Moore responded affirmatively. The trial court

> then asked whether [Moore] had talked to his lawyer and [Moore] responded: "I couldn't. I was in jail." The trial court then stated: "All right, but you knew you had a right to a lawyer.", and [Moore] responded: "Yes, yes, I knew." The [trial court] then announced that [it] would take judicial notice that the jail had a telephone and said: "Well, I guess you'll have to go on your own then . . . ."

Id. at 96, 277 N.W.2d at 556. Subsequently to being found guilty, Moore and his wife wrote several letters requesting counsel for the purpose of appeal. Not until 7 1/2 weeks after the trial was Moore's indigency acknowledged and counsel appointed.

> Although [Moore] had already affirmatively indicated his intention to exercise his constitutional right to counsel by retaining private counsel, the [trial] court interpreted [Moore's] appearance at trial without counsel as an affirmative, intelligent, and understanding waiver of his constitutional right to counsel simply because [Moore] had been advised of his right to counsel a month before. Under the circumstances here it was wholly unreasonable to assume that [Moore] had conclusively rejected an offer of counsel, much less that he had affirmatively waived his right to counsel.

Id. at 99, 277 N.W.2d at 557.

State v. Sondag, 214 Neb. 659, 335 N.W.2d 306 (1983), is instructive as well. Sondag had appeared at several preliminary hearings with privately retained counsel. When Sondag failed to appear at the scheduled arraignment, the trial court issued a capias and took under advisement counsel's motion to withdraw. Privately retained counsel and Sondag then appeared at a rescheduled arraignment. The trial court

conducted the hearing and then permitted privately retained counsel to withdraw. It also informed Sondag of his right to court-appointed counsel. Sondag acknowledged his right but stated that he planned to hire his own attorney. " 'I don't want a public defender and I don't feel I know enough about the law to defend myself.' " *Id.* at 660, 335 N.W.2d at 307. The trial court proceeded to warn Sondag that the trial was set for March 1, 1982, and that it would not be continued should Sondag appear without counsel. On the day of the scheduled trial, Sondag arrived without counsel before a different judge, who reminded Sondag that he had been informed of his right to counsel and of the date of trial, and that despite his failure to secure counsel, the case was to proceed. The judge further noted that Sondag had declined the original invitation to have court-appointed counsel. Sondag responded: " '[B]ut at that time I assumed that I would—I was going to be able to afford an attorney. It was an improper assumption on my behalf.' " *Id.* at 661, 335 N.W.2d at 307. Notwithstanding, the trial proceeded.

Relying on *Moore, supra*, we held that Sondag's mere intent to retain counsel and his ensuing appearance alone at the scheduled trial could not be interpreted as a waiver of his constitutional right to counsel.

Here, Sack made clear that while he was concerned about the quality of representation being provided by Truell, he did not desire to proceed without an attorney. After Truell was permitted to withdraw, Sack again indicated he wanted representation.

It is well settled that an indigent accused does not have the right to appointed counsel of his or her choice nor to be represented by an appointed attorney the accused likes or with whom the accused has rapport. See *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989). Once counsel has been appointed for an indigent accused, the accused must remain with the appointed counsel unless one of the following conditions is met: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and chooses to proceed pro se, see *State v. McPhail*, 228 Neb. 117, 421 N.W.2d 443 (1988); (2) appointed counsel is incompetent, in which case new counsel is to be appointed, see *State v. Clark*, 216 Neb. 49, 342 N.W.2d 366

(1983); or (3) the accused chooses to retain private counsel, see *State v. Neal*, 231 Neb. 415, 436 N.W.2d 514 (1989). However, retaining private counsel does not compel the granting of a continuance. See *id*.

Sack said nothing nor took any action sufficient to satisfy any of these conditions to discharge his court-appointed counsel. He did not waive his right to counsel and elect to represent himself, nor did he unequivocally forfeit his then appointed counsel in pursuit of a private attorney. The trial court found that Truell was competent, and his motion to withdraw as appointed counsel should therefore have been overruled. Under the circumstances, Sack's statement that he did not wish to proceed pro se renders clearly wrong the trial court's finding that Sack freely, voluntarily, and understandingly waived his right to counsel.

A plea of guilty cannot be said to have been entered freely, intelligently, voluntarily, and understandingly unless the accused either was represented by counsel or freely, voluntarily, and understandingly waived the right thereto. See, *State v. Glover*, 236 Neb. 402, 461 N.W.2d 410 (1990); *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). It therefore necessarily follows that the trial court's finding that Sack's plea of guilty was entered freely, intelligently, voluntarily, and understandingly is likewise clearly wrong.

Accordingly, the judgment must be reversed and the cause remanded for further proceedings on both the forgery and burglary charges.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GRANT, J., participating on briefs.

SUSAN JANE KROENKE, APPELLEE, V. GARY LOUIS KROENKE, ALSO KNOWN AS GARY LEWIS KROENKE, APPELLANT.

477 N.W.2d 583

Filed December 20, 1991. No. 91-126.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Michael F. Pistillo and Mark A. Steele, of Steier, Rogers & Pistillo, P.C., for appellant.

Lawrence H. Yost, of Yost, Schafersman, Yost, Lamme, Hillis & Mitchell, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

In modifying a previously entered dissolution of marriage decree, the trial court dissolved a provision for joint custody of the parties' children, granted the children's permanent custody to the petitioner mother with liberal visitation rights in the respondent father, and increased the father's obligation to pay child support. The respondent appeals.

The ultimate test in determining the appropriateness of an award involving custody of minor children is reasonableness, as determined by the facts of each case, and the trial court's determination normally will be affirmed in the absence of an abuse of discretion. *Pournazari v. Pournazari*, 236 Neb. 260, 460 N.W.2d 661 (1990).

We have reviewed the record de novo, as we are required to do under *Pournazari, supra*, and have determined that the trial court did not abuse its discretion in awarding permanent custody of the parties' minor children to their mother.

Modification of child support is controlled by the rules set forth in *Phelps v. Phelps*, *ante* p. 618, 619-20, 477 N.W.2d 552, 554-55 (1991):

> Modification of child support is an issue entrusted to the discretion of the trial court. Appellate review of such issues is de novo on the record, but absent an abuse of discretion by the trial court, its decision will be affirmed

on appeal. The de novo review is also qualified by the fact that when there is a conflict in the evidence, weight is given to the fact that the trial court saw and heard the witnesses and accepted one version of the facts as opposed to the other.

Although *Phelps v. Phelps, supra*, had not been decided by this court when the trial court entered its modification order in the case at bar, the trial judge did apply all of the principles which we later set forth in the *Phelps* case. Our de novo review of the record reveals that the trial court did not abuse its discretion in increasing the child support award in this case.

We have reviewed all of the alleged trial errors claimed by the respondent and find they are without merit. Therefore, the order of the trial court modifying the dissolution of marriage decree in this case is affirmed. The petitioner wife is allowed an attorney fee of $1,500 in this court.

AFFIRMED.

DOUGLAS M. PHIPPS, APPELLANT, V. MILTON G. WALDBAUM & CO., A CORPORATION, ET AL., DEFENDANTS AND THIRD-PARTY PLAINTIFFS, AND STATE OF NEBRASKA, SECOND INJURY FUND, THIRD-PARTY DEFENDANT, APPELLEES.

477 N.W.2d 919

Filed December 20, 1991. No. 91-346.

1. **Workers' Compensation: Proof.** A claimant has the burden to prove by a preponderance of the evidence that his employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act.
2. **Workers' Compensation.** Findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case.
3. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.

4. **Workers' Compensation: Appeal and Error.** Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Kathleen Koenig Rockey, of Domina & Copple, P.C., for appellant.

Jay L. Welch, of Rickerson, Welch & Kruger, for appellees corporation et al.

Don Stenberg, Attorney General, and John R. Thompson for appellee State.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

This is an appeal in a proceeding under the Workers' Compensation Act.

The plaintiff, Douglas M. Phipps, was injured in an accident on June 28, 1989, while employed by the defendant Milton G. Waldbaum & Co. The accident occurred when the plaintiff slipped and fell, causing a bucket of alkali to splash on his face and body. Fellow employees immediately flushed the plaintiff's right eye with water and took him for treatment to the Benthack Clinic in Wayne, Nebraska, where he was seen by a physician's assistant, Gary West, and by a Dr. Benthack. The plaintiff was then referred to an ophthalmologist in Sioux City, Iowa, Dr. Larry Zweben.

Dr. Zweben saw the plaintiff on June 29 and 30 and July 3, 1989. In spite of evidence of healing, the plaintiff continued to complain of blurred vision and other difficulties with his right eye. Dr. Zweben referred the plaintiff to an Omaha ophthalmologist, Dr. William Schlichtemeier, who examined the plaintiff on July 7. Dr. Schlichtemeier determined that the plaintiff's eye injury had healed and that the plaintiff could return to work on July 10. Dr. Schlichtemeier further expressed his opinion that the plaintiff was able to drive a car and did not need to wear a patch over his right eye.

On July 10, instead of returning to work, the plaintiff saw physician's assistant West at the Benthack Clinic in Wayne. At that time he complained of nausea, vomiting, pain in his lower back, and pain in his right eye. West instructed the plaintiff to return on July 14 for a followup visit for treatment of his headaches and nausea.

On July 14, 1989, the plaintiff, while still wearing an eye patch, requested that his 15-year-old brother drive him to his appointment in Wayne. Instead of taking the paved highway from Wakefield to Wayne, the plaintiff and his brother took old Highway 35, which is a gravel road. Approximately 3 miles out of Wakefield, the plaintiff's brother lost control of the vehicle, which resulted in an accident in which the plaintiff was severely injured.

All of the plaintiff's medical and hospital expenses in connection with the eye injury of June 28 have been paid, and he has been paid all compensation for temporary total disability to which he is entitled in regard to the June 28 eye injury. This action was brought to recover compensation for the injuries the plaintiff sustained in the automobile accident on July 14.

Following the hearing before a single judge of the compensation court, the plaintiff recovered an award. On rehearing, the compensation court found that the plaintiff had failed to prove that the accident of July 14 arose out of and in the course of his employment because the trip to Wayne was not necessitated by the injury to his eye on June 28 and was not intended to involve treatment for that injury.

The plaintiff has appealed to this court. The plaintiff's assignments of error contend that the compensation court erred in failing to award compensation to him for the injuries he sustained in the accident of July 14.

A claimant has the burden to prove by a preponderance of the evidence that his employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act. *Roan Eagle v. State*, 237 Neb. 961, 468 N.W.2d 382 (1991). The employee must establish the cause-and-effect relationship involving employment, an industrial injury, and disability. *Id.*

"Findings of fact made by the Nebraska Workers'

> Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. [Citations omitted.] In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. [Citations omitted.] Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. [Citations omitted.] As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony."

Roan Eagle v. State, supra at 962, 468 N.W.2d at 384 (quoting *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990)).

The record shows that the plaintiff suffers from a somatoform disorder which manifests itself in the form of gastric problems. The plaintiff has had this condition for several years.

The record further shows that the plaintiff's eye injury of June 28 had healed by July 14 and that he had been released to return to work on July 10. The record also shows that the plaintiff's eye injury was mild and would not cause nausea and vomiting. It was the opinion of physicians who had treated the plaintiff that his eye injury was not severe and that the eye injury alone would not have caused the plaintiff to suffer stomach problems.

Physician's assistant West testified that after he treated the plaintiff's eye injury on June 28 and referred the plaintiff to Dr. Zweben, he considered himself no longer involved in the care of the plaintiff's eye injury unless there was a referral back. West treated the plaintiff for headaches and nausea on July 10. When

West scheduled the plaintiff's followup appointment for July 14, he intended to check on the plaintiff's headaches and stomach problems.

The plaintiff argues that he is entitled to workers' compensation benefits because his injuries from the accident of July 14 were the result of an accident that occurred in the course of a trip to his doctor's office for treatment of the eye injury he sustained on June 28. We do not reach the issue of whether injuries suffered as a result of an accident in the course of a journey to a doctor's office occasioned by a compensable injury are also compensable because in this case it is clear that the plaintiff was not en route for treatment for a work-related injury when he was injured on July 14.

When the evidence in this case is viewed in the light most favorable to the defendants, it establishes that the trip to Wayne on July 14, 1989, was not necessary for and did not involve treatment of the plaintiff's injury to his eye. Furthermore, the plaintiff failed to prove that there was any connection between his eye injury of June 28, 1989, and the headaches and nausea for which he was seeking treatment on July 14, when the automobile accident occurred. The compensation court's finding that the plaintiff's accident and injuries of July 14 did not arise out of and in the course of his employment by the defendant company is supported by the record.

The judgment is affirmed.

AFFIRMED.

LORINDA LYNN ADCOCK, APPELLANT, V. KEVIN LYNN ADCOCK, APPELLEE.

477 N.W.2d 583

Filed December 20, 1991. No. 91-397.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

K.C. Engdahl, of Schmid, Mooney & Frederick, P.C., for appellant.

Jon S. Okun for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

The petitioner mother, Lorinda Lynn Adcock, appeals from the judgment of the district court which, in dissolving the marriage of the parties, awarded custody of the parties' minor child, Aaron Lynn Adcock, to the respondent father, Kevin Lynn Adcock, and ordered the mother to pay child support. Appellant's assignments of error relate solely to the issues of custody and child support.

As stated in *Knickrehm v. Knickrehm*, *ante* p. 290, 475 N.W.2d 908 (1991), "[t]he ultimate test in determining the appropriateness of an award involving custody of a minor child is reasonableness, as determined by the facts in each case, and the trial court's determination normally will be affirmed in the absence of an abuse of discretion." The same test is applicable in reviewing an award of child support. See *Helms v. Helms*, 234 Neb. 630, 452 N.W.2d 269 (1990).

We have reviewed the record de novo, as we are required to do, and determine that the trial court did not abuse its discretion. *Knickrehm v. Knickrehm, supra.*

AFFIRMED.

KAREN P. ISENBERGER, APPELLEE, V. DAVID M. ISENBERGER, APPELLANT.

477 N.W.2d 927

Filed December 27, 1991. No. 89-825.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed as modified.

Warren S. Zweiback and Peter J. Lorenz, of Zweiback, Hotz & Lamberty, P.C., for appellant.

Pamela Hogenson Govier, of Frost, Meyers, Guilfoyle & Govier, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

This is a dissolution action of a 25-year marriage in which the respondent husband has appealed. He assigns as error the trial court's actions in (1) not allowing respondent to withdraw his rest and adduce further testimony as to his expenses, (2) granting excessive alimony of $900 per month for 90 months, (3) dividing the assets of the parties, (4) ordering respondent to pay $800 on petitioner's attorney fees in the trial court, and (5) providing that the period of 90 months for the payment of alimony shall not begin until this appeal is disposed of and that during the appeal, respondent shall pay $900 per month as temporary alimony.

With regard to the first four assignments of error, we have reviewed the trial court's judgment de novo on the record, and we determine that the trial court did not abuse its discretion in refusing to allow respondent to withdraw his rest, in the determination of alimony, in the division of marital assets, or in the order as to attorney fees.

We do note, however, that while the trial court found that alimony should be paid for 90 months, the court's order did not limit payments to the 90-month period. The decree should be modified in that respect.

We further determine that the court abused its discretion in ordering that respondent's payment of alimony during the

appeal "shall be in the form of temporary alimony and shall not constitute a credit against the Respondent's final obligation to pay alimony." We reverse that order and direct that respondent's obligation to pay alimony begin on July 1, 1989, and continue for 90 months.

As so modified, the trial court's order is affirmed. Each party shall pay his or her own attorney fees on appeal.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. CHERYL SUMSTINE, APPELLANT.

478 N.W.2d 240

Filed December 27, 1991. No. 90-507.

1. **Speedy Trial.** The purpose of Nebraska's speedy trial act, Neb. Rev. Stat. §§ 29-1207 et seq. (Reissue 1989), sometimes called the "6-month rule," is protection of an accused from a criminal charge pending for an undue length of time.
2. _____. In addition to protecting the interests of a defendant, the speedy trial act protects the interests of society and of the government in obtaining prompt disposition of criminal charges.
3. _____. The primary burden is on the State to see that an accused is brought to trial within the time prescribed by the Nebraska speedy trial act.
4. **Speedy Trial: Time: Proof.** To avoid a defendant's absolute discharge from an offense charged, as dictated by Neb. Rev. Stat. § 29-1208 (Reissue 1989), the State, by a preponderance of evidence, must prove existence of a period of time which is authorized by Neb. Rev. Stat. § 29-1207(4) (Reissue 1989) to be excluded in computing the time for commencement of the defendant's trial in accordance with the Nebraska speedy trial act, or "6-month rule."
5. **Speedy Trial: Proof.** To obtain absolute discharge under Neb. Rev. Stat. § 29-1208 (Reissue 1989), a defendant is not required to show prejudice sustained as the result of failure to bring the defendant to trial within 6 months in accordance with the Nebraska speedy trial act.
6. **Speedy Trial: Time: Indictments and Informations.** While time chargeable against the State under the speedy trial act commences with the filing of an initial information against a defendant, the time chargeable to the State ceases, or is tolled, during the interval between the State's dismissal of the initial information and refiling of an information charging the defendant with the same crime alleged in the previous, but dismissed, information.

7. _____: _____: _____. When the State dismisses an information against a defendant and refiles another information charging the defendant with the same offense alleged in the previous information, the periods during which the informations are pending for the same offense shall be combined in determining the last day for commencement of trial under Nebraska's speedy trial act, subject to time excluded pursuant to Neb. Rev. Stat. § 29-1207(4) (Reissue 1989) in computing the date for trial.
8. **Speedy Trial: Time: Indictments and Informations: Lesser-Included Offenses.** When the State dismisses a criminal charge contained in an information against a defendant and subsequently files an information against the defendant which alleges (1) the same offense charged in the previously dismissed information, (2) an offense that includes the simultaneous commission of a lesser-included offense charged in the information previously dismissed by the State, or (3) commission of a crime that is a lesser-included offense of the crime charged in the previously dismissed information, time which elapses during pendency of the informations shall be charged against the State in determining the last day for commencement of a defendant's trial pursuant to the Nebraska speedy trial act. The preceding rule requiring combination of the periods during which informations are pending is subject to the provision for excludable time, in accordance with Neb. Rev. Stat. § 29-1207(4) (Reissue 1989) of the Nebraska speedy trial act.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded with direction.

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch for appellant.

Don Stenberg, Attorney General, and Linda L. Willard for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

A jury in the district court for Lancaster County convicted Cheryl Sumstine of first degree arson, a violation of Neb. Rev. Stat. § 28-502(1) (Reissue 1989), which is a Class II felony. Sumstine was sentenced to imprisonment.

In her two assignments of error, Sumstine contends, first, that her right to a speedy trial, required by Nebraska's speedy trial act, Neb. Rev. Stat. §§ 29-1207 et seq. (Reissue 1989), was violated and, second, that the evidence is insufficient to sustain her conviction.

BACKGROUND

Filed on June 26, 1989, an information charged Sumstine with second degree arson, a Class III felony, and alleged that Sumstine intentionally set fire to her apartment building at 837 G Street on April 29, 1989, a violation of Neb. Rev. Stat. § 28-503(1) (Reissue 1989): "A person commits arson in the second degree if he or she intentionally damages a building by starting a fire . . . ." After Sumstine's arraignment on June 28, 1989, at which her trial was scheduled for September 11, the State, on September 7, obtained the court's permission to endorse the information with the names of 3 witnesses in addition to the 29 witnesses already endorsed on the information and take depositions within 40 days, but apparently did not take those depositions. While the record fails to disclose the nature of the proposed amendment to the information, on October 18 the court authorized the State to file an amended information against Sumstine within 7 days, but the State did not file the amended information. However, on November 9, the prosecutor appeared before the court and, without explanation reflected in the record, dismissed the pending second degree arson charge against Sumstine.

On January 8, 1990, the State filed an information against Sumstine charging her with first degree arson, a violation of § 28-502(1), which states:

> A person commits arson in the first degree if he or she intentionally damages a building by starting a fire . . . when another person is present in the building at the time and either (a) the actor knows that fact, or (b) the circumstances are such as to render the presence of a person therein a reasonable probability.

The 1990 arson charge alleged that Sumstine set fire to her apartment building at 837 G Street on April 29, 1989, and, in accordance with § 28-502(1), contained the allegation concerning a person's presence in the building set afire.

At her arraignment on January 10, 1990, Sumstine pled not guilty to the first degree arson charge. Immediately before trial on April 9, Sumstine moved for dismissal of the pending arson charge against her and based her claim to dismissal on the State's failure to comply with the Nebraska speedy trial act and

bring her to trial within 6 months after the second degree arson information was filed in June 1989. Section 29-1207(1) of Nebraska's speedy trial act provides: "Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section." Section 29-1207 thereafter sets forth the method of computing the 6-month period for commencement of trial after an information has been filed, including specified periods of time excludable for the computation and a catchall exclusion: "Other periods of delay not specifically enumerated herein [shall be excluded], but only if the court finds that they are for good cause." § 29-1207(4)(f). Section 29-1208 of the speedy trial act states: "If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he [or she] shall be entitled to his [or her] absolute discharge from the offense charged and for any other offense required by law to be joined with that offense."

In arguing her dismissal motion in the district court, Sumstine contended that the previous second degree arson charge in 1989 was a "lesser grade felony" included within the pending first degree arson charge in 1990; therefore, the time during which the second degree charge was pending should be "tacked" to the period of pendency for the first degree arson charge, resulting in expiration of 6 months without Sumstine's trial and entitling her to absolute discharge from the first degree arson charge. The doctrine of tacking allows joining or combining periods which have a nexus for continuity of time involved in separated events or actions, for example, tacking based on privity of estate for adverse possession of realty, see *Bryan v. Reifschneider*, 181 Neb. 787, 150 N.W.2d 900 (1967), and *Thomas v. Flynn*, 169 Neb. 458, 100 N.W.2d 37 (1959), and tacking in reference to an extension of authority for motor carrier routes under Public Service Commission jurisdiction, see *Nebraska State Railway Commission v. Seward Motor Freight, Inc.*, 188 Neb. 223, 196 N.W.2d 200 (1972).

In opposing Sumstine's dismissal motion, the State asserted that the two arson informations related to "two different cases" and that, in cases such as Sumstine's, the practice of a prosecutor's voluntarily dismissing and refiling charges was

"done all of the time and done in the past and will be done in the future." Responding further to Sumstine's motion, the prosecutor stated:

> I don't think there has been any prejudicial effect of any kind. I am not sure what the tactical advantage was by filing one or the other [charge against Sumstine]. It doesn't appear to me to make any particular difference at this particular time. Again, it has been done numerous times. There is no showing of any kind of prejudice, wrongful doing by the State in so doing and I just think that again it's ready to go to trial and the State is ready.

The district court overruled Sumstine's dismissal motion based on the speedy trial act. Sumstine was tried and convicted, and has appealed with the assignments of error previously mentioned.

SPEEDY TRIAL

Sumstine claims she should have been discharged from the arson charge, since she was not brought to trial within 6 months as required by the Nebraska speedy trial act, §§ 29-1207 to 29-1209. Since Sumstine did not raise the question of her constitutional right to a speedy trial, we consider only Sumstine's contention based on Nebraska's speedy trial act. See, *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990) (the constitutional right to a speedy trial is distinct from the provisions for a speedy trial prescribed by the Nebraska speedy trial act); *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983).

"The purpose of Nebraska's speedy trial act, sometimes called the '6-month rule,' is protection of an accused from a criminal charge pending for an undue length of time." *State v. Lafler*, 225 Neb. 362, 367, 405 N.W.2d 576, 580 (1987). See, also, *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984). The Supreme Court of North Carolina, construing North Carolina's speedy trial act, observed in *State v. Marlow*, 310 N.C. 507, 515, 313 S.E.2d 532, 537 (1984):

> The basic purpose of the Speedy Trial Act is to provide for the efficient administration of justice, which, according to our legislature, is best effectuated through a prompt determination of a criminal defendant's guilt or

> innocence. The Act's delineation of specific time limits and exclusions serves as a guideline for processing cases, and thus provides a technical defense for criminal defendants.

In reference to the federal Speedy Trial Act of 1974, 18 U.S.C. §§ 3161 et seq. (1988), the court stated in *U.S. v. Cephas*, 937 F.2d 816, 819 (2d Cir. 1991): "[I]n addition to protecting the interests of a defendant . . . the speedy trial act [protects] the interests of society and of the government in obtaining prompt disposition of criminal charges."

Accordingly, referring to the Nebraska speedy trial act, we have stated:

> " 'To avoid a defendant's absolute discharge from an offense charged, as dictated by § 29-1208, the State, by a preponderance of evidence, must prove existence of a period of time which is authorized by § 29-1207(4) to be excluded in computing the time for commencement of the defendant's trial in accordance with the Nebraska speedy trial act, or "6-month rule."...' "

State v. Oldfield, supra at 441, 461 N.W.2d at 560. Accord, *State v. Vrtiska*, 227 Neb. 600, 418 N.W.2d 758 (1988); *State v. Lafler, supra*.

To obtain absolute discharge under § 29-1208, a defendant is not required to show prejudice sustained as the result of failure to bring the defendant to trial within 6 months in accordance with the Nebraska speedy trial act. *State v. Lafler, supra*.

The first information against Sumstine was filed on June 26, 1989; hence, the last day for commencement of Sumstine's trial on the first information was December 26, 1989. See *State v. Oldfield, supra* at 441, 461 N.W.2d at 560: Computation of the 6-month period is based on the " 'move forward 6 months, but then back up 1 day' rule expressed in [*State v. Jones*, 208 Neb. 641, 305 N.W.2d 355 (1981)]." Since the State dismissed the first information on November 9, 1989, and filed the second information against Sumstine on January 8, 1990, there was an interval of 59 days without any arson charge against Sumstine. Also, during pendency of the first information, the State was allowed 40 days to obtain depositions. Sumstine suggests, however, that "it is reasonable to assume that the defendant was

also granted the same 40 days to take depositions. Consequently, those 40 days would be chargeable against the defendant." Brief for appellant at 14. We accept Sumstine's suggestion and concession of reciprocity concerning time allowed for depositions and, for that reason and for the purpose of this appeal, acknowledge that Sumstine is also charged with the time allowed for depositions. See, *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983) (time for discovery requested by a defendant may be excluded under § 29-1207(4) in computing the last day for trial under the speedy trial act); *State v. Fatica*, 214 Neb. 776, 336 N.W.2d 101 (1983) (reasonable time used to obtain a deposition requested by a defendant in preparation for trial is excluded in computing the last day permissible for commencement of trial pursuant to the speedy trial act). Hence, if tacking based on the pendency of informations is allowed for computation of the period within which a defendant must be brought to trial pursuant to the Nebraska speedy trial act, and if the State is not charged with the interval between dismissal of the first information and the filing of the second information, 99 days (40 days for depositions and the 59-day interval between the arson informations) are added to the date of December 26, 1989, in determining the last day for commencement of Sumstine's trial on the second arson information. Since the second information was filed on January 8, 1990, and, for present purposes, since we assume applicability of tacking in computing time charged to the State for commencement of Sumstine's trial, chargeable time against the State was revived on January 8, 1990, when prosecution of Sumstine was resumed on the arson charge. The date of January 8, 1990, itself is counted or included in the 99-day extension for commencement of Sumstine's trial, because, if tacking is applicable, all the time during which an arson information was pending against Sumstine, except the initial filing day of June 26, 1989, must be used to determine the last day for commencement of Sumstine's trial in the absence of any excludable time concerning the computation. Therefore, extending the date of December 26, 1989 (the last day for trial under the first arson information), by 99 days (the interval during which no arson information was pending against

Sumstine plus the time for depositions, which is excluded pursuant to § 29-1207(4)), the last day for commencement of Sumstine's trial was April 4, 1990. Sumstine's trial started on April 9, 1990.

Thus, the all-important question in Sumstine's appeal is whether tacking based on the pendency of the informations is allowed in determining the last day for commencement of a defendant's trial pursuant to the Nebraska speedy trial act.

We implicitly approved tacking in *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989), wherein the information, filed on March 18, 1986, charged Batiste with first degree murder. On October 29, 1986, the State dismissed the information because a State's witness could not be located. On June 18, 1987, the State filed a first degree murder charge for the same homicide alleged in the previous information against Batiste, who, on October 1, 1987, moved for dismissal, claiming that her trial had not commenced within 6 months after the filing of the first information. In computing the 6-month period, the trial court concluded that only the time involved in the pendency of the murder informations was included in determining the last day for commencement of Batiste's trial. On the question about the speedy trial act presented in Batiste's appeal, we stated: "In Batiste's case, the time between the dismissal and refiling of the charge is not includable in calculating the 6-month time period set forth in § 29-1207 [Reissue 1989]." 231 Neb. at 485, 437 N.W.2d at 129. Thus, in *Batiste*, we recognized that, while time chargeable against the State under the speedy trial act commences with the filing of an initial information against a defendant, the time chargeable to the State ceases, or is tolled, during the interval between the State's dismissal of the initial information and refiling of an information charging the defendant with the same crime alleged in the previous, but dismissed, information. As a corollary of the preceding, and in accordance with *Batiste*, when the State dismisses an information against a defendant and refiles another information charging the defendant with the same offense alleged in the previous information, the periods during which the informations are pending for the same offense shall be combined in determining the last day for commencement of

trial under Nebraska's speedy trial act, subject to time excluded pursuant to § 29-1207(4) in computing the date for trial.

Similar to our conclusion in *Batiste, supra*, is the conclusion in *Cole v. State*, 650 S.W.2d 818 (Tex. Crim. App. 1983), wherein the Court of Criminal Appeals of Texas construed the Texas speedy trial act in relation to statutorily excluded time, i.e., the interval between the dismissed charge and a refiled charge based on the same transaction involved in the previous but dismissed charge, and stated: "It is reasonable to infer that by excluding the time between dismissal and the bringing of the new charge the time which elapsed under the first charging instrument is to be included in computation [of the last day for commencement of trial], and we so hold." 650 S.W.2d at 820. In *State v. Cuezze, Houston & Faltico*, 225 Kan. 274, 589 P.2d 626 (1979), the court recognized tacking in reference to the 180-day requirement for trial pursuant to the Kansas speedy trial act. Cuezze and Houston were charged in the initial information, which contained two counts of making a false writing and two counts of conspiracy. Cuezze was arraigned on June 13, 1977, and Houston on May 20, 1977. In September 1977, the State filed a second information against Cuezze, Houston, and Faltico, who was implicated by evidence obtained after the arraignments of Cuezze and Houston. When the second information was filed, the State dismissed the initial information against Houston and Cuezze, who were then arraigned on the second information on January 19 and 20, 1978, respectively. Since the Kansas speedy trial act required a trial within 180 days after a defendant's arraignment, the trial court dismissed the second information. In affirming the dismissal, the Kansas Supreme Court stated:

> [T]he purpose of [the Kansas speedy trial statute] is to implement and define the constitutional guarantee of a speedy trial and the statute establishes certain maximum time limits within which a defendant must be brought to trial. Absent a showing of necessity, the state cannot dismiss a criminal action and then refile the identical charges against the same defendant and avoid the time limitations mandated by the statute.

State v. Cuezze, Houston & Faltico, supra at 278, 589 P.2d at

630. See, also, *U.S. v. Leone*, 823 F.2d 246 (8th Cir. 1987) (when an indictment is dismissed on the government's motion, but the defendant is reindicted, the time limit for bringing a defendant to trial pursuant to the federal speedy trial act is tolled during the interval between indictments, but the time chargeable against the government is restarted when the second indictment is filed); *U.S. v. Fuesting*, 845 F.2d 664 (7th Cir. 1988) (time interval between government's dismissal of criminal complaint and return of indictment reinstating charges was excludable for the purposes of the federal speedy trial act, and the time limit for commencement of trial pursuant to the act was tolled during the interval; however, the time limit for commencement of trial began to run again when the charges were reinstated by indictment). Without tacking and the "tolling approach," the State, whenever a prosecutor desired a postponement of trial beyond the 6-month period specified in § 29-1207, could regularly evade the Nebraska speedy trial act as a result of the prosecutor's dismissing a charge, refiling the same charge, and acquiring a new 6-month period for commencement of a defendant's trial on the refiled charge. Thus, tacking and the tolling approach to a speedy trial act, that is, the State is not charged with the time during which no information is pending against a defendant, prevent undermining or subverting implementation of the speedy trial act by automatically providing prosecutors a new period in which to bring an accused to trial, irrespective of the time involved in the pendency of a prior proceeding dismissed by the State.

In light of the foregoing, we turn to Sumstine's case and consider the two charges filed against her, namely, the initial arson information filed in 1989 and the subsequent arson information filed in 1990. The initial information charged Sumstine with second degree arson in intentionally setting fire to her apartment building on April 29, 1989, a violation of § 28-503(1). The subsequent information charged Sumstine with intentionally setting fire to the same building described in the initial information and setting that fire on the same date alleged in the initial information. However, since the charge in the subsequent information was first degree arson, the second information contained the additional allegation that "another

person" was present in the apartment building when Sumstine allegedly set fire to the structure. See § 28-502(1). As far as the record reflects, all information concerning the arson charges was available to the State at the time the initial information was filed in 1989. Therefore, with the exception of the allegation concerning the presence of another person within the building set afire, both informations had the same allegation that Sumstine had intentionally set fire to her apartment building on the specific date mentioned in the informations. The identity of allegations for the arson offenses supplies a legal and rational nexus for the two informations against Sumstine. Moreover, in describing a lesser-included offense, we have stated: "To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater offense without simultaneously committing the lesser offense." *State v. Olsan*, 231 Neb. 214, 219, 436 N.W.2d 128, 132 (1989). Consequently, the arson charged in the initial information was a lesser-included offense of arson charged in the subsequent information filed against Sumstine, since, under Nebraska law applicable in the present case, Sumstine, as charged by the informations, could not have committed first degree arson without simultaneously committing second degree arson.

The Supreme Court of Ohio, in *State v. Bonarrigo*, 62 Ohio St. 2d 7, 402 N.E.2d 530 (1980), construed Ohio's speedy trial act and its requirement of a trial within 270 days after the filing of a felony charge. In *Bonarrigo*, the state entered its *nolle prosequi* on a misdemeanor charge against Bonarrigo and later filed a felony charge against Bonarrigo, which was based on the same conduct charged in the misdemeanor case. Bonarrigo, by combining the time during which the felony and misdemeanor charges were pending, claimed he was entitled to dismissal of the felony charge. Agreeing with Bonarrigo, the court approved of computing the statutory time for commencement of a trial pursuant to the Ohio speedy trial act and refused to construe the act so that a prosecutor was provided with "a new 270-day period in which to bring an accused to trial, irrespective of the amount of unexplained delay involved in the prior misdemeanor proceedings," 62 Ohio St. 2d at 10, 402 N.E.2d at 534, and observed:

> The General Assembly has chosen to enforce the speedy trial statutes by providing an accused with a right to dismissal of charges upon timely motion, when not accorded trial within the statutory time. It was not the General Assembly's sole purpose in enacting the speedy trial statutes to reward those accused of criminal conduct for a prosecutor's lack of diligence. Concededly, an accused has a valid interest in, and an independent constitutional right to, a speedy trial. However, in construing the speedy trial statutes, this court also recognizes the public's interests not only in the prompt adjudication of criminal cases, but also in obtaining convictions of persons who have committed criminal offenses against the state.
>
> Consistent with these interests, we hold that, where a prosecutor obtains a felony indictment, based upon the same conduct as was a previously *nolled*, lesser-included misdemeanor charge, the time within which the accused shall be brought to trial pursuant to [the Ohio speedy trial act] consists of whatever residue remains from the 270-day period [required for trial in a felony case] after deducting the speedy trial time expended prior to the *nolle prosequi*. Such a holding adequately protects the accused's statutory rights.

62 Ohio St. 2d at 10-11, 402 N.E.2d at 534. Later, in *State v. Adams*, 43 Ohio St. 3d 67, 68, 538 N.E.2d 1025, 1027 (1989), the Supreme Court of Ohio, again construing Ohio's speedy trial act, concluded:

> "[W]hen new and additional charges arise from the same facts as did the original charge and the state knew of such facts at the time of the initial indictment, the time within which trial is to begin on the additional charge is subject to the same statutory limitations period that is applied to the original charge." [Quoting from *State v. Clay*, 9 Ohio App. 3d 216, 459 N.E.2d 609 (1983).]

Consistent with the legislative expression of policy in the Nebraska speedy trial act, see *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987) (prevention of a criminal charge pending against an accused for an undue length of time), we, therefore,

hold that when the State dismisses an information against a defendant and subsequently files an information against the defendant which alleges (1) the same offense charged in the previously dismissed information, (2) an offense committed simultaneously with a lesser-included offense charged in the information previously dismissed by the State, or (3) commission of a crime that is a lesser-included offense of the crime charged in the previously dismissed information, time which elapses during pendency of the informations shall be charged against the State in determining the last day for commencement of a defendant's trial pursuant to the Nebraska speedy trial act. The preceding rule requiring combination of the periods during which informations are pending is subject to the provision for excludable time in accordance with § 29-1207(4) of the Nebraska speedy trial act.

In Sumstine's case, as we have already noted, on the basis of tacking the last day for commencement of Sumstine's trial was April 4, 1990, in the absence of additional excludable time in computing the last day for commencement of trial. See § 29-1207. Since the State has not shown any excludable period, except the time utilized in Sumstine's obtaining depositions and the interval when Sumstine was not charged under any arson information, the State has failed to meet its burden and show that the speedy trial clock stopped at any time after restarting on January 8, 1990, when the State filed the second arson information against Sumstine. When the periods of pendency for the arson informations are tacked, or combined, it is clear that the State failed to bring Sumstine to trial within the 6-month period specified by § 29-1207. Sumstine is not required to prove prejudice to her as the result of the State's failure to comply with the speedy trial act; hence, Sumstine is entitled to absolute discharge on the arson charge, a result dictated by § 29-1208. Consequently, Sumstine's entitlement to absolute discharge requires that we reverse the district court's judgment and remand this cause with direction to enter judgment dismissing the arson information against Sumstine. Under the circumstances, it is unnecessary to consider Sumstine's second assignment of error concerning sufficiency of evidence to sustain her conviction.

Notwithstanding that the prosecutor informed the district court that the practice outlined in Sumstine's case is "done all of the time and done in the past," which may have been the situation, and further stated that such course of action "will be done in the future," our only comment is: "Not after today."

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. OTIS WOODFORK, APPELLANT.

478 N.W.2d 248

Filed December 27, 1991. No. 90-784.

1. **Pleadings: Double Jeopardy: Final Orders: Appeal and Error.** The denial of a plea in bar raising a double jeopardy claim is a final, appealable order.
2. **Constitutional Law: Double Jeopardy: Lesser-Included Offenses.** To determine whether a subsequent prosecution is barred by the double jeopardy clause of the U.S. Constitution, a court must first determine if the offenses have identical statutory elements or if one is a lesser-included offense of the other, and if so, then the inquiry must cease and the subsequent prosecution is barred.
3. **Double Jeopardy: Statutes: Proof.** Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.
4. **Constitutional Law: Double Jeopardy: Lesser-Included Offenses.** The fifth amendment to the U.S. Constitution forbids successive prosecution and cumulative punishment for a greater and a lesser-included offense.
5. **Constitutional Law: Double Jeopardy: Motor Vehicles: Convictions: Proof: Lesser-Included Offenses.** Willful reckless driving, Neb. Rev. Stat. § 39-669.03 (Reissue 1988), and operating a motor vehicle while intoxicated, Neb. Rev. Stat. § 39-669.07(1) (Cum. Supp. 1990), are not lesser-included offenses of operating a motor vehicle while the operator's license was revoked, § 39-669.07(5). Nor does proof of the conduct of operating a motor vehicle in a reckless manner or while intoxicated prove all of the elements of operating a motor vehicle while the operator's license was revoked so as to bar as violative of the double jeopardy clause of the U.S. Constitution a subsequent conviction for the latter offense.
6. **Case Disapproved: Constitutional Law: Double Jeopardy: Convictions: Proof.** The double jeopardy clause of the fifth amendment to the U.S. Constitution prohibits a subsequent prosecution where the State, in securing a conviction for one offense, *necessarily* has proved the conduct comprising *all* of the elements of

the subsequent offense not yet prosecuted, and to the extent that the holding of this court in *State v. Harrington*, 236 Neb. 500, 461 N.W.2d 752 (1990), is in conflict with this rule, it is expressly disapproved.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Scott C. Sladek for appellant.

James S. Jansen, Douglas County Attorney, and Robert C. Sigler for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Defendant, Otis Woodfork, appeals an order of the district court that overruled his motion to dismiss, which was in the nature of a plea in bar which he had filed in response to an information charging him with the Class IV felony offense of operating a motor vehicle while the operator's license was revoked. This charge arose out of the same incident which had previously resulted in no contest pleas and convictions in county court for the misdemeanor offenses of willful reckless driving and operating a motor vehicle while intoxicated (DWI). The basis for defendant's motion to dismiss/plea in bar was that prosecution on the felony charge was barred by the double jeopardy clause of the fifth amendment to the Constitution of the United States, and his sole assignment of error is that the district court should have sustained that motion/plea.

The denial of a plea in bar raising a double jeopardy claim is a final order as defined in Neb. Rev. Stat. § 25-1902 (Reissue 1989). *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990). Therefore, the appeal is properly before us.

It is Woodfork's contention that the driving incident which gave rise to his convictions of willful reckless driving and DWI was the same incident out of which the present felony charge of driving while his license was revoked arose. Therefore, he argues, a prosecution for this latter offense will require proof of conduct that constitutes the two offenses for which he has already been convicted. Finally, he states that under the rule of

Grady v. Corbin, ____ U.S. ____, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), and the decision of this court in *State v. Harrington*, 236 Neb. 500, 461 N.W.2d 752 (1990), the present prosecution violates his right to be free of double jeopardy. See, Neb. Const. art. I, § 12; U.S. Const. amend. V.

The U.S. Supreme Court stated in *Grady v. Corbin, supra* at 110 S. Ct. at 2090:

> To determine whether a subsequent prosecution is barred by the Double Jeopardy Clause, a court must first apply the traditional *Blockburger* test. If application of that test reveals that the offenses have identical statutory elements or that one is a lesser included offense of the other, then the inquiry must cease, and the subsequent prosecution is barred.

In *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), the Supreme Court adopted the following "test of identity" to determine whether crimes separately charged were actually but one offense:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

284 U.S. at 304.

In *Brown v. Ohio*, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977), the U.S. Supreme Court took note of the *Blockburger* test and stated, "Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense."

Applying this test to the case at hand, we conclude that willful reckless driving and DWI are not greater offenses to or lesser-included offenses of driving while the operator's license was revoked.

The willful reckless driving charge is based on Neb. Rev. Stat. § 39-669.03 (Reissue 1988), which states, "Any person who drives any motor vehicle in such a manner as to indicate a willful disregard for the safety of persons or property is guilty

of willful reckless driving."

In addition, defendant apparently pleaded no contest to a charge of DWI based on Neb. Rev. Stat. § 39-669.07(1) (Cum. Supp. 1990), which provides in part, "It shall be unlawful for any person to operate or be in actual physical control of any motor vehicle: (a) While under the influence of alcoholic liquor or of any drug."

In order to convict Woodfork of driving while his license was revoked based on § 39-669.07(5), the State must prove the following elements: "Any person operating a motor vehicle on the highways or streets of this state while his or her operator's license has been revoked pursuant to subdivision (2)(c) of this section shall be guilty of a Class IV felony."

One commits willful reckless driving by (1) driving a motor vehicle (2) in such a manner as to indicate a willful disregard (3) for the safety of persons or property. DWI is committed by (1) operation or physical control of a motor vehicle (2) while under the influence of alcohol. These offenses are definitely not greater offenses to or lesser-included offenses of driving while the operator's license was revoked, which requires (1) operating a motor vehicle on the highways or streets (2) with a license that has been revoked (3) pursuant to prior DWI convictions. It is clear that each offense requires proof of an additional fact.

Although defendant concedes that willful reckless driving and DWI are not lesser-included offenses of driving while the operator's license was revoked, he argues that a conviction of driving while the operator's license was revoked will require proof of conduct that constitutes an offense for which he has already been prosecuted. The conduct to which he refers is the driving or operation of a motor vehicle.

Woodfork bases his argument on the U.S. Supreme Court decision in *Grady v. Corbin*, ____ U.S. ____, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990). The defendant in *Grady* was involved in an automobile accident in which one person was killed. He received traffic citations charging him with driving while intoxicated and crossing the median, to which charges he pleaded guilty. Later he was indicted for criminally negligent homicide and third-degree reckless assault. The prosecution filed a bill of particulars which indicated the negligent and

reckless acts as (1) driving while intoxicated, (2) crossing the median, and (3) driving too fast for the weather and road conditions. The defendant moved to dismiss the indictment on double jeopardy grounds.

The U.S. Supreme Court agreed with the defendant that a subsequent prosecution for negligent homicide and third-degree reckless assault would violate the double jeopardy clause. The Court referred to *Harris v. Oklahoma*, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977), to demonstrate that a strict application of the *Blockburger* test is not the exclusive means of determining whether a subsequent prosecution violates the double jeopardy clause. In *Harris*, the state indicted and convicted the defendant of robbery with a firearm after he was first convicted of felony murder. The subsequent prosecution would have passed the *Blockburger* test, since the felony murder statute on its face did not require proof of a robbery to establish felony murder; other felonies could underlie a felony murder conviction. See *State v. Garza*, 236 Neb. 202, 459 N.W.2d 739 (1990). However, the *Harris* Court barred the subsequent robbery prosecution because the same robbery was used as the necessary felony. The *Grady* Court then proceeded to formulate a new test already suggested in *Illinois v. Vitale*, 447 U.S. 410, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980), which should be applied in case the subsequent prosecution survives the *Blockburger* test:

> [T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, *to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.* This is not an "actual evidence" or "same evidence" test. The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. As we have held, the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding.

(Emphasis supplied.) *Grady v. Corbin, supra* at 110 S. Ct. at 2093.

Note that this rule seems to require that the *entire* conduct constituting the prior offense must be necessary to prove an element of the charged offense. In a footnote, the Court suggests this conclusion by stating the obvious corollary: "Similarly, if in the course of securing a conviction for one offense the State *necessarily* has proved the conduct comprising *all* of the elements of another offense not yet prosecuted (a 'component offense'), the Double Jeopardy Clause would bar subsequent prosecution of the component offense." (Emphasis supplied.) 110 S. Ct. at 2093 n.11.

The Court in *Grady* applied the analysis to the facts and concluded that the State had admitted by its own pleadings that "it will prove the entirety of the conduct for which Corbin was convicted—driving while intoxicated and failing to keep right of the median—to establish essential elements of the homicide and assault offenses." *Grady, supra* at 110 S. Ct. at 2094. However, the Court added that the prosecution would not have been barred "if the bill of particulars revealed that the State would not rely on proving the conduct for which Corbin had already been convicted (*i.e.*, if the State relied solely on Corbin's driving too fast in heavy rain to establish recklessness or negligence)." *Id.*

We adopted the *Grady* test in *State v. Harrington*, 236 Neb. 500, 503, 461 N.W.2d 752, 754 (1990), where we held that "[t]he issue is whether the State relied upon 'conduct' that constituted an offense for which the defendant had already been prosecuted to establish an essential element of the offense charged in this case." As will be pointed out later in this opinion, this was a misapplication of the *Grady* rule.

Applying the requirements of *Grady* to the case at issue, we conclude that a subsequent prosecution on the driving while the operator's license was revoked charge would not violate the analysis set out in that case. The test is whether the subsequent prosecution will require the State to prove the *entire* conduct for which the defendant has already been convicted. According to the complaint, the State intends to prove that Woodfork did "unlawfully operate a motor vehicle upon the streets and highways in said city, county, and state while his operator's license had been suspended, or revoked pursuant to Section

39-669.07 for life or for a period of 15 years . . . ." Woodfork has not been convicted of prior conduct comprising the entirety of that charge. The case would have been analogous to *Grady v. Corbin*, ____ U.S. ____, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), if the complaint had stated that Woodfork operated a vehicle upon the streets and highways in a reckless manner or while intoxicated. The word "unlawfully" in the complaint clearly refers to driving with a revoked or suspended license, since the statute does not require an additional unlawful act for a charge of driving while the operator's license was revoked. In other words, reckless behavior or a state of intoxication are not essential elements of a driving while the operator's license was revoked charge under § 39-669.07. Driving, on the other hand, is an essential element of the driving while the operator's license was revoked charge, but driving does not constitute an offense for which the defendant has already been prosecuted.

The fact that the prosecution might use evidence that while Woodfork was driving while his license was revoked, he was also intoxicated and reckless is not dispositive, since the U.S. Supreme Court does not follow the same evidence rule. The critical inquiry is what *conduct* the State will prove. Looking at the statute and the complaint, we determine it is clear that the only conduct the State intended to prove was driving while the defendant's license was revoked or suspended.

Woodfork also seems to claim that a subsequent prosecution on the driving while the operator's license was revoked charge is double jeopardy as to the willful reckless driving and DWI convictions, not because the offenses are identical or lesser included, but because they arose out of the same transaction. Woodfork bases his argument on the following language in *State v. Harrington, supra* at 503, 461 N.W.2d at 754: "In the *Grady* case, the court noted that prosecution for minor offenses and major offenses involving the same conduct may be permissible if all offenses are joined in one case. It is the proof of *conduct* for which the defendant has already been prosecuted that bars the subsequent prosecution."

Appellant seems to imply that the U.S. Supreme Court in *Grady v. Corbin, supra*, and thereby this court in *State v. Harrington, supra*, adopted the "same transaction" test set out

by Justice Brennan in his concurring opinion in *Ashe v. Swenson*, 397 U.S. 436, 453-54, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970): "In my view, the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." Stated differently, defendant implies that the U.S. Supreme Court and this court have held that "the same conduct" refers to the same act or transaction. It should be noted that Justice Brennan's same transaction test, although accepted in some states, has never been adopted by a majority of the U.S. Supreme Court. See *Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977) (*Ashe, supra*, was followed by *Brown*, wherein the Supreme Court embraced the *Blockburger* test). The *Blockburger* test was not rejected and replaced with the same transaction test in *Grady, supra*. The U.S. Supreme Court simply introduced the additional "proof of conduct" test, which should be applied when the subsequent prosecution passes the *Blockburger* test. *Grady, supra*, does not stand for the proposition that separate and distinct offenses arising out of the same act or transaction amount to the "same offense."

This state has never accepted the same transaction test either. Recently, this court repeated that "the rule that a person cannot twice be put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act, because the constitutional inhibition is directed to the identity of the offense and not to the act." *State v. Brown*, 235 Neb. 10, 12-13, 453 N.W.2d 576, 578 (1990).

The rationale for rejecting the same transaction test is well worded by a Florida court:

> The absurdity of the "same transaction" standard can be easily illustrated. Assume that one breaks and enters a building to commit larceny of an automobile, does thereafter in fact steal the automobile and drive away, killing the night watchman in the process, and two blocks away runs a red light which brings about his arrest by the municipal police. Could it be said with any logic that a plea of guilty to breaking and entering would bar a subsequent prosecution for murder? If so, presumably a

> plea of guilty to the traffic offense would likewise, since all arise from the "same transaction".

State v. Conrad, 243 So. 2d 174, 177 (Fla. App. 1971).

The subsequent prosecution on the driving while the operator's license was revoked charge passes the *Grady* test, since the State is not required to prove the *entire* conduct for which the defendant was convicted of willful reckless driving and DWI. There was no need for the State to prove conduct which constituted reckless behavior or a state of intoxication because neither conduct is an essential element of a driving while the operator's license was revoked charge under § 39-669.07. The only conduct which needs to be proven again in a subsequent proceeding, and which is mentioned in the State's complaint, is driving upon the streets and highways. Since driving in and of itself is not unlawful and does not constitute the entire conduct for which the defendant was previously convicted, a conviction of driving while the operator's license was revoked would not violate the double jeopardy clause. Woodfork's assignment of error is without merit.

However, we must now examine *State v. Harrington*, 236 Neb. 500, 461 N.W.2d 752 (1990). The *Grady* test, adopted by this court in *Harrington*, determined whether the State relied upon "proof of conduct" that constituted an offense for which the defendant had already been prosecuted to establish an essential element of the offense charged in the subsequent prosecution. However, as previously stated in this opinion, quoting from a footnote in *Grady v. Corbin*, ____ U.S. ____, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), it is the fact that the State *necessarily* has proved the conduct comprising *all* of the elements of the subsequent offense not yet prosecuted that bars the State, under the double jeopardy clause, from prosecuting that subsequent offense.

Thus, in summary, the State, because of the double jeopardy clause, cannot in the subsequent prosecution prove the *entirety* of the conduct for which the defendant has already been convicted to establish the essential elements of the offense charged in the subsequent prosecution.

The defendant in *Harrington* was convicted during his first

prosecution of discharging a projectile, in violation of the Omaha Municipal Code, which made it unlawful for any person to discharge an instrument which releases a projectile by means of an explosive charge. Omaha Mun. Code, ch. 20, art. VII, § 20-196 (1980). Thus, the elements of that offense are (1) a person discharges (2) an instrument (3) which releases a projectile (4) by means of an explosive charge.

In the subsequent prosecution, the defendant in *Harrington* was charged with being a felon in possession of a firearm with a barrel less than 18 inches in length, in violation of Neb. Rev. Stat. § 28-1206(1) (Reissue 1989). That section states in substance that any person who possesses any firearm with a barrel less than 18 inches in length and who has previously been convicted of a felony commits the offense of possession of a firearm by a felon. The elements of this offense are (1) a person who previously has been convicted of a felony (2) possesses (3) a firearm (4) which has a barrel less than 18 inches in length.

When we apply the *Blockburger* test, it is apparent that the sections are not identical and one offense is not a lesser-included offense of the other, because each provision requires proof of an additional fact.

It appears that the second prosecution also would not violate the additional *Grady* test. The essential issue in the case was whether in order to prove the element of possession necessary to convict the defendant of being a felon in possession of a firearm, the State relied upon conduct surrounding his conviction of the offense of discharging a projectile.

The conduct that was necessary to establish the violation of the city ordinance was that the defendant discharged a projectile. That conduct, discharging a projectile, although perhaps necessarily requiring temporary possession of a firearm to accomplish that act, was not a necessary element of the felony charge of being a felon in possession of a firearm. That latter charge required only proof of possession of a particular type of firearm and that the defendant be a convicted felon. In securing the conviction for the municipal code violation, the State did not *necessarily* prove the conduct comprising *all* of the elements of the felony offense of a felon in possession of a firearm.

Although the bill of exceptions in *Harrington* is no longer available, defense counsel in *Harrington*, in his brief, quoted from that record, indicating that the factual basis for both convictions was supplied by the reception into evidence of the police report of the incident.

Defense counsel in *Harrington* suggested that the U.S. Supreme Court and this court follow the same incident or same transaction test. Counsel argued that *Blockburger* stands for the proposition that the double jeopardy clause prohibits successive prosecutions for the same criminal act or transaction.

However, this is not true. The issue is not what evidence the State will introduce at trial, but what *conduct* the State will *prove*. The Nebraska Supreme Court especially stated that the *Grady* test is not an "actual evidence" or "same evidence" test. "The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. As we have held, the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding." *Grady v. Corbin*, ____ U.S. ____, 110 S. Ct. 2084, 2093, 109 L. Ed. 2d 548 (1990). Thus, the fact that the State used the same police report in both prosecutions in *Harrington* does not make the second prosecution a violation of the double jeopardy clause.

The double jeopardy clause of the fifth amendment to the U.S. Constitution prohibits a subsequent prosecution where the State, in securing a conviction for one offense, *necessarily* has proved the conduct comprising *all* of the elements of the subsequent offense not yet prosecuted, and to the extent that the holding of this court in *State v. Harrington*, 236 Neb. 500, 461 N.W.2d 752 (1990), is in conflict with this rule, it is expressly disapproved.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., concurring.

I agree with the majority's treatment of the double jeopardy issue presented in this case and only write to emphasize the flaws which that analysis reveals in our separate lesser-included

offense doctrine.

The majority recognizes that the U.S. Supreme Court's decision in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), is the starting point for analysis of double jeopardy issues. In that case, the Supreme Court held that in determining whether the same act or transaction is punishable under more than one statutory provision, the test is "whether each provision requires proof of a fact which the other does not." *Blockburger, supra* at 284 U.S. at 304. As the majority also points out, in *Grady v. Corbin*, ____ U.S. ____, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), the Court held that the fifth amendment affords additional protection in the context of subsequent prosecutions involving the same act or transaction.

Nevertheless, it remains the case that application of the *Blockburger* test ordinarily determines whether cumulative punishments may be imposed for separate offenses arising out of the same act or transaction in a single prosecution. *Ohio v. Johnson*, 467 U.S. 493, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984). When two statutory provisions proscribe the "same offense" under the *Blockburger* test, there is a presumption that the imposition of punishment for both in a single prosecution is forbidden. *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983), quoting *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980). The application of the *Blockburger* test, moreover, clearly involves a strict comparison of statutory elements, rather than reliance on the actual evidence adduced at trial. See, *United States v. Woodward*, 469 U.S. 105, 105 S. Ct. 611, 83 L. Ed. 2d 518 (1985); *Illinois v. Vitale*, 447 U.S. 410, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980).

The determination of whether a person is being put in jeopardy more than once for the same offense in a single prosecution is closely related to the question of whether a lesser-included offense instruction is proper in a criminal case. Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 Am. Crim. L. Rev. 445 (1984). It is obviously desirable, then, to use the same test to resolve both issues. See *U.S. v. Schmuck*, 840 F.2d 384 (7th Cir. 1988). Given

the continuing vitality of the *Blockburger* test in the double jeopardy context, it would be logical to adopt a strict elements approach to the lesser-included offense doctrine as well. The U.S. Supreme Court recently did so for the federal courts in *Schmuck v. United States*, 489 U.S. 705, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989). Therefore, I repeat the view expressed previously that this court should adopt a strict elements approach rather than the amorphous cognate-evidence approach for determining whether a lesser-included offense exists. See *State v. Garza*, 236 Neb. 202, 459 N.W.2d 739 (1990) (White, J., dissenting).

BOSLAUGH, J., dissenting.

In abandoning the interpretation of *Grady v. Corbin*, ____ U.S. ____, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), which this court adopted on November 2, 1990, in *State v. Harrington*, 236 Neb. 500, 461 N.W.2d 752 (1990), the majority appears to have accepted the position of the Wyoming Supreme Court in *Eatherton v. State*, 810 P.2d 93, 99 (Wyo. 1991), wherein that court stated, "The Supreme Court did not really develop any new law in *Grady* with respect to successive prosecutions." I find that concept hard to accept. Apparently the four dissenting members of the U.S. Supreme Court in *Grady* reached the same conclusion.

In Justice O'Connor's estimation, the decision rendered null the Court's very recent holding in *Dowling v. U.S.*, 493 U.S. 342, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990), that the collateral estoppel component of the double jeopardy clause did not bar in all circumstances the later use of evidence relating to prior alleged criminal conduct for which a defendant has been acquitted. See *Grady, supra* (O'Connor, J., dissenting).

The dissent written by Justice Scalia characterizes the decision as a departure "from clear text and clear precedent" and advises that "[t]he effects of this innovation upon our criminal-justice system are likely to be substantial." *Grady, supra* at 110 S. Ct. 2096. In particular, Justice Scalia believes that the practical effect of the decision "will come down to a requirement that where the charges arise from a ' "single criminal act, occurrence, episode, or transaction," ' they 'must

be tried in a single proceeding.' " 110 S. Ct. at 2102. In other words, the Court's decision "to extend the Double Jeopardy Clause to prosecutions that *prove* a previously prosecuted offense will lead predictably to extending it to prosecutions that *involve the same facts as* a previously prosecuted offense." (Emphasis in original.) 110 S. Ct. at 2104 (Scalia, J., dissenting).

If indeed the *Grady* Court "did not really develop any new law" with respect to successive prosecutions, then it would seem that the issues in this case could have been resolved under our decision in *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990).

The majority's analysis of the *Grady* case seems to ignore the Supreme Court's concern that "a technical comparison of the elements of the two offenses as required by *Blockburger* does not protect defendants sufficiently from the burdens of multiple trials." *Grady, supra* at 110 S. Ct. at 2093.

In Chief Justice Urbigkit's dissent in the *Eatherton* case, he noted that in another case since argued before the Wyoming court, the attorney general had suggested that "the United States Supreme Court opinion in *Grady* was 'difficult to understand', a 'muddled up piece of logic', 'confused' and perhaps questionable in future validity." *Eatherton, supra* at 104. Chief Justice Urbigkit then stated, "If that is the foundation upon which this decision is structured, it sits not even on sand but only on imagination. *Grady* was a constitutional case and is now controlling." *Id.*

The *Grady* case was decided on May 29, 1990. In a dissenting opinion to the denial of certiorari in *Parker v. Arkansas*, ____ U.S. ____, 111 S. Ct. 218, 112 L. Ed. 2d 186 (1990), filed on October 1, 1990, Justice Marshall suggests that the subsequent prosecution for " 'causing the death of two or more persons in a single criminal episode' " was barred under the *Grady* case by the prior prosecution for felony murder because in the second prosecution, "the State clearly reproved the *conduct* for which the petitioner was originally convicted — breaking into the Warrens' home and killing them — in order to establish essential elements of the offense of causing the death of two or more persons in a single criminal episode." (Emphasis in original.) 111 S. Ct. at 219 n.3.

The critical question in applying the *Grady* case is to determine what the U.S. Supreme Court meant by the term "conduct." Ordinarily, conduct refers to acts as distinguished from status. In the *Harrington* case, the first offense involved possession of and the discharging of a firearm. The only *conduct* involved in the second offense was the possession of the firearm. That was *conduct* for which the defendant had already been prosecuted.

CAPORALE, J., joins in this dissent.

IN RE INTEREST OF A.C., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. C.C. AND G.C., APPELLANTS AND CROSS-APPELLEES.

478 N.W.2d 1

Filed December 27, 1991. No. 91-322.

1. **Parental Rights: Appeal and Error.** In a parental rights termination case, our review is de novo on the record, and we are required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, we will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. _____: _____. The adjudication that a child is within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) is a final, appealable order.
3. **Appeal and Error.** Errors which are assigned but not argued will not be considered by this court.
4. **Parental Rights: Proof.** In order to terminate parental rights, it must be shown that termination of parental rights is in the child's best interests and that at least one of six bases provided in Neb. Rev. Stat. § 43-292 (Reissue 1988) exists.
5. **Parental Rights: Evidence.** A juvenile court may terminate all parental rights between the parents and a juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that the parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection.
6. **Parental Rights: Proof: Words and Phrases.** An order terminating parental rights must be based upon clear and convincing evidence. Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
7. **Parental Rights: Evidence: Proof.** A parent's natural right to the custody of his or her own child must yield when the two requirements of Neb. Rev. Stat. § 43-292 (Reissue 1988) have been met. First, there must be clear and convincing

evidence of the existence of one or more of the circumstances described in subsections (1) to (6) of § 43-292. Second, if one of the conditions prescribed in subsections (1) to (6) has been evidentially established, there must be an additional showing by clear and convincing evidence that termination of parental rights is in a child's best interests. It is a combination of the best interests of the child and evidence of fault or neglect on the part of the parent that is required.

8. **Parental Rights.** A plan for rehabilitation is not a prerequisite or condition precedent to termination of parental rights.

Appeal from the Separate Juvenile Court of Sarpy County: WILLIAM D. STALEY, Judge. Affirmed.

Susan Koenig-Cramer for appellants.

Michael D. Wellman, Sarpy County Attorney, and Lawrence D. Gendler for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

The adoptive parents of A.C., a 10-year-old female child, appeal the termination of their parental rights by the separate juvenile court of Sarpy County.

The juvenile court entered the termination order after finding (1) that the parents of the child "have substantially and continuously or repeatedly neglected said child and refused to give said child necessary care and protection" and (2) that it is in the best interests of the child for the parental rights to be terminated. We affirm.

We have held that in a parental rights termination case,

> "[o]ur review is de novo on the record, and we are required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, we will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another."

In re Interest of B.M., ante p. 292, 475 N.W.2d 909, 910 (1991).

A.C., born October 29, 1980, is the adoptive daughter of appellants, C.C. and G.C., and the biological granddaughter of G.C.

In 1988, upon learning that A.C. had been sexually abused,

the family moved to Sarpy County from Turkey, where C.C. had been stationed in the military. In May of that year, A.C.'s increasingly inappropriate behavior prompted her parents to hospitalize her in Omaha for psychiatric treatment. At that time, she revealed to hospital personnel some details of abuse in the home. Upon her release from the hospital, A.C. was placed in foster care under the supervision of the Department of Social Services (DSS). The record is unclear as to how DSS initially became involved in A.C.'s case.

In June 1988, the State filed a petition which, as amended in August 1988, requested that the juvenile court take jurisdiction of A.C. under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) because A.C. was a "juvenile who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian . . . ." The parents stipulated to the facts alleged in the amended petition. Based upon the stipulated facts, the juvenile court took jurisdiction of A.C., pursuant to § 43-247(3)(a), and continued her custody with DSS for foster placement. The parents were ordered to cooperate with DSS.

DSS arranged therapy for A.C. and her parents. After two sessions with the therapist, the parents moved to Texas in early 1989 when C.C. retired with pension benefits from the military. A.C. remained in foster care in Nebraska. Thereafter, the parents made no effort to return to Nebraska until July 1990, when a supplemental petition to terminate parental rights was filed, despite a promise from C.C. that he and G.C. would return to Nebraska for monthly visitation with A.C. and for therapy. Although no written plan was ever adopted by the court, this promise was an informal agreement between C.C., his attorney, and DSS. The agreement that C.C. and G.C. would return to Nebraska for therapy was not mandated by the court, and the parents' failure to do so, in and of itself, is not a significant factor in terminating their parental rights in A.C. However, their failure to visit A.C. evidences their lack of interest in and neglect of the child.

A.C.'s parents' lack of interest in the well-being of their daughter was manifested in a number of other ways. There were five separate court hearings regarding A.C. from January 1989 to July 1990. None of those hearings was personally attended

by either parent. One hearing was attended by their counsel. Although three separate visits with A.C. were scheduled, both parents failed to appear at any of them. The parents stipulated that they misappropriated Social Security funds intended for A.C. The record reflects the amount misappropriated was $5,000. In Texas, the parents' phone was disconnected, and DSS had no contact with them for at least 5 months. DSS was unable to contact them by telephone. The evidence reflects A.C. told her therapist and hospital personnel that she had been sexually abused by her adoptive brother, who was also her biological cousin. He remains in the home of C.C. and G.C. A.C. continually expressed fear of returning to the care of her grandmother-adoptive mother.

A.C.'s parents requested that she receive psychiatric treatment in Texas. The recommendations of her therapist and of a Texas social worker who conducted a home study were that A.C. not be returned to her family in Texas. C.C. and G.C. adopted five children who were the natural children of G.C.'s three daughters. Four of the adopted children lived in Texas with C.C. and G.C.

On August 17, 1990, the State filed an amended supplemental petition, requesting that the parental rights of C.C. and G.C. to A.C. be terminated under Neb. Rev. Stat. § 43-292(2) and (6) (Reissue 1988). The petition alleged that "reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination" that A.C. was a juvenile under § 43-247(3)(a). The amended supplemental petition also alleged that "[t]he parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection." See § 43-292(2).

Following an evidentiary hearing on January 24, 1991, attended by C.C. and G.C., their attorney, and A.C.'s guardian ad litem, the juvenile court found that there was clear and convincing evidence that A.C.'s adoptive parents had "substantially and continuously or repeatedly neglected [the juvenile] and refused to give [the juvenile] necessary care and protection . . . ." The juvenile court judge also found by clear and convincing evidence that it was in the best interests of A.C.

that C.C.'s and G.C.'s parental rights be terminated. The judge terminated them under § 43-292(2).

A.C.'s parents claim the juvenile court erred in finding that reasonable efforts, under the direction of the court, had failed to correct the conditions leading to the determination that the child was within the meaning of § 43-247(3)(a). That finding was made upon stipulated facts in the original petition, which was amended in August 1988. The adjudication that a child is within the meaning of § 43-247(3)(a) is a final, appealable order. *In re Interest of L.J., M.J., and K.J.*, 238 Neb. 712, 472 N.W.2d 205 (1991). No appeal was taken from that adjudication. Thus, the appeal of that adjudication is untimely and requires no further discussion. Two other assignments of error were not discussed in the appellants' brief. Errors which are assigned but not argued will not be considered by this court. *In re Interest of B.M., ante* p. 292, 475 N.W.2d 909 (1991).

The parents also assign as error the juvenile court's (1) finding that the parents had substantially and continuously or repeatedly neglected said child and refused to give said child necessary care and protection and (2) failure to consider the reasonableness of the plan, if any, of DSS, which plan failed to take into consideration the parents' geographic location.

In our de novo review of the record, we find that clear and convincing evidence supports the juvenile court's determination that parental rights should be terminated under § 43-292(2). In order to terminate parental rights, it must be shown that termination of parental rights is in the child's best interests and that at least one of six bases provided in § 43-292 exists. *In re Interest of C.P.*, 235 Neb. 276, 455 N.W.2d 138 (1990). Section 43-292 provides:

> [A juvenile court] may terminate all parental rights between the parents . . . and [a] juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .
>
> (2) The parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection . . . .

An order terminating parental rights must be based upon clear and convincing evidence. Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of C.P., supra.*

> A parent's natural right to the custody of his or her own child must yield when the two requirements of Neb. Rev. Stat. § 43-292 (Reissue 1988) have been met. First, there must be clear and convincing evidence of the existence of one or more of the circumstances described in subsections (1) to (6) of § 43-292. Second, if one of the conditions prescribed in subsections (1) to (6) has been evidentially established, there must be an additional showing by clear and convincing evidence that termination of parental rights is in a child's best interests. It is a combination of the best interests of the child and evidence of fault or neglect on the part of the parent that is required.

In re Interest of N. W. and R. W., 238 Neb. 620, 630, 472 N.W.2d 887, 893 (1991).

The evidence of fault or neglect on the part of the parents has been set forth in the above facts. Those facts show clearly and convincingly that the parents substantially and continuously or repeatedly neglected A.C. and refused to give A.C. necessary parental care and protection. In fact, their conduct went beyond neglect of A.C. when they misappropriated $5,000 in Social Security funds which were intended for her benefit.

The evidence is also clear and convincing that termination of parental rights is in the best interests of A.C. A caseworker assigned to A.C. was asked why she believed it would be in the child's best interests to terminate parental rights in this case. She answered,

> [A.C.] has been living in foster care for several years now, she has grown into a very verbal child who is doing well in school, doing well in her children's groups such as Brownies and gymnastics, and she has consistently, since I've managed the case, not wanted to be with her grandparents.

Of particular significance is the testimony of A.C.'s therapist, a clinical psychologist, who opined that it was in

A.C.'s best interests that the adoptive parents' parental rights be terminated. The therapist testified that A.C.'s main fears are "[r]emolestation sexually by a family member, physical abuse from the grandmother. She also has an idea that her grandmother may try to kill her." The therapist diagnosed this then nine-year-old child as suffering from post-traumatic stress syndrome—a syndrome commonly associated with returning Vietnam veterans. A.C. was described by her therapist as a child of above-average intelligence whose behavior improved dramatically with therapy. The therapist testified that, in her opinion, if A.C. were returned to the family, "she'd decompensate psychologically [which] would mean going back to probably the worst of her symptoms thus far, probably compounded by the fact that she'd been abandoned by people that she trusted to keep her safe from that environment."

Similar testimony was given by another caseworker, who stated that after 2 years in foster care "[h]er behavior had stabilized to the point that, according to the foster mother, she only reacted negatively when she was afraid or when there was a discussion about her returning to her family . . . ."

Most disturbing is the continued presence in the family home of A.C.'s adoptive brother. A.C. has consistently maintained that this adolescent boy engaged in inappropriate sexual activity with her. The parents appear inexplicably indifferent to this fact, while for their daughter it remains "one of her main fears."

The requirements of § 43-292(2) having been met by clear and convincing evidence, appellants' first assignment of error is without merit.

The parents also allege error in the court's failure to consider the reasonableness of the plan, if any, of DSS. The essence of their argument is that DSS had no written plan for the family's reunification. This assignment of error is also without merit. A plan for rehabilitation is not a prerequisite or condition precedent to termination of parental rights. *In re Interest of A.H.*, 237 Neb. 797, 467 N.W.2d 682 (1991). A DSS caseworker testified it had been her hope that the parents would return to Nebraska for therapy and to work out a plan regarding visitation with A.C. The parents never returned for either of

those purposes.

Assigning as error the failure of the court to also adjudicate this matter under § 43-292(6), the State has cross-appealed. As we have found that parental rights were properly terminable under § 43-292(2), it is unnecessary for us to reach that issue.

The judgment of the trial court is correct and is affirmed.

AFFIRMED.

JOHN A. HELTER, APPELLANT, V. MARGARET E. WILLIAMSON, APPELLEE.

478 N.W.2d 6

Filed December 27, 1991. No. 91-371.

1. **Parent and Child: Presumptions: Proof: Evidence: Paternity.** The legitimacy of children born during wedlock is presumed, and this presumption may be rebutted by clear and convincing evidence. The testimony or declaration of a husband or wife is not competent to bastardize a child.
2. **Actions: Parties: Judgments.** Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests or without leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded with directions.

Brian R. Watkins for appellant.

Beth Tallon, of Legal Services of Southeast Nebraska, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

Appellant, John A. Helter, alleges that he is the biological father of Kristopher Charles Williamson, born in Riverside, California, on October 18, 1988, to appellee, Margaret E.

Williamson. From the time of Kristopher's conception and birth through the present, Williamson has been married to Tracy Williamson.

Helter and Margaret Williamson cohabited for 7 months in California, commencing in December 1988, and separated in July 1989, because the family became homeless. Helter took Kristopher with him to his parents' home, and Margaret Williamson took her son from her marriage to Tracy Williamson with her to stay with a friend.

Shortly thereafter, Helter and Kristopher moved to Lincoln, where Helter had found employment. Margaret Williamson moved to Iowa to live with her parents. Helter took Kristopher to Iowa to see Margaret Williamson once, shortly after her arrival in Iowa. She did not assist in Kristopher's financial support; however, she testified to making several phone calls to Lincoln. She was unable to visit Kristopher again because she did not have access to a car, nor did she even possess a driver's license. A few months later, Margaret Williamson attempted to remove Kristopher while he was in the care of Helter's aunt.

The district court awarded Margaret Williamson custody of Kristopher, as well as ordering Helter to pay $75 per month in child support. Helter assigns the following errors: (1) that the judgment of the trial court is contrary to the evidence and facts adjudged at trial; (2) that the judgment of the trial court is contrary to the law relative to awarding custody of minor children born out of wedlock; (3) that the trial court erred in failing to make a factual finding of the fitness or unfitness of the appellant to be the custodial parent, as required by decisions of the Nebraska Supreme Court; (4) that the trial court erred in failing to state in its order reasons why the best interests of the child required a change of placement from appellant to appellee; and (5) that the trial court erred in changing custody of the minor child from the appellant to the appellee without a showing of a change in circumstances or compelling facts favoring a change of custody in the best interests of the minor child.

Due to our disposition of this matter, we do not address appellant's assignments of error, nor do we comment on the merits of his appeal.

A common tenet of both American and English common law is the premise that the legitimacy of children born during wedlock is presumed, and this presumption may be rebutted by clear and convincing evidence; the testimony or declaration of a husband or wife is not competent to bastardize a child. See, *Perkins v. Perkins*, 198 Neb. 401, 253 N.W.2d 42 (1977); *Ford v. Ford*, 191 Neb. 548, 216 N.W.2d 176 (1974); Neb. Rev. Stat. § 42-377 (Reissue 1988); *Goodright v. Moss*, 98 Eng. Rep. 1257, 2 Cowp. 591 (1777).

Although the parties do not dispute Kristopher's parentage, he is presumed to be an issue of appellee's marriage to Tracy Williamson absent clear and convincing evidence to the contrary. Notice of the proceedings and opportunity to appear must be served upon Tracy Williamson. We have held:

> " ' "Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. . . ." ' "

Koch v. Koch, 226 Neb. 305, 312, 411 N.W.2d 319, 323 (1987).

We are cognizant of the fact that notice, the ensuing rehearing, and the inevitable delay in the resolution of this case will not aid in serving Kristopher's best interests.

However, the presumption that children born during the marriage are rebuttably deemed to be legitimate is a tenet of our common law that perseveres for reasons that are as sound today as they were in the 18th century. The presumption prevents nonparents from arriving on the scene, either during or after the marriage, and staking claims, parental visitation rights, and responsibilities without the knowledge or consent of the true parent.

The judgment is reversed and the cause remanded with directions to join Tracy Williamson as an indispensable party to this action.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. MARK D. PETERSEN, RESPONDENT.

478 N.W.2d 257

Filed December 27, 1991. No. 91-1183.

Original action. Judgment of disbarment.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

A disciplinary complaint was filed against Mark D. Petersen with the Counsel for Discipline of the Nebraska State Bar Association.

Pursuant to Neb. Ct. R. of Discipline 15 (rev. 1989), respondent filed a voluntary surrender of license with this court. The respondent freely and voluntarily waived all proceedings against him in connection with the disciplinary complaint. Respondent knowingly admitted that he had violated Canon I, DR 1-102(A)(1) and (4), of the Code of Professional Responsibility. He also freely and voluntarily consented to an order of disbarment and waived any right to notice, appearance, or hearing prior to entry of the order.

Accordingly, the respondent is hereby disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

NEBRASKA BUILDERS PRODUCTS CO., A CORPORATION, APPELLANT, V. THE INDUSTRIAL ERECTORS, INC., APPELLEE.

478 N.W.2d 257

Filed January 3, 1992. No. 89-368.

1. **Judgments: Appeal and Error.** In reviewing a judgment in a bench trial of a law action, the Supreme Court does not reweigh the evidence but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every

reasonable inference deducible from the evidence.

2. _____: _____. In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. However, when such judgment is not supported by the evidence, it is clearly wrong and must be set aside.
3. _____: _____. Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
4. **Uniform Commercial Code: Contracts: Sales: Appeal and Error.** If a contract involves both the sale of goods and services, and the parties have presented the case to the trial court and the Supreme Court on the theory that the sales article of the Uniform Commercial Code applies, the Supreme Court will dispose of the case on appeal on that theory.
5. **Uniform Commercial Code: Contracts: Sales: Parties: Intent.** A contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract. An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined. Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.
6. **Uniform Commercial Code: Contracts: Parties: Intent.** A contract may be found in the bargain of the parties by their language or by implication from other circumstances, such as course of dealings or usage of trade.
7. _____: _____: _____: _____. A contract does not fail for indefiniteness because a term is left open, as long as the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.
8. **Contracts.** An enforceable contract can be formed and still retain a condition to performance of that contract.
9. _____. A condition is excused if the occurrence of the condition is prevented by the party whose performance is subject to the condition.
10. **Uniform Commercial Code: Statute of Frauds: Contracts: Sales.** A writing may be sufficient to avoid the Neb. U.C.C. § 2-201 (Reissue 1980) statute of frauds if the writing evidences a contract for the sale of goods, is signed by the party against whom enforcement is sought, and specifies a quantity. The required writing need not contain all the material terms of the contract.
11. **Statute of Frauds: Contracts.** Several writings can be pieced together to satisfy the writing requirement of the statute of frauds, even though such writings taken alone would not have been sufficient.
12. **Statute of Frauds: Contracts: Sales.** Oral contracts may be enforced absent a writing if the party against whom enforcement is sought admits in his or her pleading, testimony, or otherwise in court that a contract for sale was made.
13. **Statute of Frauds: Contracts.** It is no longer possible to admit the execution of a contract in court and still treat the statute of frauds as a defense.
14. **Uniform Commercial Code: Statute of Frauds: Contracts.** Neb. U.C.C. § 2-201(3)(b) (Reissue 1980) contains three requirements: The statute of frauds is

not applicable if the contract is admitted; the admission must be made by the party against whom enforcement of the oral contract is sought; and the admission must be made in court.

15. **Uniform Commercial Code: Statute of Frauds: Contracts: Trial.** An admission within the meaning of Neb. U.C.C. § 2-201(3)(b) (Reissue 1980) can be made when the party denying the existence of the contract and relying on the statute takes the stand and, without admitting explicitly that a contract was made, testifies to facts which as a matter of law establish that a contract was formed.
16. _____: _____: _____: _____. A compelled or involuntary admission of the existence of an oral contract, obtained during cross-examination at trial, may be relied upon to satisfy Neb. U.C.C. § 2-201(3)(b) (Reissue 1980).
17. **Statute of Frauds: Contracts.** The statutory requirement of admission of a contract can be satisfied by way of pleadings, bills of particulars, depositions, affidavits, admissions pursuant to notices to admit, and oral testimony, including admissions made on cross-examination.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Reversed and remanded for further proceedings.

Thomas J. Culhane and Gary L. Hoffman, of Erickson & Sederstrom, P.C., for appellant.

Edward D. Hotz, of Zweiback, Hotz & Lamberty, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Appellant, Nebraska Builders Products Co. (Nebraska Builders), brought this action against the appellee, The Industrial Erectors, Inc. (Industrial), to recover the excess costs of substitute performance on an alleged purchase contract for cranes. Nebraska Builders appeals from a judgment of the trial court declaring that there was no enforceable contract between the parties but that, instead, the parties contemplated a written contract which was never executed. We reverse, and remand for further proceedings.

In reviewing a judgment in a bench trial of a law action, the Supreme Court does not reweigh the evidence but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the

evidence. *Albee v. Maverick Media, Inc., ante* p. 60, 474 N.W.2d 238 (1991). In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. *Id.* However, when such judgment is not supported by the evidence, it is clearly wrong and must be set aside. *Hammond v. Streeter*, 225 Neb. 491, 406 N.W.2d 633 (1987). Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989).

The record reflects the following facts: In early 1985, the Omaha Public Power District (O.P.P.D.) invited bids for the construction of a service center near Elkhorn, Nebraska. William Hawkins, on behalf of Nebraska Builders, an Omaha-based company engaged in the business of selling construction products, obtained the plans and specifications which identified supplies, materials, and equipment to be used in the construction of the service center. Nebraska Builders intended to submit its bid as a subcontractor or material supplier to the companies bidding for the general contract for the construction of the service center later that year. Hawkins identified many items in the plans and specifications which Nebraska Builders could potentially supply for the project, including several types of crane systems. Previously, Nebraska Builders had purchased such cranes from Industrial. Industrial is a Chicago-based company which manufactures various types of cranes and also sells cranes manufactured by others.

Hawkins contacted Timothy Brennan, Industrial's sales manager, in February 1985, to inquire if Industrial was interested in submitting a bid on the cranes. Brennan traveled to Omaha on February 28, 1985, to review the plans and specifications for the crane systems. Brennan obtained the information necessary to prepare a bid, including Section 11520 of the specifications—Material Handling and Associated Equipment. The specifications were very detailed, specifying manufacturer, model number, electrical requirements, capacity, speed, control system, and other performance characteristics. Variance in equipment had to be approved in writing by the project engineer pursuant to a procedure set forth in the

specifications. Both Brennan and Hawkins were aware of this procedure.

On March 12 or 13, 1985, Brennan telephoned Hawkins and told him that Industrial would sell and install the crane systems as per specifications for a total sum of $449,920, which consisted of $399,935 for materials and $49,985 for installation. Brennan stated that there were some minor exceptions to the specifications, but those could be worked out with the O.P.P.D. engineer. Nebraska Builders submitted a bid based, in part, on Industrial's bid. On March 26, 1985, Brennan confirmed the telephone conversation with a letter to Hawkins stating Industrial's proposal.

By this letter, exhibit 14, Industrial "propose[d] to furnish all Crane Systems, Jib Cranes and Monorail Systems per Specification #11520 dated 2/26/85 including the three Addendums." Then followed a detailed listing of the specific items which Industrial agreed to furnish at a total material cost of $399,935, plus $49,985 if Industrial was to install the listed equipment.

William Hawkins contacted Hawkins Construction Company (Hawkins Construction), the general contractor with the lowest bid, to see if Nebraska Builders was the low bidder on any of the items Hawkins Construction had bid on. This conversation led to a period of negotiations between Industrial and Nebraska Builders. During the negotiations, Nebraska Builders put together a "package bid" and gave Hawkins Construction a lump-sum price on several items, including the cranes. Nebraska Builders alleges that upon its request Industrial reduced its bid twice. Industrial disputes the second reduction and argues that the bid was only once reduced, by $4,500. However, exhibit 46 consists of a series of adding machine tapes including notations admittedly made by Brennan of Industrial. These tapes indicate a second reduction of $26,937, with additions of $2,400 for each interlock device. As testified to by Hawkins, there were four interlock devices, and this total reduction was therefore $17,337.

At the time Nebraska Builders submitted its package bid to Hawkins Construction, William Hawkins had reviewed Industrial's proposal and knew that the items proposed were

different models made by different manufacturers than those called for in the specifications; however, the proposal stated that Industrial would furnish all crane systems as required by Section 11520 of O.P.P.D.'s specifications. Hawkins was also aware that any deviations needed specific approval. He was not concerned about the deviations, since O.P.P.D. was required to accept alternatives if they were of equal quality. Since Industrial was in the business of manufacturing and selling cranes and had stated that the proposal was per specifications and any deviations from the specifications were "minor," Hawkins believed that the cranes set forth in Industrial's proposal were of equal quality, and thus, approval of the deviations would not be a problem.

During early May, Hawkins was informed by Hawkins Construction that Nebraska Builders' bid on the crane systems, as well as on various other items, was accepted. Hawkins testified that he immediately telephoned Industrial to accept Industrial's offer. He does not remember whether he talked to Brennan or Jerry Cole, the president of Industrial. Brennan testified that he did not have that conversation with Hawkins. Cole did not testify at the trial.

Although Brennan denies his having the conversation in which Nebraska Builders accepted Industrial's bid, Industrial and Nebraska Builders exchanged correspondence concerning the variance approval and exceptions to the specifications between May 31 and August 9, 1985. In a letter dated May 31, 1985, Brennan assured Nebraska Builders that Industrial had adhered to all of O.P.P.D.'s specifications in preparing its bid and that all equipment "will be equal to or better than" the equipment specified in the plans and specifications. Brennan also sent a letter dated June 10, 1985, which starts as follows: "This letter is to confirm our telecon regarding the above subject." The above-named subject in the letter was "Jib Crane, Monorails and Crane Equipment." The letter states further that Industrial is "trying to alleviate the confusion of the materials that Industrial is supplying." Brennan went on to describe the cranes "to be furnished" and concluded by stating that he hoped "this letter will alleviate any confusion regarding the materials to be furnished and we look forward to working with

you on this project." The O.P.P.D. engineers for the district ultimately approved Twin City Monorail (Twin City) and Crane Manufacturing & Service Corporation, Industrial's subcontractors, as crane manufacturers.

During this same time period, Industrial repeatedly requested Nebraska Builders to issue a purchase order, written contract, or letter of intent. Nebraska Builders denied these requests, stating that a written contract would be forthcoming upon its signing a contract with Hawkins Construction. Nebraska Builders never provided Industrial with a written contract. Industrial, in turn, did not issue any written contract or purchase order to any of its suppliers and, in fact, told one supplier that a written purchase order could not be given until Industrial received one from Nebraska Builders.

Despite the fact that there was no written contract, Brennan visited Nebraska Builders' office on August 8, 1985, on behalf of Industrial. Industrial also prepared and submitted shop drawings showing the recommended foundation design and bolt locations for the various floor-mounted jib cranes included in Industrial's proposal.

Brennan sent Hawkins a letter dated July 23, 1985, to confirm a verbal conversation concerning a list of deviations from the specifications, which deviations, if changed to meet the specifications, would constitute an additional cost of an unspecified amount to Industrial's bid. Hawkins testified that he was confused when he received the letter because he had not spoken to Brennan about any deviations to the specifications other than when he got Industrial's oral bid in March 1985. Hawkins discussed the letter with Brennan during Brennan's trip to Omaha on August 8, 1985. Brennan stated that he had not included in Industrial's bid the hoists for the jib cranes and that he had forgotten to include the footwalks and handrails for the largest overhead crane. Hawkins told Brennan that he expected Industrial to supply everything called for in the specifications in accordance with its bid.

Brennan had prepared another letter, dated August 7, 1985, which purported to confirm a telephone conversation between Hawkins and Brennan. The letter informed Hawkins that in order to provide the cranes in accordance with the

specifications "with no exceptions" there would be an additional cost of $167,500 to the original quotation. Brennan testified that the letter was never sent to Hawkins. Brennan further stated that he could not recall the telephone conversation referred to in his letter to Hawkins.

In September 1985, Brennan told Hawkins that Twin City, the company from which Industrial was to purchase some of the cranes, did not want to furnish the cranes. According to Brennan, Twin City felt that the specifications had been drawn up for one manufacturer.

Hawkins became concerned that Industrial was not going to perform under the alleged contract. He telephoned Cole, Industrial's president, to discuss his concerns. Cole assured Hawkins that he would discuss the matter with Twin City and attempt to get it resolved. Brennan informed Hawkins sometime between October 7 and 9 that Twin City had taken several exceptions to the specifications and that as a result Twin City's price to Industrial was going to increase by more than $100,000.

Hawkins went to Chicago on October 14, 1985, to meet with Brennan and Cole to discuss Industrial's problem with Twin City. During the meeting, Brennan and Cole showed Hawkins a breakdown of the original bid and the new costs in view of Twin City's price increase. Hawkins was informed that strict compliance with the specifications would increase the original bid by approximately $150,000, which included extra costs for the jib crane hoists and Twin City's price increase. Hawkins told Industrial that a price increase was not possible. Brennan stated that Industrial would not perform without the price increase. Discussions between Industrial and Nebraska Builders terminated. Nebraska Builders claims to have obtained performance of the contract elsewhere at an additional cost of $136,136.11.

Industrial and Nebraska Builders had no written agreement regarding the time of performance, necessity or amount of a performance bond, time of payment, or whether Industrial would be bound by the terms and conditions of the general contract. However, some of these items were discussed in Industrial's proposal letter. Nebraska Builders and Industrial

contemplated entering into a written agreement which would have addressed such concerns. Hawkins testified that Nebraska Builders has a standard subcontract form which includes such terms as a complete description of work, approved variances, price, terms of payment, time of performance, performance bond, and adherence to the terms of the general contract.

The parties stipulated at trial that the dispute would be governed by the Uniform Commercial Code. Following a trial and submission to the court without a jury, judgment was entered in favor of Industrial.

In order for one to more clearly understand the issues in this case, it may be helpful to set forth that portion of the district court's order which contains its findings:

> The Court finds that no contract existed between Nebraska Builders Products and Industrial Erectors. The Court finds that the parties had negotiated to enter into an agreement at a later time which would include among other items the delivery dates, payment schedules and specific waivers of general contractor's written requirements and specifications. In fact, each of the parties contemplated a written contract which was never entered. Fleming Co. of Nebraska v. Michals, 230 NW 2d 753 [sic] (1988), Nebraska Seed Co. v. Harsh, 98 Neb. 89, 154 [sic] NW 310 (1915). A contract was not present in this case as a matter of law and facts.

Nebraska Builders' five assignments of error can be summarized as follows: (1) The decision of the trial court is not supported by the evidence and is contrary to law; (2) the trial court erred in deciding there was no enforceable contract because the parties intended to execute a written contract at some point in the future; and (3) the trial court misapplied the Nebraska U.C.C. in its determination that no valid enforceable contract existed between Nebraska Builders and Industrial in that there was no agreement on incidental terms.

Since the parties stipulated at trial that the U.C.C. governed the dispute, this court will presume that the U.C.C. controls the case. Because of its citation to *Michals* and *Harsh* in its order, it is quite apparent that the trial court decided this case on common-law grounds and not under the U.C.C. In doing so,

the district court erred.

This court has previously decided that if a contract involves both the sale of goods and services, and the parties have presented the case to the trial court and the Supreme Court on the theory that the sales article of the U.C.C. applies, this court will dispose of the case on appeal on that theory. See, *Hammond v. Streeter*, 225 Neb. 491, 406 N.W.2d 633 (1987); *Sesostris Temple Golden Dunes v. Schuman*, 226 Neb. 7, 409 N.W.2d 298 (1987).

The first issue to be determined is whether a contract was formed between the parties. Neb. U.C.C. § 2-204 (Reissue 1980) on formation of a contract states:

> (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
>
> (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.
>
> (3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

A contract may be found in the bargain of the parties by their language or by implication from other circumstances, such as course of dealings or usage of trade. *Crane Co. v. Roberts Supply Co.*, 196 Neb. 67, 241 N.W.2d 516 (1976). See, also, Neb. U.C.C. § 1-201(3) (Reissue 1980).

The conduct of the parties in the case before us would support a finding that a contract existed. Industrial submitted an oral proposal to Nebraska Builders to supply cranes for the service center in telephone calls on March 10, 1985, and on March 12 or 13. Later, Industrial confirmed the offer in a letter dated March 26, 1985, written to Hawkins by Brennan, as sales manager of Industrial. That letter consisted of seven pages and was quite explicit. It stated in part:

> This letter is to confirm our telecom regarding the above subject. Per that telecom, we are pleased to propose the following.

> IEI proposes to furnish all Crane Systems, Jib Cranes and Monorail Systems per Specification #11520 dated 2/26/85 including the three Addendums.
>
> We also propose to furnish the following: [There then followed a detailed listing and description of 14 different cranes and a machine shop monorail.]

There then followed a statement that the material price on the above items would be $399,935, with an additional cost to install those items of $49,985. The letter went on to state:

> Our quotation is based on delivery of all items of equipment and materials so that work can proceed in a proper sequence of erection.
>
> Our prices does [sic] not include applicable taxes on materials and freight charges to jobsite. Terms are to be negotiated prior to acceptance of order. Delivery is to be schedule [sic] with the erection of building.

Included within exhibit 14 were four pages of detailed specifications, including what was termed a "Clearance Sketch."

Nebraska Builders relied on the bid contained in the telephone calls and letter in submitting its own bid as a material supplier on the project. Immediately after Hawkins learned that Nebraska Builders' bid had been accepted by the general contractor, Hawkins stated, he called Industrial and accepted the offer. Brennan, however, denies his having this telephone conversation.

A review of the facts in a light most favorable to Industrial, the prevailing party, would support a finding that the offer was never orally accepted by telephone. However, Industrial's conduct in submitting the information and shop drawings and the correspondence between Industrial and Nebraska Builders concerning the variance approval contradicts such a finding. In addition, Brennan also visited Nebraska Builders' office on August 8, 1985, almost 5 months after the alleged agreement was made, to answer questions on the crane systems that Industrial would supply.

The written proposal, the exchange of information on the project, and the oral conversations between Nebraska Builders and Industrial manifest the intent that a contract existed

between the parties.

The next issue to be decided is whether the contract fails for indefiniteness. The trial court in the case at hand found that the parties had negotiated to enter into an agreement at a later time which would include among other items the delivery dates, payment schedules, and specific waivers of the specifications, and that as a result there was no contract. The trial court cited the cases *Fleming Co. of Nebraska v. Michals*, 230 Neb. 753, 433 N.W.2d 505 (1988), and *Nebraska Seed Co. v. Harsh*, 98 Neb. 89, 152 N.W. 310 (1915). *Michals* and *Harsh*, however, are not controlling in determining what constitutes an enforceable contract under the U.C.C., since they construe contracts formed under common law.

According to § 2-204(3), a contract does not fail for indefiniteness because a term is left open, as long as the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. Cf. *Zimmerman v. Martindale*, 221 Neb. 344, 377 N.W.2d 94 (1985) (when an agreement not covered by the U.C.C. stipulates that certain terms will be settled later by the parties, such terms will not become binding unless and until they are settled by later agreement). The U.C.C. allows the courts to supply reasonable terms for those that are missing. See Neb. U.C.C. §§ 2-305 (Reissue 1980) (price), 2-308 (Reissue 1980) (place of delivery), 2-309 (Reissue 1980) (time of delivery), 2-310 (Reissue 1980) (payment terms), 2-503 (Reissue 1980) (tender by seller), 2-509 (Reissue 1980) (risk of loss), 2-511 (Reissue 1980) (tender by buyer), and 2-513 (Reissue 1980) (buyer's inspection). The official comment to § 2-204 states:

> If the parties intend to enter into a binding agreement, this subsection recognizes that agreement as valid in law, despite missing terms, if there is any reasonably certain basis for granting a remedy. The test is not certainty as to what the parties were to do nor as to the exact amount of damages due the plaintiff. Nor is the fact that one or more terms are left to be agreed upon enough of itself to defeat an otherwise adequate agreement. Rather, commercial standards on the point of "indefiniteness" are intended to be applied, this act making provision elsewhere for

missing terms needed for performance, open price, remedies and the like.

The only necessary term to satisfy the definiteness requirement under the U.C.C. is the quantity. See Neb. U.C.C. § 2-201(1) (Reissue 1980). But see Neb. U.C.C. § 2-306 (Reissue 1980). In the case at bar, the quantity requirement was satisfied, since the proposal letter listed the materials to be furnished, i.e., 14 cranes and 1 monorail. Since the conduct of the parties indicated that the parties intended to make a contract, the requirements of § 2-204(3) have been met, and the contract is not indefinite. The fact that the parties intended to execute a written agreement in the future is immaterial in this case, since the U.C.C. focuses on the parties' conduct. The trial court was therefore clearly wrong in finding that no enforceable contract existed.

Industrial argues that the formation of any contract would have been conditional upon approval of the variances, since both parties knew that the equipment proposed contained variances that required written approval from the project engineer. This argument fails. An enforceable contract can be formed and still retain a condition to performance of that contract. See, *Hahn v. International Management Services, Inc.*, 207 Neb. 229, 298 N.W.2d 140 (1980); *Bellevue College v. Greater Omaha Realty Co.*, 217 Neb. 183, 348 N.W.2d 837 (1984). In other words, contrary to what Industrial contends, it is the performance of the contract that is conditional, not the formation.

A condition is excused if the occurrence of the condition is prevented by the party whose performance is subject to the condition. *Hahn, supra.* In *Hahn*, the parties entered into an agreement for the purchase of real estate conditioned upon the buyer entering into an agreement to complete a nursing home for the price that had been quoted by the seller, to protect the buyer against increases in labor and material costs. The court found that the buyer was under a duty to make a good faith effort to enter into an agreement. The failure of the buyer to make such an effort excuses the condition. Since Industrial never obtained variance approval but elected not to perform instead, it cannot use the condition as a defense to

performance.

First, the proposal letter stated that the materials to be provided would meet specifications. The materials did not meet specifications as promised. It was up to Industrial to attempt to meet the specifications. Second, O.P.P.D. was required to accept any materials of equal quality. Industrial by its May 31, 1985, letter promised all materials would be of equal quality to or better quality than the equipment specified. Therefore, approval should not have been a problem. Finally, Industrial elected not to perform under the contract rather than continue to seek variance approval.

The last issue argued by Industrial is that Nebraska Builders' action is barred by the statute of frauds. Section 2-201 of the U.C.C. states the formal requirements of the statute of frauds:

> (1) Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
>
> . . . .
>
> (3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable . . . (b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted . . . .

Since the value of the cranes exceeds $500, the statute of frauds is applicable. Therefore, we turn to the question whether the requirements of the statute of frauds have been met. In the case *Veik v. The Tilden Bank*, 200 Neb. 705, 265 N.W.2d 214 (1978), a letter was found to be sufficient to satisfy the requirements of the statute of frauds. This court stated that a

writing will be sufficient to avoid the U.C.C. statute of frauds if the writing evidences a contract for the sale of goods, is signed by the party against whom enforcement is sought, and specifies a quantity. The required writing need not contain all the material terms of the contract. According to comment 1 to § 2-201, the writing needs only to afford a basis for believing that the offered oral evidence rests on a real transaction.

Several writings can be pieced together to satisfy the requirement, even though the writings taken alone would not have been sufficient. See, *Reich v. Helen Harper, Inc.*, 3 U.C.C. Rep. Serv. (Callaghan) 1048 (N.Y. City Civ. Dec. 27, 1966) (a sales confirmation and an invoice sent by the seller's agent to the buyer, combined with a letter by the buyer criticizing the quality of the goods, satisfy the writing requirement of § 2-201(1)); *Waltham Truck Equip. Corp. v. Massachusetts Equip. Co.*, 7 Mass. App. 580, 389 N.E.2d 753 (1979) (three separate letters signed by a representative of the buyer can be read together to satisfy the statute of frauds, even though two letters indicated a dispute as to one of the terms of the contract).

In the case at bar, the proposal letter and the followup letters indicate that a contract was formed. The proposal letter of March 26, 1985, begins with the following sentence: "This letter is to confirm our telecom regarding the above subject [i.e., 'Jib Cranes and Monorails']." The letter states the quantity of the goods to be furnished; the items, 14 cranes and 1 monorail, are listed in detail. After the alleged phone conversation in which Nebraska Builders accepted Industrial's bid, a correspondence between the two parties emerged concerning the materials to be furnished. A letter sent by Brennan dated May 31, 1985, assures Nebraska Builders that Industrial has adhered to the plans and specifications required by O.P.P.D. In a subsequent letter dated June 10, 1985, Brennan states that Industrial is "trying to alleviate the confusion of the materials that Industrial *is supplying*." (Emphasis supplied.) The letter refers to the included brochures, which "show that the equipment *to be furnished* meets the standards and quality [required by O.P.P.D.]." (Emphasis supplied.) The letter ends as follows: "We hope this letter will alleviate any confusion regarding the

materials to be furnished and *we look forward to working with you on this project*." (Emphasis supplied.)

On August 9, 1985, Brennan sent another letter to Nebraska Builders in which he "assume[s] that the hoist/trolley units will be furnished by others or would be an adder to the *contract*." (Emphasis supplied.) Finally, on August 15, 1985, Brennan sent Hawkins a letter in which he recommends a certain foundation for the bolt setting of the mast-type jib crane. The letter includes several drawings. The drawings were returned to Industrial with notes and corrections on them made by Nebraska Builders' architect.

The three requirements of the statute of frauds § 2-201 are satisfied when the five letters are read together. First, the letters clearly evidence a sale of goods. Second, the writings are signed by the authorized agent of the party against whom enforcement is sought. In the case at hand, enforcement of the contract is sought against Industrial, and the letters are all signed by Brennan, who had the authority to contract on behalf of Industrial. Last, the quantity of the goods to be sold is indicated in the letter dated March 26, 1985, which describes in detail 14 cranes and 1 monorail.

The agreement is also enforceable, since the case falls within the statute of frauds exception of § 2-201(3)(b). According to § 2-201(3)(b), oral contracts may be enforced absent a writing "if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made . . . ." Comment 7 to § 2-201 states that "it is no longer possible to admit the contract in court and still treat the statute as a defense."

Section 2-201(3)(b) contains the following three requirements: There must be an admission; the admission must be made by the party against whom enforcement of the oral contract is sought; and the admission must be made in court.

An admission within the meaning of § 2-201(3)(b) can be made "when the party denying the existence of the contract and relying on the statute takes the stand and, without admitting explicitly that a contract was made, testifies to facts which as a matter of law establish that a contract was formed." See *Lewis v. Hughes*, 276 Md. 247, 256-57, 346 A.2d 231, 236 (1975).

A compelled or involuntary admission of the existence of an oral contract, obtained during cross-examination at trial, may be relied upon to satisfy § 2-201(3)(b). See, *Lewis, supra*; *Dangerfield v. Markel*, 252 N.W.2d 184 (N.D. 1977), *appeal after remand* 278 N.W.2d 364 (N.D. 1979); *Meylor v. Brown*, 281 N.W.2d 632 (Iowa 1979); *Franklin Cty. Co-op. v. MFC Services (A.A.L.)*, 441 So. 2d 1376 (Miss. 1983); *M & W Farm Serv. Co. v. Callison*, 285 N.W.2d 271 (Iowa 1979). The statutory requirement can be satisfied by way of pleadings, bills of particulars, depositions, affidavits, admissions pursuant to notices to admit, and oral testimony, including admissions made on cross-examination. See *Reissman Int'l Corp. v. J.S.O. Wood Products*, 10 U.C.C. Rep. Serv. (Callaghan) 1165 (N.Y. Civ. June 6, 1972).

Brennan made the following admission while being cross-examined:

> Q At the meeting on October 14th in Chicago you specifically told Mr. Hawkins, did you not, either you or Mr. Cole, that Industrial Erectors would not perform or supply any cranes on this project unless it received compensation somewhere in the neighborhood of $150,000.00 more than that set forth in its bid, isn't that correct?
>
> A I believe it was stated, if the order was to be as per specified with the electrical circuitry and everything else, that there would be an increase *to the contract*.

Since Industrial disputes the fact that there was a meeting of the minds, and Brennan's testimony establishes the existence of a contract, his testimony should be considered an admission.

This case is very similar to *Ursa Farmers' Cooperative v. Trent*, 58 Ill. App. 3d 930, 374 N.E.2d 1123 (1978). In *Trent*, the defendant denied the making of a contract, but admitted at trial that he had testified during a discovery deposition: " 'Whoever I talked to, I contracted 2500 bushels of beans,' " and " 'I signed up for 2500 bushels of beans at [$]4.01.' " *Id.* at 931, 374 N.E.2d at 1124. The court held that the trial court properly concluded that the defendant had made an in-court admission of an oral contract for the sale of beans. We hold that similarly in this case Brennan's testimony, considering the circumstances

presented at trial, established the existence of an oral contract.

We do not hereby hold that an admission is made whenever the defendant utters the magic words contract or agreement. We acknowledge the possibility that laypeople might misuse legal terminology. We therefore suggest that if a party denying the existence of a contract uses contractual terminology, the court should look at the other evidence presented by the defendant. The record in this case shows that Brennan admitted submitting variance approval documents to Nebraska Builders shortly after the alleged agreement occurred. He also admitted that he sent a letter advising Nebraska Builders that Industrial would adhere to the specifications. In addition, Brennan testified that he visited Omaha and was looking for more commitment from Nebraska Builders in the form of a letter of intent or purchase order. Brennan's conduct indicates that an agreement between the parties existed. See *Quaney v. Tobyne*, 236 Kan. 201, 689 P.2d 844 (1984) (an admission can be established through verbal admission and conduct). In light of Brennan's conduct we consider the testimony previously quoted to be an admission, and not an inadvertently mistaken use of legal terminology.

The second requirement, that the admission be made by the party against whom enforcement is sought, is also satisfied, since Brennan made the admission on behalf of Industrial.

Last, the admission must be made in court. In *Wilke v. Holdrege Coop. Equity Exchange*, 200 Neb. 803, 265 N.W.2d 672 (1978), this court held that the exception of § 2-201(3)(b) did not apply to a letter of compromise written by plaintiff's attorney to the manager of the defendant, since the admission was not made in the pleading, testimony, or otherwise in court. The case at hand, however, is distinguishable from *Wilke*, since Brennan admitted to a contract during his testimony at trial. In *Farmland Service Coop, Inc. v. Klein*, 196 Neb. 538, 244 N.W.2d 86 (1976), we held that a letter confirming the oral agreement was not within the exceptions enumerated in § 2-201(3). The letter in *Farmland Service Coop* was referred to in a deposition, but never offered or received into evidence. The admission in the case at bar, however, was made by Brennan during his cross-examination at trial and thus offered into evidence. As a result the case falls within the exception to the

statute of frauds, and Industrial can therefore not use § 2-201 as a defense. The rationale is that the statute of frauds was not designed to protect a party who made an oral contract, but, rather, to aid a party who did not make a contract though one is claimed to have been made orally with him. See *Reissman Int'l Corp., supra.*

The district court's finding that no contract existed was based on an erroneous application of the law controlling this case. As previously mentioned, the parties stipulated at trial that the case was governed by the U.C.C. Even if the parties had not made this stipulation, the case should have been decided under the U.C.C., since the predominant factor of the alleged contract was the sale of goods. See *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 363 N.W.2d 155 (1985) (to determine whether a contract which involves both the sale of goods and services falls within the coverage of the U.C.C., the court looks at the predominant factor of the contract). Therefore, the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

NEBRASKA STATE BOARD OF AGRICULTURE, APPELLEE, V. NEBRASKA STATE RACING COMMISSION, APPELLANT.

478 N.W.2d 270

Filed January 3, 1992. No. 89-809.

1. **Declaratory Judgments: Judicial Construction: Statutes.** A declaratory judgment action, pursuant to Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1989), is an appropriate method to obtain judicial construction of a statute.
2. **Declaratory Judgments: Statutes.** A declaratory judgment action to construe a statute presents a question of law.
3. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, the appellate court, regarding questions of law, has an obligation to reach its conclusion independent of the conclusion reached by the trial court.
4. **Statutes.** When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning, so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning.

5. _____. An expressed object of a statute's operation excludes the statute's operation on all other objects unmentioned by the statute.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed and remanded with direction.

Robert M. Spire, Attorney General, and L. Jay Bartel for appellant.

Hal Bauer, of Bauer, Galter & O'Brien, for appellee.

Kim M. Robak, of Rembolt Ludtke Parker & Berger, for amicus curiae Platte County Agricultural Society.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

The Nebraska State Racing Commission (Racing Commission) appeals from a declaratory judgment granted by the district court for Lancaster County in favor of the Nebraska State Board of Agriculture (Board), namely, the judicial determination that the Board's racetrack at the State Fairgrounds in Lincoln had a "total annual parimutuel handle" of less than $12 million in 1987 and, therefore, was a "recipient track" entitled to receive money from the Track Distribution Fund under Neb. Rev. Stat. §§ 2-1208.03 and 2-1208.04 (Reissue 1987). To reach the foregoing conclusion, the district court construed the phrase "total annual parimutuel handle" to exclude any wagers accepted on simulcast races for the purposes of § 2-1208.03(5), which states: "Recipient track shall mean a racetrack with a total annual parimutuel handle, based on the previous racing year, of twelve million dollars or less." We reverse the district court's judgment.

This case involves interaction of two legislative programs, separately enacted to strengthen the "racing, breeding, and parimutuel wagering industry" in Nebraska. See, Neb. Rev. Stat. §§ 2-1224 through 2-1227 (Reissue 1987); §§ 2-1208.03 and 2-1208.04. The first of these programs is the Track Distribution Fund, by which revenue, based on a racetrack's total annual parimutuel handle, is distributed from larger racetracks to smaller racetracks. See §§ 2-1208.03 and

2-1208.04. The second program is a 1987 law authorizing "experimental" intrastate telecasting of horseraces, or "simulcasting," which permits Nebraska racetracks to accept wagers on races taking place at other locations, but which are broadcast by television to an authorized site where wagers are accepted on the televised race. See §§ 2-1224 et seq.

The question to be resolved is how wagers on simulcast races are involved in computing the total annual parimutuel handle for purposes of the Track Distribution Fund. The Racing Commission contends that wagers on simulcast races are part of the total annual parimutuel handle of the track where the wagers are accepted. The Board insists that the total amount wagered on simulcast races should be assigned to the total annual parimutuel handle of the track where the races are run and which is the origin of the racing telecast. The outcome of this case and a potential $200,000 distribution to the Board from the Track Distribution Fund depend on the definition of "total annual parimutuel handle," which is included in the legislation under examination, but which phraseology is undefined by Nebraska statutes.

TRACK DISTRIBUTION FUND

In 1986, the Legislature established the Track Distribution Fund, codified at §§ 2-1208.03 and 2-1208.04, for the purpose of subsidizing smaller Nebraska racetracks at the expense of the state's larger and more successful tracks. Money for the Track Distribution Fund is supplied by the tracks themselves, which are required to withhold a small percentage of their gross daily receipts from so-called "exotic wagers," such as the daily double, exacta, trifecta, pick six, and others. Each month, the racetracks pay the withheld funds to the Racing Commission, which maintains the Track Distribution Fund. Annual collections for the fund are subsequently distributed to qualifying tracks during the following year based on the formula provided in § 2-1208.04(2). To qualify for distributions from the Track Distribution Fund, a racetrack must be a recipient track under § 2-1208.03(5), previously set forth in this opinion.

INTRASTATE SIMULCASTING

In 1987, the Legislature authorized simulcasting of horseracing in Nebraska on an experimental basis. Simulcasting is a procedure under which a racetrack is permitted to accept wagers on races which are simultaneously televised from other Nebraska racetracks, or, as expressed in § 2-1225(6): "Simulcast shall mean the telecast of live audio and visual signals conducted in the state for the purpose of parimutuel wagering." The Board's Lincoln track is a "simulcast facility," that is, "a facility within the state which is authorized to display simulcasts for parimutuel wagering purposes . . . ." See § 2-1225(7).

Section 2-1227 provides in pertinent part:

> (4) Any simulcast between a sending track and receiving track . . . shall result in the combination of all wagers placed at the receiving track with the wagers placed at the sending track so as to produce common parimutuel betting pools for the calculation of odds and the determination of payouts from such pools, which payout shall be the same for all winning tickets, irrespective of whether the wager is placed at a sending track or receiving track.

FACTUAL BACKGROUND

The salient facts are either stipulated or undisputed.

In August 1987, the Board entered into a simulcast agreement with the Platte County Agricultural Society, which operated the racetrack at Columbus, Nebraska. Under this agreement, the Board, at its Lincoln racetrack, accepted bets on races simulcast from Columbus. Also, the agreement provided that the Board's track and the Columbus track would equally share expenses incurred and revenue generated by the simulcast races. During the 7 days of simulcasting in 1987, the Board accepted $508,553 in wagers at its Lincoln track on simulcast races run at Columbus. During the entire year of 1987, the Board's racetrack in Lincoln accepted a total of $12,034,795 in wagers, which included $11,526,242 bet on races run at the Board's Lincoln track and the $508,553 bet at the Lincoln track on races simulcast from Columbus.

In February 1988, the Board claimed that it was entitled to money from the Track Distribution Fund, since its total annual parimutuel handle for 1987 was $11,526,242, based on $12,034,777 (sic) in total wagers placed at the Board's Lincoln track during 1987 less $508,535 (sic) bet on simulcast races from Columbus. The Racing Commission rejected the Board's claim and refused to make a distribution to the Board from the Track Distribution Fund.

On August 8, 1988, the Board filed a declaratory judgment action in the district court for Lancaster County, seeking judicial declaration that the Board was a recipient track under § 2-1208.03(5), and requested that the Racing Commission be ordered to distribute to the Board the appropriate amount from the Track Distribution Fund.

DISTRICT COURT'S DECISION

The district court concluded that "the simulcast handle resulting from the simulcast participation by [the Board] and Columbus during the year 1987, should be treated as part of the handle at the sending track (Columbus) during the year 1987." In other words, the district court excluded from the Board's handle all wagers placed at the Board's Lincoln track on races simulcast from Columbus. On that basis, the district court decided that the Board's Lincoln track was "a recipient track for the year 1987 pursuant to Neb.Rev.Stat. §2-1208.03," since the total annual parimutuel handle of the Board's Lincoln track was less than $12 million, and then ordered the Racing Commission "to distribute to [the Board] from the Track Distribution Fund an amount pursuant to Neb. Rev. Stat. §2-1208.04, for the year 1987."

ASSIGNMENT OF ERROR

In its appeal, the Racing Commission contends that the district court erred by excluding from the Board's total annual parimutuel handle for 1987 all wagers placed at the Board's Lincoln track on simulcast races from the Columbus track.

STANDARD OF REVIEW

A declaratory judgment action, pursuant to Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1989), is an appropriate method to

obtain judicial construction of a statute. See, *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989); *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986). "A declaratory judgment action to construe a statute presents a question of law." *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb. 191, 194, 444 N.W.2d 312, 315 (1989). "In an appeal from a declaratory judgment, the appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court." *State ex rel. Spire, supra* at 265, 445 N.W.2d at 287. See, also, *County of York v. Johnson*, 230 Neb. 403, 432 N.W.2d 215 (1988); *Cornhusker Christian Ch. Home v. Dept. of Soc. Servs.*, 227 Neb. 94, 416 N.W.2d 551 (1987); *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).

"When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning." *State v. Crowdell*, 234 Neb. 469, 473-74, 451 N.W.2d 695, 699 (1990). Accord, *State ex rel. Gaddis v. Gaddis*, 237 Neb. 264, 465 N.W.2d 773 (1991); *Video Consultants v. Douglas*, 219 Neb. 868, 367 N.W.2d 697 (1985).

STATUTORY LANGUAGE IN QUESTION

The fundamental question is: What is the meaning of "total annual parimutuel handle" in § 2-1208.03(5)?

The Racing Commission urges that total annual parimutuel handle means the total of all wagers actually placed at a licensed racetrack, including any wagers made on races simulcast from another location. Conversely, the Board argues that wagers made on simulcast races are properly assignable to the total annual parimutuel handle of the sending track, viz, the track at which the race is actually run.

As mentioned above, the phrase "total annual parimutuel handle" is undefined in Nebraska statutes. However, "total" is ordinarily understood to mean the "entire amount" or "aggregate." Webster's Third New International Dictionary, Unabridged 2414 (1981). "Annual" connotes "yearly" and, as

used in § 2-1208.03(5), refers to the "racing year" or the particular year during which horseraces are run or have been run. Section 2-1208.04(1) indicates that the "racing year" for the purpose of the Track Distribution Fund begins on January 1; consequently, "annual," as used in § 2-1208.03(5) means the calendar year. "Parimutuel" refers to the wagering system authorized in Neb. Rev. Stat. § 2-1207(1) (Reissue 1987):

> Under such system the licensee may receive wagers of money from any person present at such race or racetrack receiving the simulcast race on any horse in a race selected by such person to run first in such race, and the person so wagering shall acquire an interest in the total money so wagered on all horses in such race as first winners in proportion to the amount of money wagered by him or her. . . . The balance remaining on hand [after the required deductions] shall be paid out to the holders of certificates on the winning horse in the proportion that the amount wagered by each certificate holder bears to the total amount wagered on all horses in such race to run first. The licensee may likewise receive such wagers on horses selected to run second, third, or both, or in such combinations as the commission may authorize. . . .

The meaning of "handle," used in § 2-1208.03(5), raises a question for which there is a readily available answer. Even to those who are not among the cognoscenti of horseracing, handle has a standard meaning in everyday usage for wagering: "the total amount of money bet on a race, game, or event or over a period of time (as a season)." Webster's Third New International Dictionary, Unabridged 1027 (1981). Based on the foregoing, we conclude that the phrase "total annual parimutuel handle," used in § 2-1208.03(5), means the aggregate dollar amount of wagers accepted over the course of a calendar year.

Adoption of the preceding definition, however, does not end our analysis, because total annual parimutuel handle is meaningful only when calculated in reference to something else, such as a particular track or tracks, particular types of races, or particular types of wagers. In other words, total annual parimutuel handle could refer to wagers placed *at* a track or

placed *on* some race which occurs at another site. In the present case, the reference point is supplied by § 2-1208.03(5), which refers specifically to "a racetrack."

By limiting the focus to a racetrack, instead of types of races run or types of wagers accepted, the Legislature has expressed its intent that the aggregate dollar amount of wagers accepted over the course of a calendar year at a racetrack shall be used in determining whether the racetrack qualifies for money from the Track Distribution Fund. Under § 2-1208.03(5), all wagers placed at the track are aggregately considered for the purpose of the statute, whether such wagers are placed on races occurring at the site where the wagers are placed or are placed on races simulcast to the site where wagers are placed.

We are aware that § 2-1227(4) requires "the combination of all wagers placed at the receiving track with the wagers placed at the sending track." However, § 2-1227(4) provides that the combination of wagers is for the limited purpose of "the calculation of odds and the determination of payouts." Under the general principle of statutory construction that an expressed object of a statute's operation excludes the statute's operation on all other objects unmentioned by the statute, the combination of wagers under § 2-1227(4) is restricted to the purpose or object expressed in the statute, i.e., calculation of odds in a race and determination of payments from pools resulting from parimutuel betting on the race. See, *Nebraska City Education Assn. v. School Dist. of Nebraska City*, 201 Neb. 303, 267 N.W.2d 530 (1978) (expressio unius est exclusio alterius, the expression of one thing is the exclusion of another; when a statute specifies the object of its operation, the statute excludes its operation on every object not expressly mentioned by the statute); *Galstan v. School Dist. of Omaha*, 177 Neb. 319, 128 N.W.2d 790 (1964); *Starman v. Shirley*, 162 Neb. 613, 76 N.W.2d 749 (1956); *Harrington v. Grieser*, 154 Neb. 685, 48 N.W.2d 753 (1951).

Therefore, the Racing Commission must include and use all wagers accepted at the Board's Lincoln track to determine whether the Lincoln track qualifies as a recipient track under § 2-1208.03(5). Because the Board accepted a total of $12,034,795 in wagers during the 1987 racing year, the Board's

Lincoln racetrack did not qualify as a recipient track under § 2-1208.03(5) for 1987 and, therefore, is ineligible to receive money from the Track Distribution Fund for 1987. Accordingly, the district court's judgment is reversed, and this cause is remanded for entry of judgment in the district court in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTION.

SUSAN JO KNOTT, APPELLEE, V. STEVEN ROBERT KNOTT, APPELLANT.

478 N.W.2d 275

Filed January 3, 1992. No. 89-1187.

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

Sally Millett Rau for appellant.

Brian P. Sapone, of Sherrets & Smith, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Respondent, Steven Robert Knott, has appealed from the judgment of the district court in a dissolution of marriage proceeding. His sole assignment of error is that the trial court erred in awarding an excessive amount of alimony for too long a period of time.

We have reviewed the record de novo, as we are required to do. See *Moser v. Moser*, *ante* p. 617, 476 N.W.2d 922 (1991). We determine that the trial court abused its discretion in its order as to the amount and length of alimony to be paid by appellant. We modify the decree to provide that appellant shall pay to appellee the sum of $350 per month, beginning with the date of the dissolution decree, for a period of 6 years. The decree is affirmed in all other respects. We decline to award attorney fees in this appeal.

AFFIRMED AS MODIFIED.

RUSSELL B. BARELMANN AND SHARON K. BARELMANN, APPELLANTS, V. CHARLES R. FOX, APPELLEE. CHAMBERS STATE BANK, APPELLEE, V. RUSSELL B. BARELMANN AND SHARON K. BARELMANN, APPELLANTS. RUSSELL B. BARELMANN AND SHARON K. BARELMANN, APPELLANTS, V. CHARLES R. FOX ET AL., APPELLEES.

478 N.W.2d 548

Filed January 10, 1992. Nos. 89-499, 89-713, 89-1383.

1. **Demurrer: Pleadings.** In considering a demurrer, a court accepts the truth of the facts well pled and the factual and legal inferences which may reasonably be deduced therefrom, but does not accept the conclusions of the pleader.
2. **Replevin: Time.** In an action in replevin, the focus is on the rights of the parties when the action is filed, and what takes place thereafter is immaterial in the consideration and determination of the case.
3. _____: _____. The issue in a replevin action is not ownership of the property, but the right to immediate possession at the time of the commencement of the action, and, as a general rule, all matters foreign to the issue of possession must be excluded from consideration and are not available as defenses.
4. **Summary Judgment.** Summary judgment is properly granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such facts and that the moving party is entitled to judgment as a matter of law.
5. **Summary Judgment: Proof.** Once the movant for summary judgment has established facts entitling the movant to summary judgment, the nonmovant has the burden of presenting evidence to show an issue of material fact which prevents a judgment as a matter of law.
6. **Summary Judgment: Appeal and Error.** On appeal from a summary judgment, it is an appellate court's duty to review the evidence in a light most favorable to the party against whom the judgment was granted and give such party the benefit of all reasonable inferences deducible from the evidence.
7. **Debtors and Creditors: Security Interests: Consideration.** No consideration is necessary for an instrument given as security for a debt already owed by the party giving it.
8. **Replevin: Costs: Bonds.** A successful plaintiff in replevin is entitled to recover the reasonable cost of the bond required of it by Neb. Rev. Stat. § 25-1098 (Reissue 1989).
9. **Summary Judgment: Affidavits: Time.** Neb. Rev. Stat. § 25-1332 (Reissue 1989) requires that the party resisting a motion for summary judgment serve any affidavits in opposition to the motion by the day prior to the hearing.
10. **Torts: Conversion: Property: Words and Phrases.** Tortious conversion is any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights.
11. **Conversion: Property: Proof: Tort-feasors.** A plaintiff in conversion must show

(1) an immediate right to possession of the property and (2) its wrongful possession by the tort-feasor.

12. **Livestock: Damages: Proof.** The measure of damages for nonfatal injuries to livestock is the difference in the market value of the animal immediately before and immediately after the injury.
13. **Declaratory Judgments.** Actions for declaratory judgment are not to be entertained where another equally serviceable remedy has been provided by law, nor are they to be used to create new causes of action or cumulative remedies.
14. **Demurrer: Pleadings.** A demurrer tests the substantive legal rights of the parties, and a petition will be found sufficient if, from the statement of facts set forth in the petition, the law entitles a plaintiff to recover.

Appeal from the District Court for Holt County: EDWARD E. HANNON, Judge. Affirmed.

Michael B. Kratville, of Kratville Law Offices, for appellants.

Daniel D. Jewell, of Jewell, Gatz, Collins, Dreier & Fitzgerald, for appellees Fox, Wrede, and Watson.

Forrest F. Peetz, of Peetz and Peetz, for appellee Bank.

James A. Widtfeldt for appellee Kerkman.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

I. INTRODUCTION

This opinion adjudicates three individual appeals, each taken in one of three separate but interrelated suits having as their origins the replevin action successfully brought by appellee, Chambers State Bank, against appellants, Russell B. Barelmann and his wife, Sharon K. Barelmann, in which the Barelmanns unsuccessfully counterclaimed for damages. Although this was the first suit filed, it was the second one appealed and is docketed in this court as case No. 89-713.

In the second suit filed, but the third appealed and docketed in this court as case No. 89-1383, the appellants Barelmann unsuccessfully sought redress, under a variety of theories, for the manner in which the replevied property was seized by the appellees, Charles R. Fox, Holt County Sheriff; Everett Watson and Clarence C. Wrede, Holt County Deputy Sheriffs;

Lyle Kerkman, appraiser; Troy Judge, Marvin Stauffer, and Mark Johnson, assistants to the appraiser; and the County of Holt. We hereafter refer to this action as the misconduct suit.

Although docketed last, the third suit was appealed first and bears case No. 89-499 in this court. It came into being after the appellants Barelmann were permitted to sever from the misconduct suit their unsuccessful effort to obtain a declaratory judgment as to their rights against the appellee Fox alone.

In each case, we affirm.

II. FACTS

Following a long course of dealing, the Barelmanns, who are residents of Chambers, Holt County, Nebraska, executed two promissory notes in favor of the bank. The first note, executed on April 19, 1985, in the initial amount of $99,029.48 and paid down to $98,729.48, represents a renewal and consolidation of other notes and the accumulated interest thereon. The second promissory note, in the initial amount of $2,500 and paid down to $500, was executed on April 22, 1985, for "Fuel, Hog Feed, & Expenses."

On April 19, 1985, the Barelmanns also executed a financing statement and security agreement, which gave the bank an interest in certain specified property and in all equipment and farm products, including but not limited to crops, livestock, and supplies the Barelmanns then owned or might thereafter acquire. Each note provides that it, at the option of the bank and without notice or demand, upon the commencement by the Barelmanns of any proceeding under any bankruptcy law, becomes immediately payable in full.

On May 3, 1985, the Barelmanns filed for protection under chapter XI of the federal Bankruptcy Act, 11 U.S.C. §§ 101 et seq. (1982 & Supp. III 1985). As permitted by 11 U.S.C. § 362 (Supp. III 1985), the bank filed a motion for relief from the automatic stay arising in such situations in order that it might seek to enforce rights it claimed against the Barelmanns. The U.S. Bankruptcy Court for the District of Nebraska granted the bank's motion.

The bank next, on September 8, 1986, filed the replevin

action described in part I, alleging that the Barelmanns were in default on loans in the principal sum of $99,229.48 and that, as a consequence, it was entitled to foreclose on the liens it held on the Barelmanns' property.

On September 23, 1986, the district court entered an order permitting the bank to replevy certain designated property held by the Barelmanns, including certain cattle and specified farm equipment. Fox, with the assistance of Watson, Wrede, Kerkman, Judge, Stauffer, and Johnson, thereafter seized the property listed in the replevin order, as well as other property which was not listed therein.

The Barelmanns subsequently filed a motion seeking return of some of the unlisted property. In response, on October 14, 1986, several of the items seized, including the cattle, were returned to the Barelmanns. The Barelmanns thereafter filed a second motion seeking the return of additional unlisted property or its value. A hearing on that motion was set for December 18, 1986; however, the Barelmanns failed to appear, and, consequently, the second motion was overruled.

Thereafter followed a series of attempts by the Barelmanns to indirectly reclaim the remaining unlisted property by asserting a variety of other damages. The answer filed on January 5, 1987, raised several affirmative defenses, including want of consideration, fraud, coercion, breach of contract, and undue influence, and asserted by way of counterclaim that the bank owed them approximately $300,000.

An even more intensive pleading war then ensued in which the bank by motions and demurrer challenged the Barelmanns' answer, amended answer, and second amended answer. After the district court sustained a portion of the bank's demurrer, it resolved the remaining issues in favor of the bank by a partial summary judgment and later by a directed verdict for the bank at the close of the Barelmanns' case.

While the pleading war in the replevin action was still being fought, the Barelmanns opened a second front by filing the misconduct suit described in part I, seeking damages from the appellees Fox, his deputies, the appraiser Kerkman, Kerkman's assistants, and the county.

In response to appellees' motion to strike the petition in the

misconduct suit, the Barelmanns filed an amended petition and then a second, third, and fourth such petition. In their fourth amended effort, the Barelmanns for the first time sought a declaratory judgment that the replevin was conducted in violation of law. The appellees again demurred; the district court sustained one of the demurrers as to Holt County, but denied the demurrers as to Fox, his deputies, the appraiser, and his assistants. In addition, the district court sustained one of the demurrers as to certain other theories of recovery and dismissed them. The Barelmanns then filed a fifth amended petition, making no mention of the county but again seeking a declaratory judgment that Fox and certain of the others had conducted the replevin improperly, to the Barelmanns' damage. The district court sustained the remaining appellees' demurrer as to the declaratory judgment and dismissed that action, stating that the Barelmanns could not "set forth a meritorious claim on the matters alleged in that cause of action." That left pending in this misconduct suit the causes of action for conversion and trespass, as to which the remaining defending parties successfully filed motions for summary judgment.

As noted in part I, the Barelmanns also filed in the misconduct suit a motion to sever the declaratory judgment action and a motion to amend by dismissing therefrom all parties except Fox, which motions the district court granted.

The declaratory judgment action against Fox was then brought as the third separate suit. The district court sustained Fox's demurrer thereto and dismissed the action.

III. ANALYSIS OF REPLEVIN ACTION (CASE NO. 89-713)

In this case, the Barelmanns have assigned 10 errors, which, as argued by the Barelmanns, may be summarized as claiming that the district court erred in sustaining the bank's demurrer to certain of the Barelmanns' defenses and striking the same from their answer and counterclaim; granting the bank a partial summary judgment as to other defenses; granting the bank a directed verdict at the close of the Barelmanns' evidence; ruling during trial against the Barelmanns on certain evidential matters; and, finally, taxing the cost of the bank's replevin bond

to them.

1. DEFENSES STRICKEN ON DEMURRER

The Barelmanns claim that the district court improvidently struck their assertions that the bank failed to make an appropriate demand before instituting this action, levied on exempt property, and refused to execute a lien waiver on a corn crop maturing after the replevin action was commenced, and that the Barelmanns were not given an opportunity to post a bond, as contemplated by Neb. Rev. Stat. § 25-1098 (Reissue 1989), rather than have the replevied property delivered to the bank. In addition, the Barelmanns complain that the district court struck the paragraph of their answer which concludes that their allegations constitute the affirmative defenses of "accord and satisfication [sic], dirress [sic], estoppel, failure of consideration, fraud, illegality, payment and waiver."

We begin this aspect of our review by recalling the rule that in considering a demurrer, a court accepts the truth of the facts well pled and the factual and legal inferences which may reasonably be deduced therefrom, but does not accept the conclusions of the pleader. *Matheson v. Stork, ante* p. 547, 477 N.W.2d 156 (1991); *Braesch v. Union Ins. Co.*, 237 Neb. 44, 464 N.W.2d 769 (1991). Although this rule is generally encountered in the context of a demurrer to a petition, it has equal application to a demurrer to an answer. See *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 302 N.W.2d 697 (1981).

That rule takes care of the first two of the Barelmanns' contentions, for they allege no facts supporting a conclusion that in the context of this replevin action, the bank had any duty to make a prior demand or that any of the property it seized was exempt from the operation of the subject notes and the security agreement of April 19, 1985. The rule also takes care of the Barelmanns' concern with their claim that they were not given an opportunity to post the bond contemplated by § 25-1098, as they did not allege facts showing that they were ready, willing, and able to post such a bond, had the opportunity been presented.

It is true that leave to amend should ordinarily be granted

when a demurrer has been sustained; but such leave is not necessary if there is no reasonable probability that the pleader can remedy the defect. See, *Kane v. Vodicka*, 238 Neb. 436, 471 N.W.2d 136 (1991); *Schmuecker Bros. Implement v. Sobotka*, 217 Neb. 114, 348 N.W.2d 130 (1984). Given the language of the notes and security document, there were no allegations the Barelmanns could make to require a demand or make the replevied property exempt. Their ability to plead that they were ready, willing, and able to post a bond of at least double the value of the property replevied, as § 25-1098 requires, is negated by the bankruptcy.

The Barelmanns' third contention, that the bank failed to execute a lien waiver on a crop maturing after this action was instituted, is resolved by the rule that rights of possession are to be determined as of the time the replevin action was commenced. See *Brown v. Hogan*, 49 Neb. 746, 69 N.W. 100 (1896). As stated in *Alliance Loan & Investment Co. v. Morgan*, 154 Neb. 745, 747, 49 N.W.2d 593, 594 (1951), the focus is on the rights of the parties when the action is filed, and "[w]hat takes place thereafter is immaterial in the consideration and determination of the case."

The remaining contention, that the district court committed prejudicial error in striking the characterization of the legal nature of the facts pled, is also without merit. Either the facts alleged support a legal theory of defense, or they do not. That inquiry is the subject of the analyses which follow.

2. Summary Judgment, Directed Verdict, and Other Rulings

We begin our analysis of the propriety of the district court's grant of a partial summary judgment, direction of the verdict, and trial rulings by reviewing the nature of a replevin action. In *Schrandt v. Young*, 62 Neb. 254, 259, 86 N.W. 1085, 1087 (1901), citing *Gillespie v. Brown & Ryan Bros.*, 16 Neb. 457, 20 N.W. 632 (1884), this court stated: "The replevin action is primarily to adjudicate the possession of the property. Other rights and claims must be determined, as a general rule, in other appropriate proceedings, even though closely connected with the controversy out of which the contest over possession

arises."

The plaintiff in *Securities Investment Corporation v. Krejci*, 132 Neb. 146, 271 N.W. 287 (1937), sought to replevy a truck subject to a chattel mortgage. The defendant filed a general denial and raised the defense that the plaintiff owed the defendant for breach of warranty and misrepresentation in relation to the sale of the truck. Although this court reversed the verdict in defendant's favor, it stated at 147, 271 N.W. at 287:

> Certainly, if the plaintiff is indebted to the defendant for damages resulting from a breach of warranty or misrepresentation *in the sale of the truck involved in the transaction*, which damages are at least equal to the amount due upon the note, it is a valid defense in a replevin action.

(Emphasis supplied.)

In *Arcadia State Bank v. Nelson*, 222 Neb. 704, 386 N.W.2d 451 (1986), this court reiterated that the subject matter of a replevin action is very narrow. " '[S]ince the main issue in a replevin action is one of title and right to possession, all matters foreign thereto must be excluded from consideration and are not available as defenses.' " *Id.* at 711, 386 N.W.2d at 457. "[T]he issue in replevin is not *ownership* of the property . . . but the *right to immediate possession at the time of the commencement of the action*." (Emphasis in original.) *Id.* at 712, 386 N.W.2d at 457-58.

The *Arcadia* plaintiff filed a replevin action against the defendants, Carl Nelson and his wife and son, seeking the immediate possession of certain items of personal property which had been pledged to the plaintiff by the husband. At the time the replevin petition was filed, all the property was in the possession of the husband, and the records on file with the county clerk revealed that the husband had executed a financing statement in favor of the son.

Each *Arcadia* defendant answered separately, and the plaintiff moved for summary judgment against each of them. The trial court sustained the motion as to the husband, but overruled it as to the wife and son, as those two had denied that the husband was the sole owner of the property. After a trial,

judgment was also entered against the wife, but the jury found the son had an ownership interest in the property. The plaintiff appealed from the finding for the son.

The *Arcadia* court ruled that once the trial court had entered summary judgment in favor of the plaintiff and against the husband, the only party in possession of the property sought to be replevied, the lawsuit was over. The *Arcadia* court observed, however, that had the property been in the son's possession rather than the husband's, the son's alleged claim of ownership might have been relevant. But as the facts established that the property was in the husband's possession, the son's interest was not relevant.

> All that the Bank was seeking to do was to obtain possession. The replevin did not give it a right to dispose of the property, only the right to have possession. Its right to dispose of the property came by reason of the security agreement signed by Carl Nelson. If, indeed, the Bank did not have the right to dispose of the property, once having acquired possession, Jerry Nelson was at liberty to bring an appropriate action to bar such disposition. That, however, was a part of a separate action and not properly a part of the replevin action.

Id. at 712, 386 N.W.2d at 457.

The *Arcadia* court also discussed *Blue Valley Bank v. Bane & Co.*, 20 Neb. 294, 30 N.W. 64 (1886), in which the general owner of a stock of goods was in default on a debt in favor of Blue Valley Bank, which held two chattel mortgages on the goods. In order to foreclose the mortgages, Blue Valley seized and took possession of the goods. At about this time, several general creditors of the owner issued writs of attachment in efforts to levy upon the same goods. The trial court entered a judgment of possession in favor of Blue Valley, but found that the replevied goods had a value in excess of the debt the owner owed Blue Valley and entered judgment for the other creditors in that amount. On appeal, this court affirmed the ruling that Blue Valley was entitled to possession, but reversed the portion of the judgment which assessed damages against Blue Valley and in favor of the other creditors for the surplus funds. In so doing, the *Blue Valley* court stated at 299, 30 N.W. at 67:

> The action of replevin, or, as it is, I think, more appropriately termed in our state, the action for the delivery of personal property, is a statutory action, every proceeding in which is specially provided for by statute. It cannot be changed into a suit in equity, nor into one for money had and received; neither does off-set or counter-claim lie against it.

Thus, the issue in a replevin action is not ownership of the property, but the right to immediate possession at the time of the commencement of the action, and, as a general rule, all matters foreign to the issue of possession must be excluded from consideration and are not available as defenses. Accord, e.g., *Dubied Machinery Co. v. Vermont Knitting Co., Inc.*, 739 F. Supp. 867 (S.D.N.Y. 1990) (counterclaims relating to item not replevied could not serve as a defense to replevy of another item); *Faulkner v. Marineland, Inc.*, 18 Conn. App. 1, 555 A.2d 1001 (1989) (claims for storage fees and interest not arising out of replevy not recoverable); *Ford Motor Credit Co. v. Caiazzo*, 387 Pa. Super. 561, 564 A.2d 931 (1989) (breach of warranty defense, as well as counterclaims for return of purchase price paid and defamation damages, not proper defenses to replevin action).

Consequently, the only matters properly at issue in this case were whether the Barelmanns were indebted to the bank and, if so, whether the bank possessed a valid lien on the property it seized. On those issues the district court granted the bank's motion for summary judgment.

At this juncture it is well to recall that summary judgment is properly granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such facts and that the moving party is entitled to judgment as a matter of law. *Flamme v. Wolf Ins. Agency*, *ante* p. 465, 476 N.W.2d 802 (1991), citing *Krohn v. Gardner*, 238 Neb. 460, 471 N.W.2d 391 (1991). Once the movant has established facts entitling him to summary judgment, the nonmovant has the burden of "presenting evidence to show an issue of material fact which prevents a judgment as a matter of law." *A.G.A. Inc. v. First*

Nat. Bank, ante p. 74, 75, 474 N.W.2d 655, 656 (1991). On appeal, it is this court's duty to review the evidence in a light most favorable to the party against whom the judgment was granted and give such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

(a) Existence of Debt

The existence of the Barelmanns' debt is evidenced by the notes described in part II. These notes are negotiable instruments. See Neb. U.C.C. § 3-104 (Reissue 1980). According to Neb. U.C.C. § 3-307(2) (Reissue 1980), "[w]hen signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense."

As the Barelmanns admittedly signed the two notes in question, they could successfully defend this aspect of the matter only by showing either that these notes were invalid or that they had been paid.

The promissory note executed on April 19, 1985, recites that its purpose was to "Renew Operating Notes and Int[erest]." Inasmuch as no consideration is necessary for an instrument given as security for a debt already owed by the party giving it, it would appear that as of April 19, 1985, the Barelmanns were indebted to the bank. See, *First Nat. Bank of Omaha v. Kizzier*, 202 Neb. 369, 275 N.W.2d 600 (1979); Neb. U.C.C. § 3-408 (Reissue 1980).

However, the Barelmanns allege that Sharon Barelmann was not a party to the original note creating the indebtedness represented by the April 19 note, and, thus, the April 19 note is not valid as to her. This claim overlooks that the bank's agreement to refinance the loan would, in and of itself, be consideration, as there are no facts pled which show that the bank was under any obligation to agree to refinance the note originally executed by Russell Barelmann. In *Hecker v. Ravenna Bank*, 237 Neb. 810, 815, 468 N.W.2d 88, 93 (1991), quoting *Buckingham v. Wray*, 219 Neb. 807, 366 N.W.2d 753 (1985), we stated:

> "[C]onsideration is sufficient to support a contract if there is any detriment to the promisee or benefit to the

> promisor. Generally, a court will not inquire into the adequacy of consideration for a contract, inasmuch as consideration based on value of property or performance of a promise is a matter of personal judgment by parties to a contract. Ordinarily, a contract will not be held invalid for inadequacy of consideration alone, unless inadequacy is so great as to furnish of itself evidence of fraud."

The promissory note executed on April 22, 1985, recites it covered fuel, hog feed, and expenses. There being no evidence it was not so issued, the document itself supports the conclusion that the consideration for its issuance was the advancement of $2,500 for the designated farm expenses.

There being no proof that the notes in question were paid off or otherwise discharged or that they were executed as the result of some fraud or other deceit practiced by the bank, the district court properly determined that the Barelmanns were indebted to the bank.

(b) Existence of a Lien

The existence of the lien is evidenced by the signed financing statement and security agreement dated April 19, 1985.

Neb. U.C.C. § 9-203 (Reissue 1980) provides three basic prerequisites to the existence of a security interest: agreement, value, and collateral. In addition, the agreement must be in writing. The Barelmanns admitted that the signatures on the April 1985 financing statement and security agreement were theirs. Therefore, the requirement of a written agreement is satisfied. They do not claim that they did not own the property given as collateral for the security agreement. Therefore, the only remaining issue is whether value was given for the security agreement.

The definition for value is found in Neb. U.C.C. § 1-201(44) (Reissue 1980): "Except as otherwise provided with respect to negotiable instruments and bank collections . . . a person gives 'value' for rights if he acquires them . . . (d) generally, in return for any consideration sufficient to support a simple contract." The determination that there was valid consideration to support the questioned promissory notes necessarily means that the bank gave value for the security agreement.

Neb. U.C.C. § 9-402 (Reissue 1980) provides, in relevant part:

> A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party . . . gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral.

The Barelmanns do not plead any facts refuting the existence of any of these requirements. However, Russell Barelmann questions the adequacy of the financing statement, claiming that it does not include, by attachment or otherwise, a list of the equipment and machinery pledged. This position overlooks that the financing statement creates a security interest in

> the following collateral, whether now owned or hereafter acquired: all equipment, all farm products, including but not limited to crops, livestock, supplies used or produced in farming operations, all contract rights and accounts, and in additions, accessions, substitutions thereto, and all products and proceeds thereof, including but not limited to those used in or arising from farming and ranching and dairy operation.

In addition, the financing statement, as required by § 9-402, describes the real estate on which the crops were to be grown.

Neb. U.C.C. § 9-110 (Reissue 1980) provides: "For the purposes of this article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described." In addition, § 9-402(8) provides: "A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading."

In *North Platte State Bank v. Production Credit Assn.*, 189 Neb. 44, 55-56, 200 N.W.2d 1, 8 (1972), this court stated:

> "The fundamental purpose of Art. 9 of the code is to make the process of perfecting a security interest easy, simple, and certain. . . . The code very simply and briefly provides for a notice-filing procedure with a minimum of information required to be publicized in a filed financing statement. All that is required is a minimal description, and it may be by type or kind. The statement need not

> necessarily contain detail as to collateral, nor any statement of quantity, size, description or specifications . . . ."

Thus, the financing statement adequately describes the collateral which is the subject of the security interest. The description is such as to put a reasonably prudent person on notice as to which property was covered by a security agreement, thereby fulfilling the purpose of supplying in the financing statement a description of the collateral. Therefore, the assertion in Russell Barelmann's affidavit that no itemized list of the collateral was attached to the financing statement is of no relevance. The district court therefore correctly determined that the bank possessed a valid lien on the property the Barelmanns pledged as collateral for money they obtained from the bank.

As we have seen from the analysis of the nature of a replevin action, once it was determined that the Barelmanns were indebted to the bank and that the bank possessed a valid lien on the property it sought to replevy, there was nothing left to try.

That being so, the district court could not have committed prejudicial error by directing a verdict in favor of the bank at the close of the Barelmanns' evidence, nor could it have committed prejudicial error by any of its evidential rulings at that trial.

3. Bond Cost

Remaining for consideration in this case is the Barelmanns' contention that the district court erred in taxing against them as a cost of suit the premium the bank paid for the replevin bond it posted, as required by § 25-1098, when the replevied property was delivered to it by the sheriff.

Neb. Rev. Stat. § 25-10,105 (Reissue 1989) provides:

> In all cases when the property has been delivered to the plaintiff, where the jury shall find for the plaintiff, on an issue joined, or on inquiry of damages upon a judgment by default, they shall assess adequate damages to the plaintiff for the illegal detention of the property; for which with costs of suit, the court shall render judgment for plaintiff.

The Barelmanns argue first that § 25-10,105 does not apply because there was no finding they illegally detained the property in question and because there was neither a jury finding nor default judgment against them. Obviously, the first claim is without merit, for the replevin judgment in favor of the bank is a finding that the Barelmanns illegally detained the subject property.

As to whether a successful plaintiff may in all circumstances recover the costs of suit, the statute is admittedly less than artfully drawn. But we need not at this time decide whether its language compels the absurd result the Barelmanns espouse, for the bank is entitled to recovery of its costs in this action without reference to § 25-10,105.

Neb. Rev. Stat. § 25-1708 (Reissue 1989) provides: "Where it is not otherwise provided by this and other statutes, costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions for the recovery of . . . specific real or personal property." Therefore, the only real issue raised by the Barelmanns' assignment of error is whether, as the bond was posted for their protection, the cost of its purchase may be taxed against them. Although this is a question of first impression for us, other jurisdictions have found that the cost of a replevin bond is correctly taxed to an unsuccessful defendant.

The plaintiff in *Crowe v. Peaslee-Gaulbert Co.*, 37 F.2d 216 (1st Cir. 1930), filed a replevin action. Massachusetts law required such a plaintiff to post a bond in an amount double the value of the goods. In upholding the assessment of the bond premium as a taxable cost to the unsuccessful defendant, the U.S. Circuit Court of Appeals for the First Circuit stated:

> Under modern conditions and practice, bonds by surety companies have come to be the accepted and approved custom where bonds are required; and where the giving of the bond is compulsory, whether by order of court or by statute, the rule as to costs, in reason and authority, requires that premiums on such bonds are properly included in a bill of costs of the successful party.

Id. at 218.

The replevin plaintiff in *Deere Co. v. Cerone Equip. Co.*, 33

A.D.2d 257, 307 N.Y.S.2d 129 (1970), moved for summary judgment and included in the proposed bill of costs the bond premium. The trial court granted the summary judgment but rejected as a taxable cost the bond premium. The appellate court modified the trial court's judgment so as to allow the plaintiff to recover the bond premium as a taxable cost of the action. In doing so, the appellate court noted that not only was the plaintiff required to provide the bond in order to gain possession, but also that the defendant interposed no meritorious defense.

We conclude that a successful plaintiff in replevin is entitled to recover the reasonable cost of the bond required of it by § 25-1098.

IV. ANALYSIS OF MISCONDUCT SUIT (CASE NO. 89-1383)

In this case the Barelmanns assign as errors, in summary, the district court's refusal to receive certain exhibits in evidence and its grant of summary judgment in favor of the appellees on the Barelmanns' causes of action for tortious conversion and trespass.

The matter of the exhibits is easily resolved, for they were not, as required by Neb. Rev. Stat. § 25-1332 (Reissue 1989), served by the day prior to the hearing. See *Center Bank v. Mid-Continent Meats, Inc.*, 194 Neb. 665, 234 N.W.2d 902 (1975).

We thus turn our attention to whether the summary judgment was properly granted under the standards reviewed in part III(2).

1. CONVERSION

With respect to their conversion claim, the Barelmanns allege that the property seized but not listed in the replevin order was tortiously converted. Tortious conversion is "any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights." *PWA Farms v. North Platte State Bank*, 220 Neb. 516, 519, 371 N.W.2d 102, 105 (1985). In order for the cause of action to arise, the tort-feasor must have assumed and exercised "the right of ownership over goods or chattels belonging to another . . . ."

Terra Western Corp. v. Berry and Co., 207 Neb. 28, 31, 295 N.W.2d 693, 696 (1980). Hence, a plaintiff in conversion must show (1) an immediate right to possession of the property and (2) its wrongful possession by the tort-feasor. *Id.*

Even if we assume for the purposes of this analysis that the appellees seized property not listed in the replevin order, the Barelmanns cannot satisfy the first element of the cause of action.

As determined in part III(2), the bank has a superior immediate right to possession of the property. The financing statement and security agreement the Barelmanns signed gave the bank a security interest in all of the Barelmanns' equipment and cattle, and further provides:

> Upon . . . default . . . [the bank] may declare all Obligations secured hereby immediately due and payable and shall have the remedies of a secured party under the Nebraska Uniform Commercial Code. [The bank] may require [the Barelmanns] to assemble the Collateral and deliver or make it available to [the bank] at a place to be designated by [it] which is reasonably convenient to both parties.

As noted in part II, the subject promissory notes further provide that the balance on the loans became immediately due upon default, which could be triggered without notice or demand by the filing for bankruptcy.

2. Trespass

The trespass action is predicated upon the Barelmanns' assertions that when the appellees came onto their property to execute the replevin order, they injured certain cattle.

If we assume for the purposes of this analysis that the appellees did in fact injure the cattle as claimed, the Barelmanns still cannot prevail, for they failed to prove damages.

The measure of damages for nonfatal injuries to livestock is the difference in the market value of the animal immediately before and immediately after the injury. See, *Fuchser v. Jacobson*, 205 Neb. 786, 290 N.W.2d 449 (1980); *Shotkoski v. Standard Chemical Manuf. Co.*, 195 Neb. 22, 237 N.W.2d 92 (1975).

As to the single cow said to have been crippled, there was no evidence of the difference in its value before and after the injury. Nor was there any such evidence with respect to the cattle said to have suffered a 3-percent shrinkage caused as a result of being herded and penned.

V. ANALYSIS OF DECLARATORY JUDGMENT ACTION (CASE NO. 89-499)

In this case the Barelmanns assign five errors, which merge to effectively claim that the district court erred in dismissing the action following the sustainment of Fox's demurrer and in interfering with the preparation of the record on appeal.

Neb. Rev. Stat. § 25-21,149 (Reissue 1989) provides: "Courts of record . . . shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." In *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 32-33, 388 N.W.2d 93, 97 (1986), quoting *Murphy v. Holt County Committee of Reorganization*, 181 Neb. 182, 147 N.W.2d 522 (1966), this court stated that the purpose of a declaratory judgment is to provide a " 'speedy determination of issues which would otherwise be delayed to the possible injury of the parties.' "

> The remedy of declaratory judgment may be available to a litigant when a controversy exists as a result of a claim asserted against one who has an interest in contesting such claim, the controversy is between persons whose interests are adverse, the party seeking declaratory relief has a legally protectable interest or right in the subject matter of the controversy, and the issue involved is capable of present judicial determination.

Mullendore, supra at 33, 388 N.W.2d at 98. A declaratory judgment is "preemptive justice" designed to relieve a party of uncertainty before the wrong has actually been committed or the damage suffered. *LaMarche v. State of Oregon*, 81 Or. App. 216, 725 P.2d 378 (1986). See, *Kapetanov v. Small Claims Court of Ogden*, 659 P.2d 1049 (Utah 1983); *Woodruff v. City of Laredo*, 686 S.W.2d 692 (Tex. App. 1985); *Elkins v. Vana*, 25 Ariz. App. 122, 541 P.2d 585 (1975). However, declaratory

judgments are not to be " 'entertained where another equally serviceable remedy has been provided by law,' " *Zarybnicky v. County of Gage*, 196 Neb. 210, 215, 241 N.W.2d 834, 837 (1976), or to create a new cause of action or a cumulative remedy, *Murphy, supra*.

The Barelmanns have failed for two reasons to properly bring an action for declaratory relief. First, the harm alleged had already occurred by the time the action was brought. Fox, as sheriff, had already replevied the property and turned it over to the bank. The property not listed in the replevin order has since been sold. Consequently, there is no law to interpret in order to determine the rights of the parties, as the alleged damage has been done.

Second, a declaratory judgment cannot be used to provide an alternative or cumulative remedy. See *Murphy, supra*. The Barelmanns could have brought an action in negligence against Fox for his alleged failure to follow the statutory guidelines in a replevin action. Indeed, the Barelmanns had a whole host of remedies available to them, several of which they pled but failed to establish. Notwithstanding, the Barelmanns cannot be allowed to bring an action for declaratory judgment simply because their other remedies, for one reason or another, failed or were not pursued.

On demurrer, a petition will be found sufficient if, from the statement of facts set forth in the petition, the law entitles a plaintiff to recover. *Matheson v. Stork*, *ante* p. 547, 477 N.W.2d 156 (1991).

The determination that a declaratory judgment action does not lie makes it unnecessary for us to determine at this time whether there ever may be circumstances under which a trial judge may interfere with the preparation of the record a litigant wishes to bring to the appellate courts.

VI. DECISION

For the foregoing reasons, the judgment of the district court in each case is, as first stated in part I, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD MELTON, APPELLANT.

478 N.W.2d 341

Filed January 10, 1992. No. 90-700.

1. **Criminal Law: Weapons.** Any person who possesses any firearm with a barrel less than 18 inches in length and who has previously been convicted of a felony commits the offense of possession of firearms by a felon.
2. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous.
3. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed witnesses testifying in regard to such motion.
4. **Confessions: Prosecuting Attorneys: Police Officers and Sheriffs: Proof: Self-Incrimination: Words and Phrases.** The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.
5. **Confessions.** When an accused initiates a conversation, his statements do not result from interrogation and are admissible.
6. **Miranda Rights: Search and Seizure.** The *Miranda* rules are not applicable to consent searches.
7. **Search and Seizure.** There is no requirement that a person asked to consent to a search be advised that he may refuse consent.
8. **Confessions: Evidence: Proof.** To be admissible in evidence, an accused's statement, admission, or confession must have been freely and voluntarily made. Using a preponderance of evidence standard, the trial judge makes that determination before the statement, admission, or confession is admitted into evidence.
9. _____: _____: _____. Once admitted into evidence, a defendant's statement, admission, or confession may not be considered by the fact finder as evidence of a defendant's guilt unless the fact finder first finds, beyond a reasonable doubt, that the defendant's statement, admission, or confession was freely, voluntarily, and intelligently made by the defendant.
10. _____: _____: _____. To meet the requirement that a defendant's statement, admission, or confession was made freely and voluntarily, the evidence must show that such statement, admission, or confession was not the product of any promise or inducement—direct, indirect, or implied—no matter how slight. However, this rule is not to be applied on a strict, per se basis. Rather, determinations of voluntariness are based upon an assessment of all of the circumstances and factors surrounding the making of a statement.

11. **Confessions: Intoxication: Proof.** The mere fact of intoxication is not conclusive on the issue of voluntariness of a statement or a consent given by a defendant. A defendant must be so intoxicated that he is unable to understand the meaning of his statements. If the trial judge is satisfied that under the totality of the circumstances the defendant was able to reason, comprehend, or resist, the statements are to be admitted.
12. **Criminal Law: Trial: Weapons: Evidence.** Evidence of possession of a revolver or gun of prohibited description, which is in apparently good condition and has the characteristics and appearance commonly understood to be those of the firearm it purports to be, is prima facie evidence sufficient to go to the jury in a prosecution for possession of a firearm by a felon.
13. **Statutes: Presumptions: Legislature: Intent: Appeal and Error.** In construing a statute, it is presumed that the Legislature intended sensible, rather than absurd, results. The Supreme Court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
14. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted or admitted without objection, supports the finding by the trier of fact.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Affirmed.

Richard A. Koehler for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Claiming that the trial court erred (1) in admitting into evidence a .45-caliber pistol found in his home and (2) in failing to require the State to prove every element of the offense charged, Donald Melton appeals his conviction of possession of a firearm by a felon.

Neb. Rev. Stat. § 28-1206 (Reissue 1989) provides in relevant part that "[a]ny person who possesses any firearm with a barrel less than eighteen inches in length . . . and who has previously been convicted of a felony . . . commits the offense of possession of firearms by a felon . . . ." The offense is a Class IV felony and carries a penalty of up to 5 years' imprisonment, up to a $10,000 fine, or both. Melton does not contest the

documentary proof that he was a convicted felon at the time of the alleged crime.

The defendant was sentenced to 254 days in the Fillmore County jail. Melton was given credit on his sentence for the time he spent in jail awaiting final disposition of his case. We affirm.

In his first assignment of error, Melton claims that the .45-caliber pistol admitted into evidence was the product or fruit of an illegal search and seizure. Melton argues (1) that the pistol was seized as a result of statements made by him, although he had not been advised of his *Miranda* rights, and (2) that the statements made by him were not the product of a free will and rational intellect because he was intoxicated and mentally ill at the time the statements were made.

At approximately 10:30 a.m. on December 10, 1989, Geneva police officer John Zelenka, while in uniform and on patrol, received a radio message to meet a visitor at the back door of the Fillmore County sheriff's office. Upon the officer's arrival there, Zelenka met the defendant. Melton asked Zelenka if a police officer in Exeter, Nebraska, had had a problem the previous night. Zelenka replied that he did not know and asked Melton to explain what he meant. Melton told Zelenka that he had taken three or four shots at Officer Curt Callahan's car or residence in Exeter the previous night. Zelenka and Melton then entered the sheriff's office.

Inside the sheriff's office, Zelenka asked Melton what time the shooting incident occurred, and Melton told Zelenka that it took place around 4 or 4:15 a.m. Zelenka asked Melton the location of the gun that he had used, and Melton answered that the gun was under the stove in the kitchen at his home and that his residence was at 311 South 13th Street. Zelenka testified, "I had asked him [Melton] if we could retrieve the gun from his residence and he said, yes, we could."

Zelenka called Deputy Sheriff Steven Roemmich for assistance and then, by telephone, talked to Callahan to find out if something had happened in Exeter the previous night. When Roemmich arrived at the sheriff's office, he too talked with the defendant. Melton told Deputy Roemmich that he had been in Exeter and had shot Officer Callahan's trailer with a

.45-caliber pistol. The defendant was not under arrest when he made that statement. The deputy testified that while Melton was in the sheriff's office "he stated if we want the weapon we could get to his residence and get the weapon." Thereafter, the two officers and Melton proceeded to a deputy's office in the back of the sheriff's office. At that point, Melton said he was going back to Exeter to "get" the police officer there and said he wanted to go to the regional center. Roemmich told Melton he should not say anything because he and Zelenka were police officers, but Melton voluntarily kept talking. Roemmich told Melton that he had the right to remain silent, but the defendant retorted, "I know my rights, you don't have to tell me my rights." Melton threatened that "if you don't take me to the Regional Center, I am going to go back and I will get the police officer because I tried to call him out last night and he didn't come out and this time I will get him."

Knowing that the regional center at Hastings, Nebraska, would not admit persons who were intoxicated, Deputy Roemmich administered a breath alcohol test, which revealed that Melton had a breath alcohol level of .158 percent. At the time of the test, the defendant was in emergency protective custody because he had been involved with a firearm and had been making threats toward another person. Roemmich testified he wanted Melton's gun so the defendant would not "go back out and . . . do some other stuff with it that he said he had already done." Melton was placed in a jail cell in order to detoxify him prior to his being taken to the regional center.

Deputy Roemmich approached Melton in his cell and told the defendant that he would have to have the defendant sign a permission to search form before he would go to his house and get the gun to which the defendant had referred. Melton replied that the deputy should just go to the residence and get the gun. Roemmich told Melton that he would not go to Melton's house unless the defendant signed the permission form. Melton signed the form.

Deputy Roemmich and Officer Zelenka then found Ronald Melton, the twin brother of Donald Melton, with whom the defendant shared a home at 311 South 13th Street in Geneva, Nebraska. The officers told Ronald that the defendant had

given them permission to go to his home and pick up a gun. Ronald Melton testified that as a resident of the house he had access to its kitchen. He voluntarily gave the officers permission to enter the home. It was Ronald who retrieved the pistol from under the stove and gave it to the officers. The barrel of the gun measured $6^{11}/_{16}$ inches in length. The gun had six shells in the cylinder, four of which had been spent. The other two shells in the cylinder were live rounds.

Deputy Roemmich signed an emergency admittance form for the defendant's admittance to the regional center. It stated in relevant part:

> I have personally observed this individual [Donald Melton] *or* I have been informed by Donald Melton Personally who is a reliable person, that this individual is a mentally ill dangerous person and that he or she presents . . . [a] substantial risk of serious harm to another person or persons within the near future, as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm . . . and that the harm described is in my opinion likely to occur before Mental Health Board proceedings can be invoked.

(Emphasis supplied.)

The next day, Melton was taken to the Hastings Regional Center.

There is no evidence in the record that Melton was ever determined to be mentally ill on December 10, 1989.

The defendant unsuccessfully moved to suppress the statements he made at the sheriff's office, the written permission to search form, and the gun. At the bench trial that followed, the statements, the permission to search form, and the gun were all admitted into evidence, over objections by the defendant. On appeal, the only suppression issue raised by Melton is whether the trial court erred in failing to suppress the .45-caliber pistol found in his home. Melton claims the pistol was the product or fruit of an illegal search and seizure.

In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Tingle*, *ante* p. 558, 477 N.W.2d 544

(1991). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed witnesses testifying in regard to such motion. *Id.*

Melton argues that the statements he made to law enforcement officers at the sheriff's office were the result of an unlawful custodial interrogation. The U.S. Supreme Court, in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), held that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. See *id.* See, also, *State v. Melton, ante* p. 506, 476 N.W.2d 842 (1991). Melton complains that law enforcement officers should have advised him that he could refuse to consent to a search. We have held that the *Miranda* rules are not applicable to consent searches, see, *State v. Packett*, 207 Neb. 202, 297 N.W.2d 762 (1980), and *State v. Clouse*, 195 Neb. 671, 240 N.W.2d 36 (1976), and that there is no requirement that a person asked to consent to a search be advised that he may refuse consent, see, *State v. Packett, supra*, and *State v. Wood*, 195 Neb. 353, 238 N.W.2d 226 (1976).

The facts here do not support Melton's contention that his statements were the result of an improper custodial interrogation. The trial court found that the defendant was not under arrest when he went to the back door of the sheriff's office and told Officer Zelenka that he had shot at Officer Callahan's car or residence in Exeter, Nebraska, the previous night. Nor was Melton in custody when he told the officers the type of gun he had fired in Exeter and where it could be found. Since Melton was not in custody, it was not necessary for law enforcement officers to give him *Miranda* warnings concerning his right to remain silent, his right to counsel, and his privilege against self-incrimination. Moreover, when an accused initiates

a conversation, his statements do not result from interrogation and are admissible. *United States v. Perkins*, 608 F.2d 1064 (5th Cir. 1979). See *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983). Clearly, Melton initiated the conversations with Officer Zelenka and Deputy Roemmich.

Melton also claims that his statements to law enforcement officers were not the product of a "free will and rational intellect" because he was intoxicated and mentally ill at the time he made the statements. Brief for appellant at 6. The trial court found that Melton's statements were voluntary and that he knew what he was saying.

" '[T]o be admissible in evidence, an accused's statement, admission, or confession must have been freely and voluntarily made . . . .' " *State v. Porter*, 235 Neb. 476, 480, 455 N.W.2d 787, 792 (1990). Using a preponderance of evidence standard, the trial judge makes that determination before the statement, admission, or confession is admitted into evidence. See *id.* Once admitted into evidence, a defendant's statement, admission, or confession may not be considered by the fact finder as evidence of a defendant's guilt unless the fact finder first finds, beyond a reasonable doubt, that the defendant's statement, admission, or confession was freely, voluntarily, and intelligently made by the defendant. See *State v. Irwin*, 191 Neb. 169, 214 N.W.2d 595 (1974). Determinations of voluntariness are based upon an assessment of all of the circumstances and factors surrounding the making of a statement. *State v. Haynie*, *ante* p. 478, 476 N.W.2d 905 (1991).

To meet the requirement that a defendant's statement, admission, or confession was made freely and voluntarily, the evidence must show that such statement, admission, or confession was not the product of any promise or inducement—direct, indirect, or implied—no matter how slight. However, this rule is not to be applied on a strict, per se basis. Rather, determinations of voluntariness are based upon an assessment of all of the circumstances and factors surrounding the occurrence when the statement is made. *Id.*

There is no evidence in the record, nor is there any contention by Melton, that any of his statements are the product of or were extracted by any direct, indirect, or implied promise or

inducement.

There is evidence of Melton's intoxication at the time he talked with Officer Zelenka and Deputy Roemmich. The mere fact of intoxication is not conclusive on the issue of voluntariness of a statement or a consent given by a defendant. See *State v. Lamb, supra.* A defendant must be so intoxicated that he is unable to understand the meaning of his statements. If the trial judge is satisfied that under the totality of the circumstances the defendant was able to reason, comprehend, or resist, the statements are to be admitted. *Id.* In *Lamb*, the defendant's blood alcohol level was at .224 percent 10 minutes after he had made incriminating statements to police officers. Lamb's statements were properly admitted in evidence. *Id.* Despite the fact that Melton's breath tested .158 percent alcohol, the evidence in Melton's case supports the trial court's finding that Melton understood the meaning of his statements. The defendant sought out a police officer concerning his own activities of the previous night. The defendant accurately related the events of the previous night, when he fired three or four shots at property owned by Officer Callahan. He knew that Callahan was a peace officer. Melton related his motive for shooting at Callahan's property: "[N]obody shoots at my brother and gets away with it." Melton declared that if he was not taken to the regional center, he planned to go back to Exeter to "get" Callahan. The defendant knew, and voluntarily told the officers, not only the location of his gun but also the caliber and type of gun that he had used in Exeter. The defendant knew he had the right to remain silent in the presence of law enforcement officers. From these facts, a trial judge could properly conclude that at the time Melton made his statements and orally gave law enforcement officers permission to search his home he was able to reason, understand, and comprehend the statements he made to both Zelenka and Roemmich.

Melton also claims that his statements were involuntary because he was mentally ill. At best, the evidence is in conflict. It is true that Deputy Roemmich, as required by Neb. Rev. Stat. § 83-1021 (Reissue 1987), signed a form (not under oath) to admit Melton to the regional center and that the defendant was taken there the day after he had made the statements to law

enforcement officers. However, when Roemmich was under oath at trial, he testified, "I didn't think he [Melton] was mentally ill." From the evidence, without being clearly wrong, a fact finder could find there was no evidence that Melton was in fact mentally ill when he made his statements to law enforcement officers.

The statements made by the defendant and the circumstances surrounding his making them provide sufficient indicia of Melton's ability to understand, to reason, and to comprehend, for the trial judge to have found that the statements were the product of a free will and rational intellect.

Whether Melton's written permission for law enforcement officers to search his home is invalid because the defendant was in custody when the written consent to search was given, as Melton argues, is of no significance at this point. The written consent to search was merely cumulative to Melton's oral consent to search. The evidence is uncontroverted that Melton, while he was not in custody, not only orally consented but, indeed, orally invited Deputy Roemmich to search his home and seize his .45-caliber pistol. That consent and invitation had never been revoked. They remained valid throughout the search for, and seizure of, the .45-caliber pistol.

Under all of the circumstances of this case, it cannot be said that the trial court was clearly wrong in not suppressing Melton's statements or the pistol, which the evidence showed was in his possession. Melton's first assignment of error is without merit.

In his second assignment of error, the defendant claims that the trial court did not hold the prosecution to its burden of proving every element of the crime charged. Melton argues that the trial court failed to require the State to prove that the .45-caliber pistol retrieved from his home was a firearm.

The evidence reflects that Melton, a convicted felon, admitted having in his possession and firing a .45-caliber pistol which could be found under the stove in the kitchen of his house. The pistol was found where Melton said it could be found. It had a barrel $6^{11}/_{16}$ inches long and had been fired four times, just as Melton had volunteered to law enforcement officers. Independent evidence reflected that the defendant had

purchased the pistol from his former employer.

We determined in *State v. Lee*, 195 Neb. 348, 237 N.W.2d 880 (1976), that evidence of possession of a revolver or gun of prohibited description, which is in apparently good condition and has the characteristics and appearance commonly understood to be those of the firearm it purports to be, is prima facie evidence sufficient to go to the jury in a prosecution for possession of a firearm by a felon. The evidence herein meets this standard. The evidence shows that the pistol had been fired four times the previous night.

The defendant argues that since the term "firearm" is not specifically defined in the Nebraska statutes, it was error to presume that the pistol is a firearm. In construing a statute, it is presumed that the Legislature intended sensible, rather than absurd, results. The Supreme Court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State v. Heckman, ante* p. 25, 473 N.W.2d 416 (1991). Clearly, a pistol is a "firearm" as used in § 28-1206.

Melton's second assignment of error is also without merit.

Even if the .45-caliber pistol was illegally seized and improperly admitted into evidence and even if Melton's statements were suppressed, there is still overwhelming independent evidence of the his guilt of being a felon in possession of a prohibited firearm. The State's documentary evidence that the defendant was a convicted felon at all relevant times in this case is uncontroverted.

The independent evidence is uncontroverted that during the period charged in the information the defendant purchased a .45-caliber pistol for $250 from his former employer. The purchase was made at the former employer's place of business, a service station in Fillmore County. The former employer testified that on the day Melton bought the gun from him, the defendant took possession of it and walked out the door with it. There was no objection to this evidence. Thus, the testimony concerning the search of Melton's house and the seizure of his .45-caliber pistol was cumulative to other relevant and properly admitted evidence of Melton's possession of a .45-caliber pistol at the time alleged in the information. That evidence supports

the court's finding that Melton was in possession of a firearm as charged. " 'Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the finding by the trier of fact.' " *State v. Coleman*, *post* p. 800, 814-15, 478 N.W.2d 349, 358 (1992); *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989).

With or without Melton's .45-caliber pistol or his statements being admitted in evidence, there is overwhelming evidence that Melton is guilty of being a felon in possession of a firearm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ANTHONY W. COLEMAN, APPELLANT.

478 N.W.2d 349

Filed January 10, 1992. No. 90-728.

1. **Police Officers and Sheriffs: Arrests: Probable Cause.** When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant.
2. **Police Officers and Sheriffs: Arrests: Motor Vehicles: Search and Seizure.** When a law enforcement officer has made a lawful custodial arrest of an automobile's occupant, the officer may, as a contemporaneous incident of that arrest, search the automobile's passenger compartment and examine contents of any container, whether open or closed, within the passenger compartment.
3. **Police Officers and Sheriffs: Motor Vehicles: Search and Seizure.** An inventory search of an automobile impounded by police protects the automobile owner's property while in police custody, protects police against claims or disputes over lost or stolen property, and protects police from potential danger; hence, inventories pursuant to standard police procedures are reasonable.
4. **Constitutional Law: Search and Seizure: Search Warrants: Evidence.** Inventory searches are a well-defined exception to the warrant requirement for a search; therefore, evidence discovered during a proper inventory search is constitutionally admissible.
5. **Trial: Evidence: Juries.** A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury.

6. **Trial: Evidence: Appeal and Error.** Because overruling a motion in limine is not a final ruling on admissibility of evidence and, therefore, does not present a question for appellate review, a question concerning admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection to the evidence during trial.
7. _____: _____: _____. An appellant claiming reversible error as the result of admission of evidence must have made a timely objection, stating the specific ground of objection if a specific ground was not apparent from the context.
8. **Trial: Evidence.** One function of a proper objection is to direct the court's attention to questioned admissibility of particular evidence so that the court may intelligently, quickly, and correctly rule on the reception or exclusion of evidence.
9. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
10. **Evidence.** To be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving an issue to be decided.
11. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
12. **Criminal Law: Trial: Evidence: Convictions: Appeal and Error.** In the trial of a criminal case, erroneous admission of evidence which is not cumulative may constitute harmless error beyond a reasonable doubt, when a defendant's conviction is supported by overwhelming evidence which has been properly admitted or admitted without objection.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Don Stenberg, Attorney General, and Jim Elworth for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

As the result of a jury trial, Anthony W. Coleman was convicted of possessing a controlled substance, "crack" cocaine, in violation of Neb. Rev. Stat. § 28-416(3) (Reissue

1989). In his pretrial motion to suppress the cocaine as physical evidence, see Neb. Rev. Stat. § 29-822 (Reissue 1989) (suppression of physical evidence obtained by unlawful search and seizure), Coleman claimed that the cocaine evidence was obtained through a warrantless and, contrary to the fourth amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, an unreasonable search of an automobile in which Coleman was a passenger. After the district court overruled the suppression motion, Coleman objected to the cocaine as evidence at his trial and again raised the question concerning constitutional admissibility of the cocaine. Also, by a motion in limine, which was rejected by the district court, and a subsequent objection overruled during trial, Coleman sought to prevent the State's introducing in its case in chief testimony about Coleman's incarceration shortly before his arrest on the cocaine charge.

THE SEARCH AND COLEMAN'S STATEMENT

The Search.

Around 9 p.m. on November 29, 1989, Officers Mark Lang and James Morgan of the Omaha Police Division were on a routine cruiser patrol northbound on 34th Avenue in Omaha when they observed a Buick Regal make an erratic turn from an east-west street onto 34th Avenue, cross the centerline of 34th Avenue, proceed astraddle the centerline toward the officers' cruiser in the northbound lane, and then continue southbound away from the cruiser. When the Buick crossed the centerline, "nearly colliding" with the cruiser, Officer Lang, who was driving the cruiser, had to "swerve to the right hand of the roadway to avoid collision with the [Buick]." Officer Lang turned the cruiser around, activated the cruiser's "overhead lights," and followed the Buick a short distance until the Buick pulled to the curb and the officers made a "traffic stop." There were three occupants in the Buick.

Officer Lang went to the driver's side of the Buick, where he contacted the driver, later identified as Ronald Branch. Officer Morgan was standing at the Buick's right rear quarter panel. Lang asked Branch "for his operator's license and the paper work for the vehicle." At that point, Lang smelled a "strong

odor of marijuana smoke" coming from inside the Buick and noticed that Branch "seemed a little bit hesitant and nervous at the time." When Branch was unable to produce an operator's license, he stated that his license might have been suspended.

After Lang smelled marijuana smoke and as a result of Branch's inability to produce an operator's license, Lang asked Branch to get out of the vehicle and performed a pat-down search of Branch for weapons. During Lang's inquiry concerning the marijuana odor, Branch stated that there was a "marijuana joint" in the car's ashtray and then pointed out the ashtray and joint to Lang.

During Lang's exchange with Branch, Officer Morgan asked that the passenger in the right front seat, subsequently identified as Jack Coleman, get out of the car, and conducted a pat-down search for weapons "for our own safety, beings that we were somewhat outnumbered." After searching Jack Coleman, Morgan asked the passenger seated in the right rear seat and thereafter identified as Anthony Coleman to step out of the car and contemporaneously instructed Jack Coleman to get into the back seat. Jack Coleman refused to enter the Buick and explained that his refusal was based on the fact that the police had not yet searched the area of the Buick's back seat.

As the result of a records check while at the scene, the officers learned that there was an active misdemeanor warrant for Branch's arrest and that his driver's license was under suspension. The officers then arrested Branch and, pursuant to that arrest, searched the Buick's back seat in conjunction with a standard "inventory search" of the Buick impounded on account of Branch's arrest. During the search of the Buick's rear seat area and immediately in front of the back seat which had been previously occupied by Anthony Coleman, Lang looked into "the rear ashtray that's mounted on the back of the front passenger's seat" and discovered a clear plastic baggie which contained "rocks of crack cocaine." Later, laboratory analysis verified that the contents of the baggie were "pieces of rock compound . . . identified as cocaine . . . the base form of cocaine, which is referred to as crack." In crack cocaine, "the hydrochloride portion of the [cocaine] molecule has been stripped away," leaving "close to 100 percent" purity of the

cocaine residue.

As a result of the search, the officers also arrested Jack Coleman and Anthony Coleman, who were transported to police headquarters with Branch.

At Police Headquarters.

As reflected in Lang's testimony at the suppression hearing, preparatory to interrogation at police headquarters, Lang administered the *Miranda* warning or admonition to Anthony Coleman. Lang then asked Coleman if he had any knowledge concerning the crack cocaine found in the Buick driven by Branch. At first, Coleman denied any knowledge of the cocaine. However, about 10 minutes into the interrogation, when Lang asked whether it was possible that either Branch or Jack Coleman placed the crack cocaine in the Buick's rear ashtray, Coleman, referring to the cocaine, said, "[I]t's mine," and further stated that he was "not going to play no games, you know, I'm an user, so you can go tell those other guys I fessed up." According to Lang, Coleman also stated that

> he [Coleman] had purchased the crack cocaine. He stated that his intentions were to use it, not to sell it, that he had just gotten out of the penitentiary . . . on the 19th of September [1989], and that he had heard that crack cocaine was a new thing and that it was a new thing to do.
>
> He stated that he had become scared during the traffic stop and had placed the crack cocaine in the ashtray, and the reason that he stated that he was admitting it was . . . that he didn't want to get Mr. Branch or his nephew, Mr. Jack Coleman, in trouble.

COLEMAN'S TRIAL

As previously mentioned, the trial court denied Coleman's pretrial motion to suppress the crack cocaine as evidence in Coleman's jury trial. Through a motion in limine, Coleman's lawyer asked for exclusion of certain statements which Coleman made during interrogation by Lang, namely:

> I would move in limine prior to any evidence put on by the officers to ask the court to exclude a statement that Officer Lang says that Mr. Coleman made to him with regards to the fact that he had gotten out of the

> penitentiary in September, September 19th of 1989, and then started using crack shortly afterwards.
>
> While it may be relevant, I think that its possible prejudicial value under Nebraska Revised Statutes Rule 403 would be too much for a jury to put out of their mind.
>
> . . . [M]y concern is the statement the officer makes saying, I got out of the penitentiary.

Thus, Coleman's motion in limine was based on Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989), which provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The trial court rejected Coleman's motion in limine and additionally commented that denial of the motion was "with the understanding [Coleman] is going to testify. Should that status change, then I might change my mind on the motion in limine also."

During the State's case in chief, and after Coleman's renewed objection that the seized crack cocaine, as previously challenged by the suppression motion, was constitutionally inadmissible, Lang testified that during interrogation of Coleman regarding the cocaine discovered in the Buick, Coleman said, "[I]t's mine. . . . I'm an user, so you can go tell those other guys [Branch and Jack Coleman] I fessed up." Concerning the cocaine discovered during the traffic stop, Lang's testimony also included Coleman's statements expressed during interrogation at police headquarters and previously recounted at the suppression hearing. The prosecutor then asked Lang whether Coleman had said anything else during the interrogation. To the preceding inquiry, Coleman's lawyer responded: "I object to any testimony regarding where Mr. Coleman was earlier in the fall prior to his arrest in November of 1989." After Coleman's objection was overruled, Lang testified: "[Coleman] had stated he had just gotten out of the penitentiary on the 19th of September [1989], and that he had heard that crack cocaine was a new thing and that it was a new thing to do."

ASSIGNMENTS OF ERROR

Coleman's assignments of error may be distilled into the following: (1) The police officers' stopping the vehicle in which Coleman was riding was constitutionally unauthorized, and therefore, the cocaine discovered by the officers during that stop should have been suppressed as constitutionally inadmissible evidence obtained through an unreasonable search and seizure, and (2) the district court erred in allowing Lang "to testify that the Defendant had just been released from the penitentiary." Brief for appellant at 13.

CONSTITUTIONALITY OF THE STOP

Standard of Review.

> In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the "trier of fact" and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress. *State v. Blakely, supra*. . . . If police have acted without a search warrant, the State has the burden of proof that the search was conducted under circumstances substantiating the reasonableness of such search or seizure. *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987).

State v. Abdouch, 230 Neb. 929, 930, 434 N.W.2d 317, 319 (1989). Accord, *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991); *State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202 (1989).

Constitutional Justification of the Search.

Coleman contends that the officers' stopping the Buick in which he was a passenger violated the standard expressed in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), concerning an investigatory stop by police. Also, Coleman argues that the officers, after observing the Buick's erratic movement, including its crossing the centerline of 34th Avenue into the lane of traffic occupied by the police cruiser

and nearly colliding with the cruiser, should have "followed the vehicle for a short distance in order to determine whether possible criminal behavior was present." Brief for appellant at 11. However, Coleman does not point out what would have been legally significant if the car caravan continued on 34th Avenue with the officers' cruiser in pursuit of the Buick driven by Branch.

In *Terry v. Ohio, supra* at 392 U.S. at 16, the U.S. Supreme Court stated:

> It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.

Additionally, "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry v. Ohio, supra* at 392 U.S. at 22. Thus, "under *Terry v. Ohio* . . . police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the fourth amendment." *State v. Staten, supra* at 18, 469 N.W.2d at 116. Accord *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991).

However, further discussion about a "*Terry* stop" is unnecessary to resolve the constitutional issue of the cocaine's admissibility in Coleman's trial.

A Search Incidental to Arrest.

We resume our analysis by considering "probable cause" to arrest without a warrant, namely: "When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant." *State v. Blakely*, 227 Neb. 816, 821, 420 N.W.2d 300, 304

(1988). Accord, *State v. Twohig, supra*; *State v. Staten, supra*; *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987).

The vehicle in which Coleman was a passenger made an erratic turn onto 34th Avenue, crossed the centerline of that public street occupied by an oncoming vehicle, and forced Officer Lang to take sudden and evasive action by sharply turning the cruiser from the path of the approaching vehicle and thereby avoiding a collision with the Buick carrying Coleman. Operation of the Buick violated at least one traffic statute in the "Nebraska Rules of the Road," see Neb. Rev. Stat. § 39-620 (Reissue 1988) (a vehicle shall be driven on the right half of the roadway), and was sufficient to provide the officers with an objective basis for the officers' reasonable or prudent belief that other Nebraska statutes may have been violated; for example, Neb. Rev. Stat. §§ 39-669 (Reissue 1988) (careless driving), 39-669.01 (Reissue 1988) (reckless driving), and 39-669.07 (Reissue 1988) (drunk driving or driving under the influence of a drug). Consequently, in Coleman's case, the officers had sufficient particularized and objective facts to stop the vehicle in which Coleman was riding, to issue a traffic citation to Branch for violating a Nebraska statute pertaining to proper operation of a motor vehicle, and to conduct further investigation into Branch's ability to safely operate a motor vehicle.

Moreover, the valid traffic stop led to discovery that the operator's license of the driver, Branch, was suspended and, hence, Branch's driving a motor vehicle subjected him to arrest for a violation of Neb. Rev. Stat. § 60-418 (Reissue 1988) (prohibition against a driver's operating a motor vehicle while the operator's driving privileges are suspended). Also, Branch was the subject of an outstanding arrest warrant and admitted that he was in possession of marijuana located in the Buick. Thus, the officers discovered the crack cocaine during their search of the Buick pursuant to a valid arrest of Branch. See *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981) (when a law enforcement officer has made a lawful custodial arrest of an automobile's occupant, the officer may, as a contemporaneous incident of that arrest, search the automobile's passenger compartment and examine contents of

any container, whether open or closed, within the passenger compartment).

Additionally, the officers found the cocaine during their inventory search of the Buick impounded on account of Branch's arrest, an impoundment which is unchallenged in Coleman's case. See, *South Dakota v. Opperman*, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976) (an inventory search of an automobile impounded by police protects the automobile owner's property while in police custody, protects police against claims or disputes over lost or stolen property, and protects police from potential danger; hence, inventories pursuant to standard police procedures are reasonable); *Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987) (inventory searches are a well-defined exception to the warrant requirement for a search; therefore, evidence discovered during a proper inventory search is constitutionally admissible); *State v. Stalder*, 231 Neb. 896, 438 N.W.2d 498 (1989) (evidence discovered during an inventory search of a vehicle is constitutionally admissible); *State v. Hill*, 214 Neb. 865, 336 N.W.2d 325 (1983) (evidence found by police without a warrant in an inventory search of a vehicle lawfully in police custody was constitutionally admissible). Cf. *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991) (constitutional admissibility of inventory items of property found on a defendant's person).

Therefore, the officers discovered the crack cocaine during a valid search of the vehicle in which Coleman was a passenger. Accordingly, Coleman's first assignment of error is without merit.

TESTIMONY ABOUT COLEMAN'S INCARCERATION

Coleman contends that the district court should have sustained the motion in limine and subsequently excluded Lang's testimony which recounted Coleman's statement that he was discharged from the state penitentiary on September 19, 1989, just over 2 months before Coleman's arrest for the cocaine charge on November 29, 1989.

Coleman's Motion in Limine.

Coleman misperceives the nature and function of a motion in

limine, which were discussed in *State v. Tomrdle*, 214 Neb. 580, 585-86, 335 N.W.2d 279, 283 (1983):

> A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury. Cf. *State v. Bennett*, [122] R.I. [276], 405 A.2d 1181 (1979). As explained in *Lagenour v. State*, 268 Ind. 441, 450, 376 N.E.2d 475, 481 (1978): "[I]t is not the office of a motion *in limine* to obtain a final ruling upon the ultimate admissibility of evidence . . . but is rather to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to a jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself." As noted in *Twyford v. Weber*, 220 N.W.2d 919, 923 (Iowa 1974): "It [the motion in limine] serves the useful purpose of raising and pointing out before trial certain evidentiary rulings the court may be called upon to make during the course of trial. . . . It is not a ruling on evidence and should not, except on a clear showing, be used to reject evidence. It adds a procedural step to the offer of evidence."
>
> . . . As clearly pointed out in *State v. Garrett*, 183 N.W.2d 652, 655 (Iowa 1971): "[T]he very purpose of the motion in limine is to receive an advance ruling on anticipated objectionable material . . . . [A] denial of a motion in limine . . . cannot, in and of itself, constitute reversible error . . . . The reason is simple. The objectionable material has not yet reached the jury's ears. It may never reach the jury." In the same mode is the ruling in *Twyford v. Weber, supra* at 924, that "where the motion is denied and opposing counsel attempts to ask the questions challenged in the motion . . . a proper objection at that time is necessary to preserve the right to complain on appeal . . . . Stated otherwise, where the motion is denied the movant must base his complaint on the trial record."

In view of *Tomrdle*, we expressed in *State v. Cox*, 231 Neb. 495, 506, 437 N.W.2d 134, 142 (1989):

> When a court overrules a motion in limine to exclude

> evidence, the movant must object when the particular evidence, previously sought to be excluded by the motion, is offered during trial and cannot predicate error on the admission of evidence to which no objection was made when the evidence was adduced.

Thus, because overruling a motion in limine is not a final ruling on admissibility of evidence and, therefore, does not present a question for appellate review, a question concerning admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection to the evidence during trial.

Coleman's "Objection."

This brings us to the "objection" during trial to Lang's testimony about Coleman's incarceration in the penitentiary shortly before Coleman's arrest. In an effort to exclude Lang's testimony, Coleman's lawyer stated: "I object to any testimony regarding where Mr. Coleman was earlier in the fall prior to his arrest in November of 1989." Bearing in mind that Coleman's motion in limine was based on Neb. Evid. R. 403 and contained Coleman's apparent concession that his penitentiary confinement "may be relevant," was the objection during trial based on Rule 403? The objection, however, made no reference to Rule 403 or to the previously overruled motion in limine. Had Coleman withdrawn from his concession of relevancy, expressed in conjunction with his motion in limine, and at trial contended that testimony concerning his incarceration was irrelevant? Was Coleman's opposition to Lang's testimony a veiled invocation of the Nebraska Evidence Rules other than the rules concerning irrelevancy or the exclusion of relevant evidence pursuant to Neb. Evid. R. 403? Coleman's objection lacked not only a specified ground for inadmissibility of Lang's testimony, but also, in the objection's context at trial, provided no readily discernible basis for exclusion of Lang's testimony. Consequently, any ground or basis for Coleman's objection is open to reasonable and serious question.

Neb. Evid. R. 103(1)(a), Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1989), provides that an appellant claiming reversible error as the result of admission of evidence must have made "a

timely objection . . . stating the specific ground of objection, if a specific ground was not apparent from the context . . . ." See, also, *Havlicek v. State*, 101 Neb. 782, 784, 165 N.W. 251 (1917) ("[i]t is the duty of counsel to make his [or her] objections so specific that the court may understand the point intended to be raised"); *State v. Todd*, 226 Neb. 906, 416 N.W.2d 13 (1987); *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987).

One function of a proper objection is to direct the court's attention to questioned admissibility of particular evidence so that the court may intelligently, quickly, and correctly rule on the reception or exclusion of evidence. See, *State v. Bissonette*, 145 Vt. 381, 488 A.2d 1231 (1985); *Langenheim v. City of Seward*, 200 Neb. 740, 265 N.W.2d 446 (1978); *Fowler v. Bachus*, 179 Neb. 558, 139 N.W.2d 213 (1966); M. Graham, Handbook of Federal Evidence § 103.1 (3d ed. 1991); 21 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5032 (1977). Thus, a true objection does not wander among the Nebraska Evidence Rules in the hope of eventually ending its odyssey at the doorstep of a particular rule of evidence. In seeking to exclude evidence, counsel must adhere to a basic and straightforward approach: Tell the court the reason why the evidence is inadmissible! At best, Coleman's lawyer expressed general opposition to Lang's testimony, but failed to express that opposition based on any of the Nebraska Evidence Rules, either by reference to the numerical identification of a particular rule within the Nebraska Evidence Rules or through use of language contained in an evidential rule which rendered Lang's testimony inadmissible. Notwithstanding Coleman's "objection" and its unspecified exclusionary ground and cryptic basis for inadmissibility of Lang's testimony about Coleman's incarceration, the State tilts at windmills built in Coleman's brief and embarks on various considerations for admissibility of Lang's testimony. Nevertheless, at the risk of condoning, or even inviting, slipshod practice and procedure for objections to evidence, but aware of Coleman's possible ineffective assistance of counsel claim on account of his lawyer's failure to specify a basis for excluding Lang's testimony, we treat Coleman's objection as one based on the ground that Lang's testimony was irrelevant,

i.e., "[e]vidence which is not relevant is not admissible." Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 1989).

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1989).

> "There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. What is 'in issue,' that is, within the range of the litigated controversy, is determined mainly by the pleadings, read in the light of the rules of pleading and controlled by the substantive law . . . .
>
> "The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove. . . ."

State v. Baltimore, 236 Neb. 736, 740, 463 N.W.2d 808, 812 (1990) (quoting McCormick on Evidence § 185 (E. Cleary 3d ed. 1984)). Accord *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). "To be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving an issue to be decided." *State v. Lonnecker*, 237 Neb. 207, 210, 465 N.W.2d 737, 740-41 (1991). Accord, *State v. Lomack, ante* p. 368, 476 N.W.2d 237 (1991); *State v. Baltimore, supra.*

Coleman's imprisonment shortly before his arrest was neither material nor probative concerning the charge that Coleman possessed cocaine when he was arrested after the traffic stop. First, the fact of imprisonment is not an element of the possession charge against Coleman, see § 28-416(1), and, hence, was immaterial to the prosecution of Coleman. Second, we find nothing in the fact of incarceration which, by itself, makes it more likely that the individual, previously incarcerated and later found in proximity to a controlled substance, possessed the controlled substance. Moreover, the adverse effect of Lang's testimony is found in the reasonable possibility

that a jury might somehow consider Coleman's recent incarceration as an indication of his guilt. Consequently, evidence of Coleman's previous incarceration was irrelevant and should have been excluded.

"Harmless Error" and "Overwhelming Evidence."

"In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt." *State v. Cox*, 231 Neb. 495, 504, 437 N.W.2d 134, 140 (1989). Accord, *State v. Lonnecker, supra*; *State v. Messersmith, supra*. "Harmless error exists in a jury trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant." *State v. Watkins*, 227 Neb. 677, 686, 419 N.W.2d 660, 666 (1988). Accord, *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991); *State v. Cox, supra*.

Lang's testimony was the only evidence on Coleman's incarceration. While it is true that evidence is accumulated in the course of a trial to determine a defendant's guilt, not all evidence is cumulative. "Cumulative evidence" means "tending to prove the same point to which other evidence has been offered." Webster's Third New International Dictionary, Unabridged 553 (1981). Therefore, Lang's testimony was not cumulative evidence concerning Coleman's incarceration.

In the trial of a criminal case, erroneous admission of evidence which is not cumulative may constitute harmless error beyond a reasonable doubt, when a defendant's conviction is supported by overwhelming evidence which has been properly admitted or admitted without objection. See *State v. Watkins, supra*. In contrast with the preceding, we have expressed the "harmless error" standard pertaining to erroneous admission of cumulative evidence: "Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection,

supports the finding by the trier of fact." *State v. Cox, supra* at 504, 437 N.W.2d at 140. Accord, *State v. Messersmith, supra* (erroneous admission of cumulative evidence; no reversible error); *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991) (erroneous admission of cumulative evidence; no reversible error). For other Nebraska decisions reflecting the "overwhelming evidence" standard, which renders erroneously admitted noncumulative evidence "harmless beyond a reasonable doubt," see, *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990); *State v. Oliva*, 228 Neb. 185, 422 N.W.2d 53 (1988); *State v. Smith*, 218 Neb. 201, 352 N.W.2d 620 (1984); *State v. Weible*, 211 Neb. 174, 317 N.W.2d 920 (1982); *State v. Van Egmond*, 206 Neb. 356, 293 N.W.2d 74 (1980); and *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977). The "overwhelming evidence" standard in relation to "harmless error" has been adopted by several jurisdictions other than Nebraska; for example, *Justice v. State*, 775 P.2d 1002 (Wyo. 1989); *Jones v. State*, 536 N.E.2d 267 (Ind. 1989); *State v. Lafferty*, 749 P.2d 1239 (Utah 1988); *State v. DePew*, 38 Ohio St. 3d 275, 528 N.E.2d 542 (1988); *Com. v. Bricker*, 378 Pa. Super. 265, 548 A.2d 604 (1988); *People v. Rodgers*, 756 P.2d 980 (Colo. 1988); *U.S. v. Moore*, 872 F.2d 251 (8th Cir. 1989); *U.S. v. Gonzalez*, 833 F.2d 1464 (11th Cir. 1987); and *United States v. Ackerman*, 704 F.2d 1344 (5th Cir. 1983).

Although Lang's testimony concerning Coleman's statement about previous incarceration was irrelevant and, therefore, should have been excluded, there was other evidence before the jury, admitted without objection or properly admitted over objection, which tended to establish Coleman's guilt, such as the circumstances surrounding Coleman's arrest during the traffic stop and his statements. For example, Coleman acknowledged that he was a "user" of cocaine; had purchased the crack cocaine discovered during the traffic stop; and, regarding that cocaine, was going to use it, since "it was a new thing to do." Anthony Coleman, as the only occupant of the back seat in the Buick, had easy access to the back seat ashtray where the crack cocaine was found, became frightened at the police traffic stop, and put the cocaine in the Buick's ashtray on the back of the passenger seat immediately in front of himself.

Additionally, Coleman "fessed up" to the fact that he was the person in possession of the cocaine discovered during the traffic stop because he did not want to get Branch and his nephew "in trouble." Any prejudice which might have resulted from Lang's testimony regarding Coleman's previous incarceration shortly before his arrest on November 29, 1989, pales by comparison with the damaging effect and, therefore, prejudice to Coleman's case as the result of his incriminating statements and the circumstances of his arrest. We conclude that the overwhelming evidence in Coleman's case renders the erroneous admission of Lang's testimony about Coleman's previous incarceration "harmless beyond a reasonable doubt." Consequently, admission of Lang's testimony in question does not require reversal of Coleman's conviction.

We note the proposition expressed in the State's brief: "The court's determination regarding admissability will not be set aside absent an abuse of discretion." Brief for appellee at 18. We direct the State to the recent decision *State v. Messersmith*, 238 Neb. 924, 936, 473 N.W.2d 83, 92 (1991), wherein we expressly disapproved the expression " 'The admission or exclusion of evidence is a matter within the discretion of the trial court.' " For that reason, we also reject the proposition expressed by the State in Coleman's case regarding our review of a trial court's ruling on admissibility of evidence.

Finally, we must comment on the district court's remark when the court denied Coleman's motion in limine "with the understanding [Coleman] is going to testify. Should that status change, then I might change my mind on the motion in limine also."

Neb. Evid. R. 104(2), Neb. Rev. Stat. § 27-104(2) (Reissue 1989), states: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Admissibility of Coleman's previous incarceration did not involve a factual question for conditional admissibility within the purview of Rule 104(2), that is, evidence of incarceration would not somehow be rendered inadmissible if Coleman did not testify in his trial; rather, Coleman's motion in limine to

exclude Lang's testimony about Coleman's previous incarceration and the eventual ruling on admissibility of that evidence in Coleman's trial were matters of law generally for the court's consideration unaffected by the possibility of Coleman's testifying or not testifying at trial. In situations such as that presented in Coleman's case, a trial court should rule on a motion in limine irrespective of anticipation that a defendant will testify or likelihood that a defendant may testify. Coleman's motion in limine stood on its own merits without reference to the possibility or likelihood of his testifying at trial.

Since Coleman's assignments of error are without merit, we affirm Coleman's conviction.

AFFIRMED.

IN RE INTEREST OF C.W., M.W., K.W., AND J.W., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. D.W., APPELLANT AND CROSS-APPELLEE, ROSEBUD SIOUX TRIBE, APPELLEE AND CROSS-APPELLEE.

479 N.W.2d 105

Filed January 17, 1992. No. 90-157.

1. **Actions: Collateral Attack: Jurisdiction.** Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter.
2. **Parental Rights: Trial: Evidence: Appeal and Error.** The improper admission of evidence by the trial court in a parental rights termination proceeding does not, in and of itself, constitute reversible error, for, as long as an appellant properly objected at trial, this court will not consider any such evidence in its de novo review of the record.
3. **Indian Child Welfare Act: Expert Witnesses: Parental Rights.** Pursuant to the Indian Child Welfare Act, qualified expert testimony is required in a parental rights termination case on the issue of whether serious harm to the Indian child is likely to occur if the child is not removed from the home.
4. **Trial: Expert Witnesses: Appeal and Error.** A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal.

5. **Indian Child Welfare Act: Courts: Jurisdiction.** The Indian Child Welfare Act does not divest state courts of their jurisdiction over children of Indian descent living off the reservation.
6. **Indian Child Welfare Act: Courts: Jurisdiction: Good Cause.** State courts may exercise jurisdiction concurrently with the tribal courts in regard to those Indian children who do not reside and are not domiciled on their tribe's reservation; however, a state court must refer the matter to a tribal court unless good cause is shown for the retention of state court jurisdiction.
7. **Indian Child Welfare Act: Courts: Jurisdiction.** That a state court may take jurisdiction under the Indian Child Welfare Act does not necessarily mean that it should do so, as the court should consider the rights of the child, the rights of the tribe, and the conflict of law principles, and should balance the interests of the state and the tribe.
8. **Indian Child Welfare Act: Evidence: Records: Good Cause: Appeal and Error.** Under the Indian Child Welfare Act, factual support must exist in the trial record for the purposes of appropriate appellate review as to good cause for failure to comply with statutory child placement preference directives.
9. **Indian Child Welfare Act: Jurisdiction.** Regarding the Indian Child Welfare Act, in determining whether the doctrine of forum non conveniens should be invoked the trial court should consider practical factors that make trial of the case easy, expeditious, and inexpensive, such as relative ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the ability to secure attendance of witnesses through compulsory process.
10. **Indian Child Welfare Act.** The Indian Child Welfare Act does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus.
11. **Indian Child Welfare Act: Jurisdiction.** The best interests of the child standard is applicable to a decision over whether to transfer the jurisdiction of a child custody proceeding to a tribal court.
12. **Indian Child Welfare Act: Courts: Jurisdiction: Good Cause.** Good cause exists for the denial of transfer of the proceeding from a state to a tribal court, for Indian Child Welfare Act purposes, based on the delay of a tribe in expressing intent to intervene, the fact that a state court forum provides better opportunity for production of valuable evidence, and the consideration that transfer of the proceeding to the tribal court would not be in the child's best interests.
13. **Trial: Guardians Ad Litem: Parental Rights.** Guardians ad litem have not been restricted in their presentation of evidence or participation at trial, and there is no reason why a guardian ad litem for a child in a termination proceeding should be restricted.
14. **Appeal and Error.** Consideration of a case will be limited to errors assigned and discussed.
15. **Trial: Proof: Appeal and Error.** A party who challenges a trial court, asserting that the court abused its discretion with regard to sanctions imposed for discovery violations, must show that the ruling of the court was clearly untenable, depriving the litigant of a substantial right and denying a just result in the matter submitted for disposition.

16. **Indian Child Welfare Act: Good Cause.** Regarding the Indian Child Welfare Act, it is patently clear that Congress envisioned situations in which the child's best interests may override a tribal or family interest. The preferences for placement expressed by the act are to be followed absent good cause to the contrary.

Appeal from the Separate Juvenile Court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Sandra Hernandez Frantz for appellant.

Gary E. Lacey, Lancaster County Attorney, and Alicia B. Henderson for appellee State.

Kevin Ruser for appellee Rosebud Sioux Tribe.

Susan Jacobs, guardian ad litem.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

A series of petitions alleged separately that each of the four children involved in this case lacked proper parental care by reason of the fault and habits of their mother, D.W., appellant. All four of the children had been born out of wedlock and had been under the jurisdiction of the juvenile court for years prior to the commencement of the termination proceeding that is the subject of this action.

The Rosebud Sioux Tribe was notified of the first petition, of which M.W. was the subject, by registered mail, return receipt requested. The tribe received notice 20 days before adjudication, but informed the Lancaster County Attorney in writing over 1 month after M.W.'s adjudication as a neglected child that the Rosebud Sioux Tribe would not accept jurisdiction of the case, citing noneligibility of both the mother and M.W. for enrollment. The Rosebud Sioux Tribe suggested that the mother and M.W. might possibly be members of the Oglala Sioux Tribe and subsequently notified by letter the Oglala Sioux Tribe, informing it of the proceedings regarding M.W.

A second petition was filed in juvenile court, this one

concerning C.W., and a copy thereof was sent to the Rosebud Sioux Tribe. The Rosebud Sioux Tribe again declined to intervene, but later posited that the mother *was* eligible and should she decide to enroll herself in the tribe, then the tribe should be sent notice.

The Oglala Sioux Tribe filed its notice of intervention and petition for transfer for both M.W. and C.W. The juvenile court transferred the case; however, upon appellant's objection to the transfer, the transfer was set aside, and C.W. was also adjudicated as a neglected child.

Later, a third petition was filed in the interest of K.W., and in light of the previous responses from the Rosebud Sioux Tribe indicating its position on the matter, notice was sent only to the Oglala Sioux Tribe.

Two weeks after K.W.'s adjudication as neglected, the juvenile court was informed that the Oglala Sioux Tribe would decline to intervene in the case because the mother was not on the official records as the daughter of a member of the tribe and was therefore not eligible for enrollment in the Oglala Sioux Tribe.

The mother's fourth child was the subject of the fourth petition to be filed, which took place in Adams County Court, as J.W. had been born in an Adams County hospital. J.W. was adjudicated a neglected child and her case was transferred to Lancaster County for disposition. After each adjudication concerning the four children, dispositional and review hearings were held on a regular basis.

A supplemental petition requested termination of the mother's parental rights on the grounds of abandonment, neglect, and her habitual use of intoxicating liquor and narcotics. No personal service of the supplemental petition was made on the mother and ineffective service was made on the Oglala Sioux and Rosebud Sioux Tribes.

Additionally, the appellant was given a substantial quantity of discovery material 7 days before trial, and another stack of discovery material at 7 p.m. the evening before trial, alleged by the mother in her brief to have been purposed to set the appellant at a tactical disadvantage.

The case was dismissed due to the insufficient notice to the

tribe, but the State refiled, sending proper notice to the tribe. Shortly before trial the Rosebud Sioux Tribe filed a petition for transfer of jurisdiction to the tribal court, which the court sustained. Three days later the State filed its motion for new trial and vacation of the juvenile court's order of transfer of jurisdiction, which was ultimately sustained. That same day the Rosebud Sioux Tribe filed an order accepting the transfer of jurisdiction.

The trial on the termination of parental rights proceeded. The court terminated the mother's parental rights, stating that she was unfit by reason of abuse of intoxicating liquor and drugs, and that reasonable efforts to correct the problems had failed. The court further terminated the parental rights of the respective putative fathers of the children and ordered that the matter be transferred to the Rosebud Sioux Tribe for the dispositional phase of the proceeding. The juvenile court stayed transfer of the children pending appeal.

Appellant alleges what we have summarized as 11 assignments of error, in which she claims that the juvenile court erred in that it (1) terminated her parental rights in violation of the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 et seq. (1988) (hereinafter the ICWA); (2) obtained jurisdiction of the matter in violation of the ICWA; (3) took judicial notice of a juvenile court file which contained evidence admitted in violation of the ICWA and took judicial notice of such file in violation of appellant's rights to confrontation and cross-examination; (4) terminated her parental rights when the petitioner had not provided qualified experts to testify, as required under the ICWA; (5) abused its discretion by refusing to transfer the case to the Rosebud Sioux Tribal Court; (6) exercised jurisdiction when it no longer had jurisdiction, as the Rosebud Sioux Tribal Court had accepted jurisdiction; (7) terminated appellant's parental rights when petitioner had not met its burden of proof beyond a reasonable doubt, nor had petitioner shown that appellant had caused any direct harm to the minor children; (8) considered the guardian ad litem's recommendations and evidence when the guardian ad litem had not adhered to the principles of the ICWA nor her statutory duties as guardian ad litem; (9) admitted into evidence

information from tribal files, social worker files, and attorney files as business records; (10) used violations of the ICWA as to placement of Indian children and the consequences of said placement against the appellant; and (11) should have excluded discovery material that was produced to appellant late.

The county attorney and guardian ad litem cross-appeal, assigning as error the juvenile court's ultimate transfer of the matter to the Rosebud Sioux Tribal Court.

In her first and second assignments of error the mother generally alleges that the trial court obtained jurisdiction and that her parental rights were terminated in violation of the ICWA. The assignments are without merit.

While the mother contends that the ICWA has been violated in many ways, she makes no references to the record to where those violations may have occurred. She does refer in her argument to the incidents of the court's taking judicial notice of files containing evidence obtained in violation of the ICWA, which we shall address later in discussion of that specific assignment.

What the mother does address clearly is her general dissatisfaction regarding the fashion in which the juvenile court obtained jurisdiction in the adjudications of her children as neglected. Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter, in keeping with our decisions in *State v. Reuter*, 216 Neb. 325, 343 N.W.2d 907 (1984), and *State v. Kelly*, 212 Neb. 45, 321 N.W.2d 80 (1982). Such challenges should timely have been made after the adjudications, which were final orders, and we consider the first two assigned errors no further.

The third assignment of error alleges that the juvenile court took judicial notice of a juvenile court file which contained evidence admitted in violation of the ICWA and also that such notice violated the mother's rights to confrontation and cross-examination. Appellant objected at trial only to the court's taking judicial notice of the predispositional reports and the attachments thereto. We decide this case de novo on the record, as we have held that we are obliged to do, see *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990),

and will consider only the relevant and untainted evidence.

While we recognize the Nebraska Evidence Rules are not applicable in a dispositional hearing, including a hearing to terminate parental rights, the requirements of due process control a proceeding to terminate parental rights and the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated. See *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

> The improper admission of evidence by the trial court in a parental rights termination proceeding does not, however, in and of itself, constitute reversible error, for, as long as the appellant properly objected at trial, this court will not consider any such evidence in its de novo review of the record.

In re Interest of D.S. and T.S., 236 Neb. 413, 414-15, 461 N.W.2d 415, 418 (1990).

It is obvious that fundamental due process is difficult to define. With reference to the evidence that is to be considered in a parental rights termination case, it is further obvious that in determining whether or not fundamental due process has been afforded to all persons interested in the proceedings, the Nebraska rules of evidence provide a guidepost in that determination. Thus, as in this principal case where hearsay evidence was excluded as fundamentally unfair, the Nebraska rules of evidence would similarly have prohibited the introduction of such evidence. Throughout this opinion we will specify what evidence we rely upon in arriving at the respective holdings.

In the mother's fourth assignment of error, she alleges that the petitioner had not provided qualified experts, in violation of the ICWA. The assignment is without merit.

The only expert witness to whom the mother objected at trial was Dr. Gary Melton, and thus, our review is limited to his status as an expert.

Pursuant to the ICWA, qualified expert testimony is required in a parental rights termination case on the issue of whether serious harm to the Indian child is likely to occur if the child is not removed from the home. See Guidelines for State

Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,593 (1979) (not codified).

The Bureau of Indian Affairs sets forth guidelines under which expert witnesses most likely will meet the requirements of the ICWA:

> (i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
>
> (ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards in childrearing practices within the Indian child's tribe.
>
> (iii) A professional person having substantial education and experience in the area of his or her specialty.

Id.

Dr. Melton obtained a Ph.D. from Boston University, is licensed to practice psychology in Nebraska, and is a certified clinical psychologist with extensive clinical research experience with children. Dr. Melton's research revealed that there exist no comparative studies between Native American children and other children in their respective needs for stability and security.

Appellant's own experts, Dr. Garrett Grandbois and Clyde Tyndall, concur with a finding that Native American children need stability and, in fact, had recommended that the mother establish and maintain a stable home environment for her children.

Whether a witness is qualified to testify as an expert under Neb. Evid. R. 702 is a preliminary question of admissibility for a trial court under Neb. Evid. R. 104(1). Such a determination will be upheld on appeal unless the trial court's finding is clearly erroneous. *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990).

In *Matter of Welfare of T.J.J.*, 366 N.W.2d 651, 655 (Minn. App. 1985), Minnesota's Court of Appeals noted in dicta that "a witness' background in Indian culture does not necessarily determine whether that witness is qualified as an expert under the Act."

Other courts have found that individuals who are professionals with substantial education and experience in psychology are deemed to be qualified experts under the ICWA. See *In re Kreft*, 148 Mich. App. 682, 384 N.W.2d 843 (1986).

We find that evidence existed to support the trial court's finding that Dr. Melton qualified as an expert. Dr. Melton possesses substantial education and experience in his area of specialty, and his lack of experience with the Indian way of life in no way compromised or undermined the value of his testimony. The assignment of error as to the use of his testimony at trial is therefore without merit.

As to the mother's fifth and sixth assignments of error regarding the propriety of the juvenile court's jurisdiction and failure to transfer the matter to the tribal court, we find the assignments are without merit.

The ICWA was enacted to promote the stability and security of Indian tribes and families through the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.

When Congress enacted the ICWA, it had two main goals: (1) protecting the best interests of the Indian children and (2) promoting the stability and security of Indian tribes and families. See 25 U.S.C. § 1902. The act is based on the assumption that protection of the Indian child's relationship to the tribe is in the child's best interests. *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989).

ICWA § 1911 mandates that the Indian tribe have jurisdiction in all child custody proceedings "involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law." The ICWA does not, however, divest state courts of their jurisdiction over children of Indian descent living off the reservation. *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587 (10th Cir. 1985), *cert. denied* 479 U.S. 872, 107 S. Ct. 247, 93 L. Ed. 2d 171 (1986). State courts may exercise jurisdiction concurrently with the tribal

courts in regard to those Indian children who do not reside and are not domiciled on their tribe's reservation; however, a state court must refer the matter to a tribal court unless good cause is shown for the retention of state court jurisdiction. See 25 U.S.C. § 1911(b).

Under the ICWA, if the tribe or either parent of the Indian child petitions for transfer of the proceeding to the tribal court, the state court cannot proceed with the placement of an Indian child living outside a reservation without first determining whether jurisdiction of the matter should be transferred to the tribe. See § 1911(b).

At a hearing on a petition to transfer a termination of parental rights proceeding to tribal court under the ICWA, the party opposing the transfer has the burden of establishing that good cause not to transfer the matter exists. See, 25 U.S.C. § 1911(b); *Mississippi Choctaw Indian Band v. Holyfield, supra.*

Regardless of whether such tribal jurisdiction is concurrent with or exclusive of state jurisdiction, all courts in the United States must give full faith and credit to the child custody determinations of tribal courts to the same extent that full faith and credit are given to the decisions of any other entity. See 25 U.S.C. § 1911(d). In the case where applicable state or federal law provides a higher standard of protection to the rights of the parent or Indian custodian of the Indian child than the rights provided under the ICWA, the state or federal court shall apply the state or federal standard. 25 U.S.C. § 1921.

That a state court may take jurisdiction does not necessarily mean that it should do so, as the court should consider the rights of the child, the rights of the tribe, and the conflict of law principles, and should balance the interests of the state and the tribe. See *Application of Bertelson*, 189 Mont. 524, 617 P.2d 121 (1980).

Under the ICWA, factual support must exist in the trial record for the purposes of appropriate appellate review as to good cause for failure to comply with statutory child placement preference directives. *In re Interest of Bird Head*, 213 Neb. 741, 331 N.W.2d 785 (1983).

The Bureau of Indian Affairs has published nonbinding

federal guidelines interpreting the ICWA's definition of "good cause to the contrary" as including, but not limited to, cases where (1) the proceeding is at an advanced stage when the petition to transfer is received, and the petition is not promptly filed after receipt of notice; (2) the Indian child is over the age of 12 and objects to the transfer; (3) evidence necessary to decide the case cannot be adequately presented to the tribal court without undue hardship to the witnesses and parties; and (4) the parents of an Indian child over the age of 5 are not available, and the child has had little or no contact with the child's tribe or members of the child's tribe. Additionally, the guidelines specify that socioeconomic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in determining whether good cause exists. The burden of establishing good cause shall be on the party opposing the transfer. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (1979) (not codified).

The third element of the guidelines has been applied to deny transfer due to considerations of forum non conveniens, such as availability of witnesses and access to proof. See *In Interest of J.R.H.*, 358 N.W.2d 311 (Iowa 1984). The Court of Appeals of South Carolina found in *Chester Co. Dept. of Soc. Serv. v. Coleman*, 296 S.C. 355, 372 S.E.2d 912 (S.C. App. 1988), that good cause may exist under the statute:

> What little we are able to glean from the record indicates that a biological parent of the two older girls, both of whom are over five years of age, may be unavailable; that none of the children has had any contact with the tribe or has resided on the reservation for a significant period of time; and that material witnesses and evidence relating to placement are in South Carolina, not South Dakota. These factors, together with evidence that removal of the children would be disruptive and detrimental to their best interests, may well constitute "good cause" for the family court to retain jurisdiction . . . .

Id. at 359, 372 S.E.2d at 915. Unable to make such a factual determination, the court remanded the cause for further consideration.

Iowa's Supreme Court, in *Interest of J.R.H., supra*, also interpreted "good cause" to include geographical conditions. The court subsequently found that there was good cause to deny transfer of the proceedings to the tribal court in South Dakota, as the evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or witnesses.

In determining whether the doctrine of forum non conveniens should be invoked, the trial court should consider practical factors that make trial of the case easy, expeditious, and inexpensive, such as the relative ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the ability to secure attendance of witnesses through compulsory process. *Matter of Wayne R.N.*, 107 N.M. 341, 757 P.2d 1333 (N.M. App. 1988).

The Supreme Court of South Dakota held in *Matter of Dependency and Neglect of A.L.*, 442 N.W.2d 233 (S.D. 1989), that notice of the proceeding concerning the dependency and neglect of children enrolled in the tribe gave the tribe actual notice, even though the tribe did not receive registered notice, and thus, the tribe's request to transfer the case to the tribal court was untimely where the tribe orally petitioned for transfer 1 year after receiving notice.

The Superior Court of Pennsylvania found in *In re Adoption of K.L.R.F.*, 356 Pa. Super. 555, 515 A.2d 33 (1986), that an adoptive Indian mother's placement of her Indian child with foster parents was temporary. Thus, the Indian mother had the right and ability under the federal ICWA to withdraw her consent to the placement and to effectuate the immediate return of the child, notwithstanding the fact that adoption may have been, at one time, the "ultimate objective" of the parties, where placement was purely consensual. The adoptive Indian parent furthermore had standing, the court found, to rely upon and demand compliance with provisions of the federal ICWA with respect to the action to terminate her parental rights.

This court, in *In re Interest of Bird Head*, 213 Neb. 741, 750, 331 N.W.2d 785, 791 (1983), recognized that the ICWA "does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus."

In *Matter of T.S.*, 245 Mont. 242, 801 P.2d 77 (1990), the Supreme Court of Montana found that the best interests of the child standard was applicable to a decision over whether to transfer the jurisdiction of a child custody proceeding to a tribal court. The evidence in *T.S.* was uncontroverted in indicating that the transfer of the child from a stable environment would devastate the child and have long-term harmful effects. The court further found that the transfer of jurisdiction to a tribal court was not mandated by the ICWA where, although the child was eligible for membership in an Eskimo tribe, neither the child nor her mother was a member of the tribe, the child had never lived on the reservation, and the child had never had any contact whatsoever with the tribe.

The Supreme Court of Oklahoma similarly found, in *Matter of N.L.*, 754 P.2d 863 (Okla. 1988), that the presence of the witnesses in Okmulgee County and the best interests of the child supported the finding of good cause to deny the mother's request for transfer of jurisdiction to the tribal court.

The California Court of Appeal held in *In re Robert T.*, 200 Cal. App. 3d 657, 246 Cal. Rptr. 168 (1988), that good cause existed for the denial of transfer of the proceeding from the state to the tribal court, for ICWA purposes, based on the delay of the tribe in expressing intent to intervene, the fact that the state court forum provided a better opportunity for production of valuable evidence, and the consideration that transfer of the proceeding to the tribal court would not be in the child's best interests.

Conversely, in *In re Armell*, 194 Ill. App. 3d 31, 550 N.E.2d 1060 (1990), the Appellate Court of Illinois strictly construed the Bureau of Indian Affairs guidelines in finding that the best interests of the child standard and the psychological effects of the transfer were inapplicable in the determination of whether "good cause" existed not to transfer the case to the tribal court.

The only remotely applicable federal case is *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989), which stated that the domicile of illegitimate infants is that of their mother. In *Holyfield*, the mother's tribal reservation was the domicile of the twin infants, and the tribal court had exclusive jurisdiction over the custody

proceeding, even though neither of the twins had ever actually been on the reservation. *Holyfield* neither speaks to nor disposes of any issue in this case.

As to the juvenile court's decision to vacate the previous order of transfer to the Rosebud Sioux Tribal Court and retain the matter in the juvenile court, we affirm. The order of transfer to the tribal court was not a final order until the tribal court formally accepted the jurisdiction, and the judge explicitly stated as much in his order. Not unlike the option of revoking an offer prior to acceptance, the juvenile court had the discretion to revoke the "offer" of jurisdiction prior to the Rosebud Sioux Tribe's acceptance, and legitimately did so.

We next ask whether this discretion was abused. We find that neither the children nor their mother were domiciled on the reservation, transfer of jurisdiction is not mandatory, and good cause existed for retaining the matter in juvenile court.

The court stated, in its November 20, 1989, findings, its reasons for the finding of good cause. The court considered the 8-year history of the case, including the facts that the appellant opposed the 1982 transfer to the Oglala Sioux Tribe, pursuant to her right to do so under the ICWA, and that in 1982 the Oglala Sioux Tribal Court judge approved of placement of two of the children in non-Indian homes. Not only was the petition for transfer filed at an advanced stage in the proceedings, but all of the evidence was located in Lancaster County. To transfer the proceedings to the tribal court, located in South Dakota, would pose an undue hardship to the witnesses and parties, and in that we find good cause to retain the proceedings in the juvenile court. We affirm the juvenile court's decision to retain jurisdiction of the matter in that court.

Appellant also claims in the seventh assignment of error that her parental rights were terminated without the petitioner proving its case beyond a reasonable doubt or showing that the mother had caused any direct harm to the minor children.

While generally assigning whether the petitioner had met the burden of proof beyond a reasonable doubt, as required by 25 U.S.C. § 1912(f), appellant does not allege that the evidence was insufficient to terminate her rights, but only specifies that the experts produced by the petitioner were not qualified as

such under the ICWA. As we held above, the experts produced by the petitioner were qualified; thus, this assignment is without merit. We further find that the State has proven beyond a reasonable doubt that the best interests of the children require termination of appellant's parental rights.

As to the issue of whether proof of the mother's direct harm to the children exists, the record is replete with evidence of her addictions, as well as her subsequent denials regarding the addictions to alcohol and inhalants. During the trial regarding the issue of termination of parental rights, the mother was committed to a detoxification center for protective custody. She had been committed to the Hastings Regional Center between July and October 1989, she was scheduled for a mental health commitment hearing because her guardian ad litem alleged that she required commitment, and she spent a night in jail for disturbing the peace at the detoxification center. She also had served over 900 days in jail for offenses related to her alcohol and inhalant addictions.

Dr. Melton testified, as an expert witness, that the children would likely suffer serious emotional harm if returned to their mother now or in the near future and that continued contact would unsettle and undermine the stability of their current living situations.

The evidence supports a causal relationship between the mother's behavior and likely damage to the children, and we will not ask the children to wait and see whether their mother grows up in the future. She has not found the incentive to mature and change her lifestyle over the years this case has been progressing through the juvenile court, when that was the only obstruction to having her children returned to her.

Appellant alleged in the eighth assignment of error violations of the ICWA in the guardian ad litem's recommendations and evidence. She specifically cites that the guardian ad litem "tried to keep out evidence that the Appellant presented" and that the guardian ad litem did not make an effort to find proper placement of the children so that they "could avoid the certain identity crisis that they will now experience." Brief for appellant at 33. The mother does not argue the principles of the ICWA that have been violated.

We find this assignment without merit. Guardians ad litem have not been restricted in their presentation of evidence or participation at trial, and there is certainly no reason why a guardian ad litem for a child in a termination proceeding should be restricted. See, *In re Interest of D.S. and T.S.*, 236 Neb. 413, 461 N.W.2d 415 (1990); *In re Interest of D.D.P.*, 235 Neb. 864, 458 N.W.2d 193 (1990); *In re Interest of R.W.*, 236 Neb. 420, 461 N.W.2d 545 (1990).

Appellant did not argue the merits of her ninth assignment of error regarding the court's consideration of certain files as business records. We therefore do not consider it. See *In re Interest of P.M.C.*, 231 Neb. 701, 437 N.W.2d 786 (1989). The Nebraska Supreme Court rules address the same position at Neb. Ct. R. of Prac. 9D(1)(d) (rev. 1991), by stating that "consideration of the case will be limited to errors assigned *and* discussed." (Emphasis supplied.)

Appellant alleges in the 10th assignment of error that the juvenile court used violations of the ICWA as to placement and consequences of those violations against the appellant. The assignment is without merit.

ICWA § 1915 and Neb. Rev. Stat. § 43-1508 (Reissue 1988) require that Indian children be placed in foster care by a preference system: first, to an extended family member; then, to an Indian home specified by the child's tribe; then, to an Indian foster home; and finally, to an Indian institution. These placement preferences yield to the wishes of the parent when contrary to the statutory scheme, and will yield for other good cause. "For purposes of foster care, preadoptive or adoptive placement, a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations: (i) The request of the biological parents . . . ." 44 Fed. Reg. 67,594 (1979).

Upon initial placement of the children, efforts were made to locate Indian foster homes for them, but Indian foster homes were not available. Even during trial, attempts were made to find Indian families, to no avail.

The mother specifically requested on several occasions that her children be placed in non-Indian foster homes, specifically directing that she did not want the children placed with family

members. Additionally, the tribes with which the mother is associated did nothing to assist in the children's placement and honored her decision to allow the children to be placed in non-Indian foster homes.

Seven years after the case began and 10 months after the termination petition was filed, the mother filed a motion to change placement. She did not appear for hearing and presentation of evidence on that motion.

The mother's plea that placement was in violation of the ICWA is without merit due to the fact that she unilaterally made the determination that the placement of her children should deviate from the ICWA scheme, and we therefore affirm the juvenile court's decision to place the children with non-Indian families.

Appellant's final assignment of error raises the failure of the juvenile court to exclude certain discovery material that was produced to the appellant late. We have held that the party who challenges the trial court, asserting that the court abused its discretion with regard to sanctions imposed for discovery violations, must show that "the ruling of [the] judge [was] clearly untenable, depriving the litigant of a substantial right and denying a just result in the matter submitted for disposition." *D.S. v. United Catholic Soc. Servs.*, 227 Neb. 654, 666, 419 N.W.2d 531, 538 (1988). Appellant makes no such showing, and her assignment is without merit.

As to the cross-appeal of the Lancaster County Attorney and guardian ad litem for the children, we reverse the juvenile court's decision to transfer the proceedings to the Rosebud Sioux Tribal Court for the purpose of disposition or placement of the children.

We find *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989), not dispositive of the present case. In that case, the U.S. Supreme Court held that a parent may not attempt to defeat the interests of the tribe by temporarily moving away from the reservation to give birth. While the case reflects that it is the tribe's decision to determine what is in the Indian child's best interests, the holding is applicable only where the child is deemed domiciled on the reservation.

Both Neb. Rev. Stat. § 43-1504(2) (Reissue 1988) and 25 U.S.C. § 1911(b) provide that a case of a nondomiciled Indian child only be transferred to the jurisdiction of the tribe upon request "in the absence of good cause to the contrary." As stated above, one of the goals of the ICWA is to protect the best interests of Indian children, as recognized and upheld by numerous courts across the country.

The Arizona Court of Appeals, in *Matter of Appeal in Maricopa County*, 136 Ariz. 528, 667 P.2d 228 (Ariz. App. 1983), considered, in an adoption case, the length of time a child had been with the adoptive mother, the occurrence of bonding, and testimony that removal of the child would cause psychological damage to the child. The court expounded that from the congressional policy, "[i]t is patently clear that Congress envisioned situations in which the child's best interest may override a tribal or family interest—the preferences for placement are to be followed absent 'good cause to the contrary.' [25 U.S.C.] § 1915(a),(b)." 136 Ariz. at 534, 667 P.2d at 234.

In *Matter of Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988), the Indiana court dealt with a child who had lived with the same foster family all of her 7 years of life, recognizing that

> [to] now sever and dislodge the child from the family and culture she has known during all of her seven years of life cannot be anything except devastating to the best interests of the child. The purpose of the ICWA, to protect the interests of the Indian family, is patently clear. However, a paramount interest is the protection of the best interests of the child.

Id. at 308.

Largely by their mother's choice, the children involved in this situation have had little exposure to their Indian culture, and the value of transfer to the tribe with future exposure to the Indian ways of life must be balanced first against the detrimental consequences these children will suffer due to the separation from the psychological parents to whom the children have bonded and become attached. Secondly, we must consider the cultural adjustments that these children, who have not lived in an Indian environment, would have to make and

their individual abilities to make those adjustments, as established by the testimony of qualified expert witnesses. See *In Interest of J.R.H.*, 358 N.W.2d 311 (Iowa 1984).

One of the qualified expert witnesses, Dr. Melton, testified that removing the children from present foster homes and placing them in equally stable foster homes would have significant consequences, would be emotionally upsetting, and would produce psychological disorganization.

Another expert witness, Professor Ann Coyne, specializes in bonding and attachment and in separation and loss, and has experience working with special needs children, tribes, and the Department of Social Services. She explained the nature of bonding and that the consequences of breaking attachments for children include short-term memory deficits, speech and language problems, and posttraumatic stress that manifests itself in children as depression and difficulty in relating to others. As Professor Coyne testified, "[F]or a child, there's nothing more desparate [sic] than to be removed from the person to whom they are attached." Professor Coyne testified that the grief process in children takes at least 6 to 8 years from the time of the loss and that, in this case, transfer to the tribe and the inevitable grief over losing their psychological parents would compromise the children's ability to benefit from that culture because they would be too busy grieving and dealing with the loss of the attachment.

From the beginning, the mother refused to allow transfer of her children's cases to the tribal court and demanded that her children be placed in non-Indian homes. While she may be entitled to change her mind, we cannot and will not close our eyes to the extensive bonding and attachment these children have experienced with the foster families who now wish to adopt them, in the 7 years the mother has adhered to her initial position.

Although we realize that the guidelines deem inappropriate considerations of tribal socioeconomic considerations and the perceived adequacy of the tribal or Bureau of Indian Affairs social services or judicial systems, we also recognize that, in the case of two of the children, those considerations become necessary to a determination of the best interests of the children

and, therefore, "good cause" not to transfer the case. Both C.W. and M.W. are mentally handicapped and have special needs which the law specifically requires that we consider. See 25 U.S.C. § 1915 (b). See, also, 44 Fed. Reg. 67,584, 67,594 (1979). The children will suffer if their respective foster homes, the only stability they have ever known, are taken away from them.

The judgment terminating parental rights is affirmed. That part of the court's judgment transferring custody to the Rosebud Sioux Tribal Court for disposition is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SHANAHAN, J., concurring.

Although the result reached today by the majority of this court is correct, I disagree with the majority's route to that result.

While the majority reiterates that "the Nebraska Evidence Rules are not applicable in a dispositional hearing, including a hearing to terminate parental rights," the majority, nevertheless, proceeds to discuss the admissibility of testimony from Dr. Gary Melton, a psychologist, and concludes that Melton's testimony is admissible because he was a witness "qualified to testify as an expert under Neb. Evid. R. 702," which was the trial court's finding on a preliminary question of admissibility and a conclusion which, under the circumstances and the Nebraska Evidence Rules, is not clearly erroneous. The majority's acknowledgment that the Nebraska Evidence Rules are inapplicable in proceedings to terminate parental rights renders the majority's discussion about admissibility of an expert's testimony under the Nebraska Evidence Rules both incongruous and unnecessary. That, however, may be the least incongruous feature of the majority's opinion in this case.

The majority then states that "the Nebraska rules of evidence provide a guidepost" in determining whether evidence adduced over a parent's objection at a hearing to terminate parental rights is reconcilable with procedural due process. The expression about a "guidepost" supplies no answer to the

question: Is application of the Nebraska Evidence Rules necessary for procedural due process in a hearing to terminate parental rights under the Nebraska Juvenile Code?

To answer the preceding question about procedural due process, we must operate from two premises. First, the parent-child relationship is accorded due process protection. Second, rules of evidence are reliable standards for presentation of information to produce reasonably trustworthy resolutions of controversies submitted to the judicial process.

Support for our first premise is found in decisions by the U.S. Supreme Court as well as decisions of this court. *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), involved due process considerations for proceedings to terminate parental rights. In *Lassiter*, the Court observed:

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U. S. 886, 895. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

452 U.S. at 24-25.

The *Lassiter* Court continued:

> This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to "the companionship, care, custody and management of his or her children" is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley v. Illinois*, 405 U. S. 645, 651. Here the State has sought not simply to infringe upon that interest, but to end it. If the State prevails, it will have worked a unique kind of

> deprivation. . . . A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one.

452 U.S. at 27.

Shortly after *Lassiter*, the Supreme Court decided *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). The Court remarked:

> In *Lassiter*, it was "not disputed that state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause." [Citations omitted.] The absence of dispute reflected this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. [Citations omitted.]
>
> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

455 U.S. at 753-54. Further, in *Santosky*, the Court noted:

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.' " [Citations omitted.] . . .
>
> . . . When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it.

455 U.S. at 758-59. Finally, in *Santosky*, the Court concluded that "the child and his parents share a vital interest in preventing erroneous termination of their natural

relationship." 455 U.S. at 760.

In other decisions, the Supreme Court has indicated that a state may not constitutionally terminate parental rights without showing parental unfitness. See *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978):

> We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected....
>
> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863 (1977) (Stewart, J., concurring in judgment).

See, also, *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) (the integrity of the family unit is protected by the due process clause of the fourteenth amendment); *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991) (the parent-child relationship involves a liberty interest).

The Supreme Court's views concerning the requirement of due process for a hearing to terminate parental rights, expressed in *Santosky v. Kramer, supra*, and *Lassiter v. Department of Social Services, supra*, have been adopted by this court regarding the Nebraska Juvenile Code. See, *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987); *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 368 N.W.2d 474 (1985). Thus, a parent has a fundamental interest in avoiding erroneous termination of parental rights. See, *Smith v. Organization of Foster Families*, 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977); *Santosky v. Kramer, supra*.

Having concluded that the parent-child relationship is an interest which is entitled to due process protection, we must now decide whether current Nebraska procedure affords that constitutional protection or, as the Supreme Court expressed in *Smith v. Organization of Foster Families, supra*:

> Where procedural due process must be afforded because a "liberty" or "property" interest is within the

> Fourteenth Amendment's protection, there must be determined "what process is due" in the particular context. . . .
>
> . . . "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U. S. 471, 481 (1972).

431 U.S. at 847-48.

Under 25 U.S.C. § 1912(f) (1988) of the U.S. Indian Child Welfare Act and Neb. Rev. Stat. § 43-1505(6) (Reissue 1988) of the Nebraska Indian Child Welfare Act, a determination to terminate parental rights must be "supported by evidence beyond a reasonable doubt." However, in proceedings that are not subject to the federal and Nebraska Indian Child Welfare Acts, "termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence." *In re Interest of T.C.*, 226 Neb. 116, 117, 409 N.W.2d 607, 609 (1987). Accord, *In re Interest of M.P.*, 238 Neb. 857, 472 N.W.2d 432 (1991); *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990); *In re Interest of L.H.*, 227 Neb. 857, 420 N.W.2d 318 (1988). See, also, *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

In *In re Interest of J.S., A.C., and C.S., supra*, we noted that the Nebraska Evidence Rules do not apply in a dispositional hearing for a child under the Nebraska Juvenile Code because the foremost purpose or objective of the code is promotion and protection of a juvenile's best interests and, therefore, "[t]o accomplish such goal and fashion a dispositional remedy beneficial to the juvenile, a judge should have access to the best available evidence which is relevant, reliable, and trustworthy concerning a correct disposition for the juvenile." 227 Neb. at 263, 417 N.W.2d at 156.

While Neb. Rev. Stat. § 43-283 (Reissue 1988) states, "Strict rules of evidence shall not be applied at any dispositional hearing," we have concluded that the "rules of evidence" mentioned in § 43-283 are the Nebraska Evidence Rules. See *In re Interest of J.S., A.C., and C.S., supra*. However, one readily notes that § 43-283 does not contain a definition or characterization for "dispositional hearing," and employs language identical to its statutory predecessor, § 43-206.03(4)

(Reissue 1978): "Strict rules of evidence shall not be applied at any dispositional hearing." Legislative history for § 43-283 (Reissue 1988) and § 43-206.03(4) (Reissue 1978) supply no information or indication of the Legislature's intent for the meaning of "dispositional hearing." Rather, the first one encounters "dispositional hearing" in relation to proceedings to terminate parental rights and applicable rules of evidence is in *State v. Bailey*, 198 Neb. 604, 254 N.W.2d 404 (1977), when this court, without explanation for its conclusion, stated:

> Appellants urge that their objections should have been sustained and that the exhibits should not have been received or considered. Section 43-206.03(4), R. S. Supp., 1976, provides that strict rules of evidence shall not be applied at any dispositional hearing. Under such a statute, the Juvenile Court may exercise a sound discretion in respect to determining the relevancy, competency, and admissibility of testimony to be considered at a dispositional hearing. We find no abuse of discretion by the Juvenile Court.

198 Neb. at 608, 254 N.W.2d at 407. The preceding pronouncement regarding admissibility of evidence was thereafter confirmed during review of a judgment terminating parental rights in *State v. Duran*, 204 Neb. 546, 552, 283 N.W.2d 382, 386 (1979), when the court expressed:

> We first point out that section 43-206.03(4), R. R. S. 1943, provides that strict rules of evidence shall not apply at any dispositional hearing. As we have previously stated, the juvenile court may exercise a sound discretion in determining the relevancy, competency, and admissibility of evidence to be considered at a dispositional hearing. State v. Bailey, 198 Neb. 604, 254 N.W.2d 404 (1977).

Thus, *Bailey* and *Duran* began a line of Nebraska decisions, which includes today's decision, in repeated reaffirmation that the Nebraska Evidence Rules do not apply at a hearing to terminate parental rights. Thus, inapplicability of the Nebraska Evidence Rules at a hearing to terminate parental rights is not the result of a legislatively expressed directive, but originated and has evolved through judicial interpretation of statutes pertaining to rules of evidence at a hearing to terminate

parental rights as a "dispositional hearing." It is quite likely that the Legislature, when enacting § 43-283, envisioned that a "dispositional hearing" meant a hearing for personal disposition of a child who is subject to the Nebraska Juvenile Code, and very unlikely that the Legislature viewed the parent-child relationship as so insignificant or valueless that the relationship might be extinguished on the basis of unreliable or untrustworthy information presented to a court.

Because the parent-child relationship is entitled to protection of due process and, further, since a parent has a recognized interest in avoiding an erroneous termination and extinction of that valuable right and relationship, Nebraska procedure for a hearing to terminate parental rights must provide reasonable assurance that a parent may avoid an erroneous termination of parental rights, and further requires that parental unfitness, as a prerequisite to termination of parental rights, be established by proof that is clear and convincing unless the proceeding is governed by the federal or Nebraska Indian Child Welfare Act, in which case proof must be beyond a reasonable doubt. Notwithstanding prior decisions of this court interpreting § 43-283 and reaffirming inapplicability of the Nebraska Evidence Rules in a hearing to terminate parental rights, due process requires a procedure that reduces the risk of a parental rights termination resting on erroneous information presented to a juvenile court and that promotes production of proof which is clear and convincing or, in proceedings subject to the federal or Nebraska Indian Child Welfare Act, proof which is beyond a reasonable doubt. Certainly, application of the Nebraska Evidence Rules as reliable standards for presentation of information at a hearing to terminate parental rights is a step in the right direction for reducing the risk of an erroneous extinguishment of parental rights and will tend to supply courts with trustworthy information for resolving a question about parental unfitness, a resolution which must be made through proof which is clear and convincing or, in proceedings governed by the federal or Nebraska Indian Child Welfare Act, proof which is beyond a reasonable doubt. Additionally, application of the Nebraska Evidence Rules should eliminate horrible hearsay, see *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251,

417 N.W.2d 147 (1987), wading through dozens of documents, see *In re Interest of A.H.*, 237 Neb. 797, 467 N.W.2d 682 (1991), and a jumble of judicial notice, see *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990), which seem to be ever-present problems in hearings to terminate parental rights.

Consequently, in accordance with due process under Neb. Const. art. I, § 3, the time has come to require that the Nebraska Evidence Rules shall be applied in a hearing to terminate parental rights, a requirement which will supply reliable and express standards for production of reasonably trustworthy information to resolve controversies between the State of Nebraska and one whose parental rights are sought to be terminated under the Nebraska Juvenile Code. Thus, while due process may never be precisely defined, fundamental fairness requires and exists in reducing the risk of an erroneous termination of parental rights through unreliable and untrustworthy information presented to a juvenile court. For that reason, the Nebraska Evidence Rules, as an aspect of due process, should apply at a hearing to terminate parental rights.

In the present case, when the Nebraska Evidence Rules are applied, the State presented sufficient admissible evidence to demonstrate, beyond a reasonable doubt, that termination of parental rights was required under the circumstances, the conclusion reached by the trial court and this court; hence, the trial court's judgment must be affirmed.

CAPORALE, J., joins in this concurrence.

MARY M. PATTRIN, NOW KNOWN AS MARY M. LAUX, APPELLEE, V. STEPHEN M. PATTRIN, JR., APPELLANT.

479 N.W.2d 122

Filed January 24, 1992. No. 89-768.

1. **Modification of Decree: Child Custody: Child Support: Visitation: Proof.** A party seeking to modify a marital dissolution decree concerning custody, support, or visitation of a child has the burden to show a material change of circumstances affecting the best interests of the child.
2. **Child Support: Modification of Decree: Rules of the Supreme Court.** Adoption of the Nebraska Child Support Guidelines, effective October 1, 1987, constitutes a material change of circumstances to justify modification of a child support order entered before October 1, 1987.
3. **Child Support: Divorce.** As a result of Neb. Rev. Stat. § 42-364(4) (Reissue 1988), only parents may be ordered to pay child support or expenses for child care pursuant to a decree of marital dissolution.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed as modified.

Thomas J. Young, of Young & LaPuzza, for appellant.

Albert L. Feldman and Brent M. Kuhn, of Harris, Feldman, Stumpf Law Offices, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

Stephen M. Pattrin, Jr., appeals from the order of the district court for Douglas County which increased Pattrin's monthly child support payment from $150 to $382.50 per month and required him to pay $32 per month in child-care expenses in addition to the child support obligation. Stephen Pattrin contends that the district court erred by (1) finding that there was a material change in circumstances that justified modification of his support obligation and (2) requiring him to pay child-care expenses for the 6-year-old daughter born to Mary M. Laux, formerly Mary M. Pattrin, during her marriage subsequent to the divorce from Stephen Pattrin.

STANDARD OF REVIEW

"A party seeking to modify a marital dissolution decree concerning custody, support, or visitation of a child has the

burden to show a material change of circumstances affecting the best interests of the child." *Schulze v. Schulze*, 238 Neb. 81, 84-85, 469 N.W.2d 139, 142 (1991). Accord, *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990); *Christen v. Christen*, 228 Neb. 268, 422 N.W.2d 92 (1988).

> In an appeal involving an action for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme 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.

Huffman v. Huffman, 232 Neb. 742, 747-48, 441 N.W.2d 899, 903-04 (1989). Accord, *Schulze v. Schulze, supra*; *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990); *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988).

CHILD SUPPORT AWARD

The marital dissolution decree for Mary and Stephen Pattrin was entered on February 6, 1980, and required that Stephen pay $150 per month for each of Pattrins' three children, whose custody was granted to Mary Pattrin, namely, Stephen, Jodi, and Ryan Pattrin. On July 9, 1985, the dissolution decree was modified so that custody of Jodi was placed with her father, Stephen, while custody of Ryan remained with Mary Pattrin. Apparently, Pattrins' son Stephen was no longer legally affected by the dissolution decree, since the 1985 modification did not refer to custody or support for the child Stephen. Otherwise, the 1980 dissolution decree remained unchanged regarding child support for Ryan Pattrin.

Pursuant to action by this court, the Nebraska Child Support Guidelines became effective October 1, 1987.

Mary Laux, formerly Mary Pattrin, on March 8, 1989, requested a modification of the dissolution decree and an increase in child support for Ryan Pattrin in conformity with the Nebraska Child Support Guidelines. After a hearing, the

court modified Stephen's support obligation and, in view of the child support guidelines, increased Stephen's child support payment from $150 to $382.50 per month for Ryan Pattrin.

Stephen Pattrin does not contest the factual basis for the district court's findings regarding child support or the court's computation of child support in conformity with the Nebraska Child Support Guidelines; rather, Stephen Pattrin questions whether the child support guidelines, which became effective on October 1, 1987, constitute a material change of circumstances, required for modification of a previously ordered child support obligation, or, as expressed by Stephen Pattrin:

> The theory upon which this case was tried to the lower court was that the child support guidelines instituted by the Nebraska Supreme Court were sufficient justification for a modification of the Decree herein with regard to child support, assuming that the use of such schedules would evidence a different amount of child support to be paid than that evidenced in the decree.

Brief for appellant at 6-7.

As this court stated in *Schmitt v. Schmitt, ante* p. 632, 637, 477 N.W.2d 563, 566 (1991), "adoption of the Nebraska Child Support Guidelines effective October 1, 1987, constituted a material change of circumstances sufficient to justify consideration of proposed modification of child support orders entered before that date." Accord *Phelps v. Phelps, ante* p. 618, 477 N.W.2d 552 (1991). Consequently, the Nebraska Child Support Guidelines are a material change in circumstances for modification of Stephen Pattrin's child support obligation expressed in the 1980 marital dissolution decree. For that reason, we affirm the district court's modification of the marital dissolution decree concerning child support payments for Ryan Pattrin.

CHILD-CARE EXPENSES

The district court also found that Mary Laux "is expending as child care expenses for the minor child born of this marriage the sum of $32 per month, which sum represents child care expenses incurred by the petitioner to enable her to visit her

doctor for medical examinations and treatments." However, as a result of our de novo review of the record, we find that the child-care expenses questioned in this appeal were in fact incurred for Mary Laux's minor daughter born of the Laux marriage subsequent to the Pattrin divorce. On direct examination during the modification hearing, Mary Laux testified:

> Q. And have you since remarried?
> A. Yes.
> Q. And do you have children as a result of your new marriage?
> A. Yes, I have one.
> Q. And how old is she?
> A. She is six.
> Q. Is she in your custody?
> A. Yes.
> . . . .
> Q. About how often would you have a doctor's appointment?
> A. Usually twice a week.
> Q. And since you have a six-year-old daughter, do you have to have a sitter for that?
> A. Yes, I do.
> Q. And what does the sitter cost you per hour?
> A. Usually around $2 an hour.
> . . . .
> Q. . . . [I]n regard to child care, does the $32 a month represent the child care that you will have to spend in order to make your physicians' appointments?
> A. Yes.

Thus, evidence at the modification hearing clearly and indisputably established that Stephen Pattrin is not the father of Mary Laux's 6-year-old daughter. Under Nebraska law, only parents may be ordered to pay child support or expenses for child care pursuant to a decree of marital dissolution. See Neb. Rev. Stat. § 42-364(4) (Reissue 1988): "[C]hild support [is] to be paid by a parent . . . ." See, also, Nebraska Child Support Guidelines, paragraph A: "The main principle behind these 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." On the basis of the record presented, Stephen Pattrin has no legal responsibility to pay child support or child-care expenses for Mary Laux's daughter because he is not a parent of the child. Hence, the district court abused its discretion in requiring that Stephen Pattrin pay child-care expenses concerning Mary Laux's daughter. Therefore, we modify the judgment of the district court by deleting from the district court's order any requirement that Stephen Pattrin pay $32 per month for child-care expenses of Mary Laux's daughter.

Although we have considered the matter of an attorney fee regarding counsels' representation in this court, we decline to order any attorney fee concerning the proceedings in this court.

AFFIRMED AS MODIFIED.

CAPORALE, J., not participating in the decision.

DIANE GOWENS, APPELLANT, V. BOARD OF EDUCATION OF DISTRICT NO. 54, RALSTON PUBLIC SCHOOLS, DOUGLAS COUNTY, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

479 N.W.2d 440

Filed January 24, 1992. No. 90-076.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded.

R.E. Richards, of Richards & Richards, for appellant.

Kelley Baker, of Harding & Ogborn, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ.

PER CURIAM.

This matter arises from the sustaining of a demurrer in the district court to appellant's petition, in which she named as defendant the board of education of the Ralston schools. The

trial court dismissed the petition. Gowens appeals.

Our recent decision in *Zyburo v. Board of Education, ante* p. 162, 474 N.W.2d 671 (1991), is dispositive. The issue in this case is therefore resolved in favor of appellant, and we reverse the order of dismissal and remand the matter to the district court for consideration consistent with this opinion.

REVERSED AND REMANDED.

GRANT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL G. MASAT, APPELLANT.

479 N.W.2d 131

Filed January 24, 1992. No. 90-904.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold a trial court's findings of fact unless those findings are clearly erroneous.
2. _____: _____. In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion.
3. **Police Officers and Sheriffs: Arrests: Jurisdiction.** The power of a police officer at common law to make an arrest without a warrant is limited to the boundaries of the governmental unit by which he was appointed, unless the police officer is acting in fresh and continued pursuit of a suspected felon who has committed an offense in the officer's presence and within his territorial jurisdiction.
4. **Police Officers and Sheriffs: Arrests: Jurisdiction: Statutes.** A local peace officer acting without a warrant outside the territorial limits of the jurisdiction under which he holds office is without official power to apprehend a suspected misdemeanor offender unless he is authorized to do so by statute.
5. **Criminal Law: Arrests.** Although the illegality of an arrest gives rise to collateral rights and remedies such as the exclusionary rule, it ordinarily is not a defense to the crime for which the arrest is made.
6. **Criminal Law: Arrests: Evidence.** The illegality of an arrest does not deprive the State of an opportunity to prove guilt through the introduction of untainted evidence.

Appeal from the District Court for Pierce County, MERRITT C. WARREN, Judge, on appeal thereto from the County Court for Pierce County, PHILIP R. RILEY, Judge. Judgment of District

Court reversed, and cause remanded with directions.

Scott D. Freese, of Hutton, Freese & Remmich, for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Claiming that the trial court erred in failing to suppress certain evidence obtained after he was arrested outside the arresting officer's jurisdiction, Michael G. Masat appeals his misdemeanor conviction of second-offense driving while under the influence of alcohol.

The defendant was originally convicted in the county court and appealed his conviction to the district court for Pierce County, where it was affirmed. He then appealed to this court.

In light of our decision in *State v. Tingle*, *ante* p. 558, 477 N.W.2d 544 (1991), we reverse Masat's conviction and remand the cause to the district court with instructions to remand it to the Pierce County Court for a new trial.

Prior to his jury trial, Masat timely filed a motion which in relevant part asked the court to suppress

> all evidence from and after the arrest of this Defendant which took place approximately two and one-half (2 1/2) miles west of Plainview, Nebraska, for the reason that said arrest was illegally made as the arresting officer, Plainview Police Officer Darrel D. Grebe, was outside his jurisdiction as of the time of the making of the arrest.

After an evidentiary hearing, the trial court denied Masat's motion to suppress. At Masat's jury trial, the judge overruled the defendant's objections to any observations Officer Grebe made outside Plainview's city limits and to "any evidence that Mr. Grebe may testify to relative to his stop and subsequent arrest of Mr. Masat." A continuing objection to each question regarding that "entire line of testimony" was permitted.

The record reflects that on January 21, 1990, Grebe was a part-time police officer with the Plainview Police Department.

Grebe testified that when he was working as a police officer, his patrol area did not extend beyond Plainview's city limits. About 7:45 p.m. on January 21, while in uniform and on duty as a police officer, Grebe observed Masat's automobile at the intersection of West Street and Highway 20, within the Plainview city limits. Grebe testified that as the defendant's vehicle turned left onto Highway 20 to proceed in a westerly direction, it "bounced very sharply against the curb" of the highway. Grebe followed Masat's vehicle as it proceeded beyond the city limits of Plainview, beyond the Pierce County border, and into Antelope County, where he arrested the driver, Masat. While following Masat from the point of his first observation to the point of Masat's arrest, Grebe noted that Masat's vehicle violated the posted speed limit and crossed the centerline of Highway 20 on two occasions. On one of those occasions an oncoming automobile left the highway to avoid an accident. Grebe stopped Masat in Antelope County and arrested the defendant for driving while under the influence of alcohol. Grebe returned Masat to Plainview, where he obtained a breath alcohol test at 8:40 p.m. reflecting that Masat had a concentration of .281 grams by weight of alcohol per 210 liters of his breath, in violation of Neb. Rev. Stat. § 39-669.07(3) (Reissue 1988).

In his appeal to this court, the defendant argues only that because he was illegally arrested, the trial court should have excluded from his trial breath alcohol test results, observations of Masat following his arrest, and any statements of the defendant following his arrest.

In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold a trial court's findings of fact unless those findings are clearly erroneous. *State v. Groves*, *ante* p. 660, 477 N.W.2d 789 (1991). In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion. *Id.*

The power of a police officer at common law to make an arrest without a warrant is limited to the boundaries of the

governmental unit by which he was appointed, unless the police officer is acting in fresh and continued pursuit of a *suspected felon* who has committed an offense in the officer's presence and within his territorial jurisdiction. *State v. Tingle, supra.* A local peace officer acting without a warrant outside the territorial limits of the jurisdiction under which he holds office is without official power to apprehend a suspected misdemeanor offender unless he is authorized to do so by statute. See *State v. Tingle, supra.* There is no Nebraska statute authorizing a police officer appointed by a municipality in Pierce County to make an arrest in Antelope County of a person suspected of committing a misdemeanor within the territorial limits of the municipality that appointed the officer. In Masat's case, there was no warrant, and we need not discuss the officer's jurisdiction or authority under a warrant.

The trial court was clearly wrong in failing to suppress the breath alcohol test results and any observations obtained subsequently to Masat's arrest. Evidence obtained as the fruit of an illegal search or arrest, in violation of the fourth amendment to the U.S. Constitution and the provisions of article I, § 7, of the Nebraska Constitution, is inadmissible in a prosecution in this state and must be excluded. *State v. O'Kelly*, 175 Neb. 798, 124 N.W.2d 211 (1963). See, also, *Bissonette v. Haig*, 800 F.2d 812 (8th Cir. 1986).

Although the illegality of an arrest gives rise to collateral rights and remedies such as the exclusionary rule, it ordinarily is not a defense to the crime for which the arrest is made. *State v. Tingle*, *ante* p. 558, 477 N.W.2d 544 (1991). The illegality of an arrest does not deprive the State of an opportunity to prove guilt through the introduction of untainted evidence. See, *State v. Tingle, supra*; *State v. Smith*, 207 Neb. 263, 298 N.W.2d 162 (1980).

We vacate Masat's sentence, reverse his conviction, and remand the cause for a new trial consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. JOHN W. KING, APPELLANT.

479 N.W.2d 125

Filed January 24, 1992. No. 90-1056.

1. **Convictions: Sentences: Ordinances: Appeal and Error.** When a defendant appeals a conviction and sentence under a municipal ordinance, claiming that the evidence is insufficient for a conviction and that a sentence is excessive, an appellate court's consideration of the assignments of error requires an examination of the specific ordinance involved.
2. **Ordinances: Presumptions: Judicial Notice: Appeal and Error.** When an ordinance charging an offense is not properly made a part of the record, an appellate court presumes the existence of a valid ordinance creating the offense charged, and an appellate court will not otherwise take judicial notice of the ordinance.
3. **Ordinances: Presumptions: Appeal and Error.** In the absence from the record of the applicable municipal ordinance, an appellate court presumes that the evidence sustains the findings of the trial court and that a sentence is within the limits set out in the applicable ordinance.

Appeal from the District Court for Douglas County, JAMES M. MURPHY, Judge, on appeal thereto from the County Court for Douglas County, THOMAS G. MCQUADE, Judge. Judgment of District Court affirmed.

Barbara Thielen, of Fabian & Thielen, for appellant.

Herbert M. Fitle, Omaha City Attorney, and Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Following a county court bench trial, John W. King was convicted of purposely or knowingly tampering with or damaging the property of another. The property damaged was a truck. King was given a 75-day jail sentence.

Upon King's appeal to the district court for Douglas County, his conviction and sentence were affirmed. The defendant then appealed to this court. Here, King has assigned as error that the evidence was insufficient to sustain his conviction and that the sentence imposed is excessive. We affirm.

King was convicted of violating a municipal ordinance of the

city of Omaha. The penalty was also set out by ordinance. When a defendant appeals a conviction and sentence under a municipal ordinance, claiming that the evidence is insufficient for a conviction and that a sentence is excessive, an appellate court's consideration of the assignments of error requires an examination of the specific ordinance involved. See *State v. Topping*, 237 Neb. 130, 464 N.W.2d 799 (1991). The record before us does not include the ordinance under which King was convicted or the ordinance under which he was sentenced.

When an ordinance charging an offense is not properly made a part of the record, an appellate court presumes the existence of a valid ordinance creating the offense charged, and an appellate court will not otherwise take judicial notice of the ordinance. See *State v. Topping, supra*. In the absence from the record of the applicable municipal ordinance, an appellate court presumes that the evidence sustains the findings of the trial court and that a sentence is within the limits set out in the applicable ordinance. See *State v. Cottingham*, 226 Neb. 270, 410 N.W.2d 498 (1987).

Because there is no municipal ordinance in the record in King's appeal, the order of the district court, affirming the judgment of the county court, is affirmed.

AFFIRMED.

DOROTHY SCHLUP, APPELLEE, V. AUBURN NEEDLEWORKS, INC., APPELLANT.

479 N.W.2d 440

Filed January 24, 1992. No. 90-1264.

1. **Appeal and Error.** This court will not consider assignments of error which are not discussed in the proponent's brief.
2. **Workers' Compensation: Evidence: Appeal and Error.** Findings of fact by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong. In testing the sufficiency of the evidence to support findings of fact made by the court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be

resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.

3. **Workers' Compensation.** Under the provisions of the Workers' Compensation Act, compensation is allowed when personal injury is caused to an employee by an accident or occupational disease, arising out of and in the course of his or her employment, if the employee was not willfully negligent at the time of receiving such injury.
4. _____. While it is quite clear that a condition resulting from the cumulative effects of repeated work-related trauma has some characteristics of both an accidental injury and an occupational disease, the compensability of a condition resulting from the cumulative effects of repeated work-related trauma is to be tested under the statutory definition of accident.
5. **Workers' Compensation: Words and Phrases.** An accident is defined in the Nebraska Workers' Compensation Act as an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.
6. _____: _____. For purposes of the Nebraska Workers' Compensation Act, "suddenly and violently" does not mean instantaneously and with force. The specification of suddenly and violently is satisfied if the injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment.
7. **Workers' Compensation.** The third specification in Neb. Rev. Stat. § 48-151(2) (Reissue 1988), that the accident produce objective symptoms, is satisfied if the symptoms manifest themselves according to the natural course of such things without any independent intervening cause.
8. **Workers' Compensation: Proof.** To recover compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability. The injured worker must show, by a preponderance of the evidence, that the employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act.
9. **Workers' Compensation.** Whether a plaintiff in a Nebraska workers' compensation case is totally and permanently disabled is a question of fact.
10. **Workers' Compensation: Words and Phrases.** Total and permanent disability contemplates the inability of the worker to perform any work which he or she has the experience or capacity to perform. It does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do.
11. **Workers' Compensation: Proof.** A claimant is entitled to an award under the Workers' Compensation Act for a work-related injury and disability if the claimant shows, by a preponderance of evidence, that the claimant sustained an injury and disability proximately caused by an accident which arose out of and in the course of the claimant's employment, even though a preexisting disability or condition has combined with the present work-related injury to produce the

disability for which the claimant seeks an award.

12. **Workers' Compensation.** Total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Jill Gradwohl Schroeder, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

J. Michael Fitzgerald, of Carpenter, Rowen & Fitzgerald, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Auburn Needleworks, Inc., appeals a Nebraska Workers' Compensation Court finding that the appellee, Dorothy Schlup, was rendered totally and permanently disabled as a result of an accident arising out of and in the course of her employment at the appellant's factory.

We affirm the decision of a three-judge panel of the Workers' Compensation Court.

In summary, Auburn Needleworks claims that the Workers' Compensation Court erred in finding that Schlup (1) was involved in an accident arising out of and in the course of her employment with Auburn Needleworks; (2) had "right and left wrist [sic] problems" as a result of the accident; (3) was permanently and totally disabled and entitled to workers' compensation benefits as a result of her accident; and (4) is entitled to benefits in excess of those provided for the loss of two members of her body, if in fact she is entitled to workers' compensation benefits for being totally and permanently disabled.

Auburn Needleworks has claimed the Workers' Compensation Court erred in awarding Schlup medical and

hospital expenses, but has failed to argue that assignment of error. This court will not consider assignments of error which are not discussed in the proponent's brief. See *State v. Spiegel, ante* p. 233, 474 N.W.2d 873 (1991).

STANDARD OF REVIEW

> Findings of fact by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong. . . . In testing the sufficiency of the evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. . . . Every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.

Cline v. County Seat Lounge, ante p. 42, 48, 473 N.W.2d 404, 408 (1991).

FACTS

Schlup, who at the time of trial was 54 years old, had been employed by Auburn Needleworks as a seamstress for 34 years, but left that company's factory work force intermittently to perform other menial labor. Her final employment at the appellant's factory was from 1982 until she left just prior to wrist surgery in June 1987. During her last year at Auburn Needleworks, Schlup performed a different task on the sewing assembly line than she had done previously. This new task required her to attach collars, cuffs, pockets, and zippers to denim jackets and jeans. Schlup had to pull, tug, and push the denim through the sewing machine she used. She also had to lift and carry the bundles of material she sewed, which bundles sometimes weighed up to 20 or 30 pounds.

As relevant here, the appellee's physical complaints began in March or April 1987. It was then that Schlup's fingers began to tingle, hurt, and get numb. Pain shot up both arms above her elbows, compelling her at times to stop work and run warm water over her hands so she could resume her work.

Schlup sought medical attention on May 8, 1987, when she visited Dr. Dana Farris. He diagnosed Schlup's ailment as bilateral carpal tunnel syndrome, which causes pain, numbness, and decreased function of the hands. Subsequently, surgery was performed on each of the appellee's wrists.

Following the two surgeries, one of her surgeons, Dr. Brent Stromberg, opined that Schlup was limited in her ability to work. He testified that Schlup's carpal tunnel syndrome was either caused by or worsened by the repetitive heavy hand motions that she was required to do in her employment. He testified that as a result of her condition, Schlup suffered a 40-percent impairment of each hand, which related to a 15-percent impairment of both upper extremities. Dr. Stromberg gave Schlup a medical release on November 19, 1987, to see how she would do at work. The appellee was able to work for only 1 day, when her hands began to swell and pain again restricted her ability to function. On February 11, 1988, Schlup was diagnosed by Dr. Stromberg as suffering from reflex sympathetic dystrophy in her hands, a physical condition in which pain and discomfort continue even after the initial reason for the pain is resolved.

On June 21, 1988, nearly a year after her surgeries, Dr. Stromberg again released Schlup for work with specific limitations that restricted her from lifting anything in excess of 10 to 15 pounds. Dr. Stromberg's restrictions required the appellee to avoid repetitive hand activities. These restrictions precluded Schlup from returning to employment at the Auburn Needleworks factory. Schlup continued to suffer from bilateral median nerve infirmities and pain, according to Dr. Stromberg.

Schlup testified that she had problems picking up and grasping objects, that she could not pick up a cup of coffee without using both hands, and that most daily household tasks caused her pain.

The appellee underwent occupational and rehabilitation therapy with rehabilitation counselor Jack Greene between September 1988 and May 1990. Greene administered aptitude and ability tests which disclosed that Schlup has extremely limited job-market skills. Wide-range achievement tests placed her at a fifth grade level in reading skills and at a third grade

level in spelling skills. In those skills, Schlup placed in the bottom 1 percent of the population. The testing disclosed that in math skills, the appellee performed at a seventh grade level, or in the bottom 10 percent of the population. Schlup's general aptitude test reflects scores well below average for general learning ability and verbal and numerical aptitudes. The appellee left high school in 1953 in the middle of the 10th grade because she "just couldn't get the hang of it," and has yet to complete her GED. Schlup additionally suffered from severe degenerative disk disease for which she underwent surgery in 1969. Because of her back problems, she is unable to sit for long periods of time and has lifting limitations.

Schlup filed a petition with the Workers' Compensation Court on September 20, 1989, alleging that she sustained carpal tunnel syndrome in an accident on or about May 8, 1987, while engaging in constant repetitive use of her hands in sewing at the Auburn Needleworks. This, she alleged, rendered her permanently and totally disabled. Auburn Needleworks denied the allegations and claimed that any disability suffered by Schlup resulted from an inherent condition not related to the course of her employment. Dr. Stromberg testified that as of August 3, 1988, Schlup had reached maximum medical recovery.

A three-judge panel of the Workers' Compensation Court found:

> [T]he plaintiff was in the employ of the defendant [Auburn Needleworks] as a sewing factory worker and while so employed and on said date and while engaged in the duties of her employment she suffered injuries to both arms as a result of an accident arising out of and in the course of her employment by the defendant when, while plaintiff was using her hands in sewing heavy material, she developed tingling, numbness and pain in both arms to areas above the elbows. As a result of said accident and injury the plaintiff incurred medical and hospital expense and, in accordance with the facts of this case, has been rendered totally and permanently disabled.

The court further found that "[m]easured by the test of employability or impairment of earning power or earning

capacity . . . recently approved at *Heiliger v. Walters [&] Heiliger Electric, Inc.*, 236 Neb. 459, [461] N.W.2d [565] (1990) . . . we have little difficulty in concluding that the plaintiff is permanently and totally disabled."

The court awarded temporary total disability benefits from May 8, 1987, to the date of the hearing on July 23, 1990; permanent total disability benefits from the date of the hearing so long as Schlup remains permanently and totally disabled; and indemnification of Schlup's medical and hospital expenses for her work-related injury. It is these rulings that Auburn Needleworks has appealed.

ACCIDENT

Auburn Needleworks first contends that Schlup did not suffer a work-related accident. Under the provisions of the Workers' Compensation Act, compensation is allowed when personal injury is caused to an employee by an accident or occupational disease, arising out of and in the course of his or her employment, if the employee was not willfully negligent at the time of receiving such injury. Neb. Rev. Stat. § 48-101 (Reissue 1988). In *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 212, 469 N.W.2d 542, 544 (1991), we recognized:

> While it is . . . quite clear that a condition resulting from the cumulative effects of repeated work-related trauma has some characteristics of both an accidental injury and an occupational disease . . . the compensability of . . . a condition [resulting from the cumulative effects of repeated work-related trauma] is to be tested under the statutory definition of accident.

Under Neb. Rev. Stat. § 48-151(2) (Reissue 1988), an accident is defined as "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." See *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982).

The "unexpected or unforeseen" requirement of § 48-151(2) is satisfied if either the cause was of an accidental character or the effect was unexpected or unforeseen. See *McLaughlin v. Self-Insurance Servs.*, 219 Neb. 260, 361 N.W.2d 585 (1985).

There is no indication in the record that Schlup's condition was either expected or foreseeable. While she had complained of pain and weakness in her hands for a time in 1980 and a sprained wrist in 1981, Schlup had no complaints about her upper extremities for 6 years after suffering the sprained wrist. From the evidence, the Workers' Compensation Court could properly conclude that Schlup's bilateral carpal tunnel syndrome which was diagnosed in 1987 was not expected or foreseen. It could also properly conclude that Schlup's 1987 diagnosis was not causally connected with her complaints of 1980 and 1981.

The second specification of § 48-151(2) requires that an employee's injury must occur "suddenly and violently" to be compensable. This court has held that "suddenly and violently" does not mean "instantaneously and with force." The specification "suddenly and violently" is satisfied if the injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment. *Sandel, supra.* In *Hayes v. A.M. Cohron, Inc.*, 224 Neb. 579, 400 N.W.2d 244 (1987), *disapproved on other grounds, Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990), the court noted that the definition of "accident," as used in § 48-101, includes injuries resulting from activities which create a series of repeated traumas ultimately producing disability. The *Sandel* court recognized that the nature of the human body being such as it is, not all injuries to the body are caused instantaneously and with force, but may indeed nevertheless occur suddenly and violently, even though they have been building up for a considerable period of time and do not manifest themselves until they cause the employee to be unable to continue his or her employment. *Id.* This specification of "suddenly and violently" is to distinguish compensable injuries such as those in *Sandel* from chronic conditions which develop over a period of many years where the injury cannot be traced to a particular job or activity of the worker.

Unlike the situation in *Vencil v. Valmont Indus., ante* p. 31, 473 N.W.2d 409 (1991), wherein the claimant's symptoms developed over a period of not less than 7 years and required no

interruption or discontinuance of his employment until almost 10 years had elapsed, here, Schlup's condition manifested itself within less than 3 months, during which time she had to periodically stop her work and run warm water over her hands to relieve the pain in her upper extremities. On May 8, 1987, the pain was severe enough to require Schlup to stop work and seek medical attention. Clearly, there was sufficient evidence for the Workers' Compensation Court to conclude that May 8, 1987, was the identifiable point in time of Schlup's injuries and that the facts surrounding Schlup's injuries satisfied the second requirement of § 48-151(2). The compensation court's decision in Schlup's case is in accord with the decision in *Erving v. Tri-Con Industries*, 210 Neb. 339, 314 N.W.2d 253 (1982). There, an employee suffered from carpal tunnel syndrome for a period of 4 months. The pain began gradually, became worse, and forced Erving to seek medical attention. These facts satisfied the requirement in § 48-151(2) that the injury occur "suddenly and violently."

The third specification in § 48-151(2), that the accident produce objective symptoms, is satisfied if the symptoms manifest themselves according to the natural course of such things without any independent intervening cause. See *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982).

> " 'We are of the opinion that the expression has a wider meaning, and that symptoms of pain, and anguish, such as weakness, pallor, faintness, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by the statute.' "

Sandel, supra at 157, 317 N.W.2d at 915-16.

Schlup clearly manifested such symptoms when she found she could not continue her work without periodically running water over her hands to relieve pain in her upper extremities. The injuries in her upper extremities manifested themselves when her fingers began to tingle, hurt, and get numb, and when pain shot up both arms above her elbows. When she consulted Dr. Farris on May 8, 1987, the doctor found Schlup's grip

strength slightly decreased bilaterally. Through testing, Dr. Farris found objective symptoms of the appellee's bilateral carpal tunnel syndrome. Prior to operating on Schlup's right wrist, Dr. Bruce Miller, a surgeon, also performed tests, including a percussion test around Schlup's wrists. As a result of these objective tests, Dr. Miller diagnosed the appellee as having a typical carpal tunnel syndrome in both her wrists. The facts of this case are sufficient to support the Workers' Compensation Court's finding that Schlup suffered a work-related accident.

WORK-RELATED ACTIVITY

Auburn Needleworks' second issue is whether the injury Schlup suffered was caused by work-related activities. To recover compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability. See *Hollinger v. Consolidated Motor Freight*, 223 Neb. 449, 390 N.W.2d 518 (1986). The injured worker must show, by a preponderance of the evidence, that the employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act. *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990).

Based upon a reasonable degree of medical certainty, Dr. Miller testified that Schlup's bilateral carpal tunnel syndrome was caused by her work at Auburn Needleworks. Dr. Stromberg gave his opinion, based upon a reasonable degree of medical certainty, that Schlup's carpal tunnel syndrome problems were caused by or worsened by the repetitive heavy hand motions that she had to do in her employment. From this evidence the compensation court could properly find that Schlup's bilateral carpal tunnel syndrome was related to her work at Auburn Needleworks.

EXTENT OF DISABILITY

Auburn Needleworks next contends that Schlup is not totally and permanently disabled and that, therefore, she is not entitled to either temporary total or permanent total disability benefits.

This court has long held that whether a plaintiff in a

Nebraska workers' compensation case is totally and permanently disabled is a question of fact. *Paris v. J. A. Baldwin Mfg. Co.*, 216 Neb. 151, 342 N.W.2d 198 (1984). Total and permanent disability contemplates the inability of the worker to perform any work which he or she has the experience or capacity to perform. *Krijan v. Mainelli Constr. Co.*, 216 Neb. 186, 342 N.W.2d 662 (1984). It does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do. *Mata v. Western Valley Packing*, 236 Neb. 584, 462 N.W.2d 869 (1990).

We have also held that a claimant is entitled to an award under the Workers' Compensation Act for a work-related injury and disability if the claimant shows, by a preponderance of evidence, that the claimant sustained an injury and disability proximately caused by an accident which arose out of and in the course of the claimant's employment, even though a preexisting disability or condition has combined with the present work-related injury to produce the disability for which the claimant seeks an award. *Heiliger v. Walters & Heiliger Electric, Inc., supra.*

Under this analysis, the Workers' Compensation Court did not err in looking at Schlup's work-related injury, as well as her existing back limitations and academic shortcomings, in finally determining that she is totally and permanently disabled.

In assessing the extent of Schlup's disablement, the compensation court relied upon *Heiliger v. Walters & Heiliger Electric, Inc., supra* at 470-71, 461 N.W.2d at 574, where we stated:

> "[T]otal disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary

> good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps."

Although Schlup might be physically able to perform some of the requirements of the jobs listed by Greene, the compensation court could properly find that her lack of mental abilities, coupled with her physical limitations, did render her unemployable.

Professor Larson has written that "[u]nder the odd-lot doctrine, which is accepted in virtually every jurisdiction, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market." 2 A. Larson, The Law of Workmen's Compensation § 57.51(a) at 10-164.68 (1989). See, e.g., *Odom Const. Co. v. U. S. Dept. of Labor*, 622 F.2d 110 (5th Cir. 1980), *cert. denied* 450 U.S. 966, 101 S. Ct. 1482, 67 L. Ed. 2d 614 (1981) (54-year-old worker with a fourth grade education, no formal technical training, and a work history of jobs requiring heavy arm work was found to be totally and permanently disabled when an accident injured his dominant arm, weakened his grasp, and made it impossible for him to perform jobs he had performed previously). See, also, *Krijan v. Mainelli Constr. Co., supra*; *Mata v. Western Valley Packing, supra*.

Professor Larson also states:

> A considerable number of the odd-lot cases involve claimants whose adaptability to the new situation created by their physical injury was constricted by lack of mental capacity or education. This is a sensible result, since it is a matter of common observation that a man whose sole stock in trade has been the capacity to perform physical movements, and whose ability to make those movements has been impaired by injury, is under a severe disadvantage in acquiring a dependable new means of livelihood . . . by comparison, say, with a book salesman who can continue to make commissions after having sustained serious brain injury.

2 A. Larson, *supra*, § 57.51(d) at 10-164.84(24), (37), and (38).

Schlup could easily have been considered by the Workers' Compensation Court to be an odd-lot case. She had few

appreciable academic or vocational skills and could not sit for long periods at a time, and the evidence is substantial that after suffering the bilateral carpal tunnel syndrome, she could no longer earn a living with her hands. Because her hands are her only means of earning a living, she was rendered totally and permanently disabled when her hands and arms were injured.

Appellant's contention that Schlup is not totally disabled is apparently based upon evidence that Dr. Stromberg continues to encourage Schlup to engage in as much activity as she can and that Greene, the rehabilitation counselor, determined that she was qualified to perform a variety of light-duty occupations. This work included being a cashier, cardiac monitor technician, telephone operator, sales clerk, hotel clerk, fast-food worker, and restaurant hostess.

Two other rehabilitation experts, David Hauswald and Alfred Marchisio, testified that because of her lack of appreciable skills and her physical and academic limitations, they doubted Schlup was a candidate for gainful employment. She attempted a job as an insurance telemarketer, but found that not only was she unable to sit for an extended period of time, but she became tonguetied and was unable to talk to the public. Evidence showed that for most of the jobs listed by Greene, the physical limitations regarding use of her hands and her lack of social and academic skills would keep her from being employed.

The Workers' Compensation Court panel found as a fact that Schlup was totally disabled by the injuries to her arms. We cannot say that finding was clearly wrong.

Since we are affirming the Workers' Compensation Court's finding that Schlup was rendered totally and permanently disabled in a work-related accident in the course of her employment at Auburn Needleworks, there is no need to consider appellant's fourth assignment of error, regarding compensation pursuant to § 48-121(3) (Reissue 1988).

Pursuant to Neb. Rev. Stat. § 48-125 (Reissue 1988), appellee is awarded $750 as attorney fees in this court. Appellee is also entitled to interest as provided in § 48-125(2).

AFFIRMED.

BOSLAUGH, J., participating on briefs.

SHANAHAN, J., concurring.

Certainly, Dorothy Schlup's claim is compensable under the Nebraska Workers' Compensation Act, but the majority's view of compensability calls for an explanation, especially in view of *Vencil v. Valmont Indus., ante* p. 31, 473 N.W.2d 409 (1991), decided just a few months ago, when this court rejected compensability of Daniel J. Vencil's claim based on the cumulative effects of repetitive work-related trauma. In *Vencil*, this court rejected compensability because there was no "identifiable moment" which produced objective symptoms requiring medical attention and the interruption or discontinuance of employment. *Id.* at 32, 473 N.W.2d at 411.

Dorothy Schlup based her workers' compensation claim on a "bilateral carpal tunnel syndrome," an injury sustained as the result of her "constant repetitive use of her hands in sewing," which involved Dorothy Schlup's frequently twisting her wrists during protracted periods in her employment at Auburn Needleworks. Daniel Vencil based his claim on injury caused by a work-related accident or an occupational disease attributable to his frequently twisting his back, bending, and stooping in his employment at Valmont. In Dorothy Schlup's case, Auburn Needleworks denied that her injury was "the result of or attributable to any accident or occupational disease."

In a comparison of Dorothy Schlup's injury with the injury of Daniel Vencil, there are some striking and substantial similarities, with one major and crucial dissimilarity:

	DOROTHY SCHLUP	DANIEL VENCIL
Age at injury:	50 years	30 years
Began employment:	1982	1979
Duration of employment:	5 years	10 years
Type of work activity:	Twisting wrists in sewing collars to coat jackets; pulling and pushing bundles of denim weighing 20 to 30 lbs.	Twisting body and back, bending, stooping, and lifting and pushing objects weighing up to 200 lbs.

	DOROTHY SCHLUP	DANIEL VENCIL
First observation of any physical problem:	1987	1986
Diagnosis of physical condition:	Carpal tunnel syndrome	Lumbar disk disease
Nature of injury:	Tissue or structures in carpal tunnel (canal from hand through wrist to arm) enlarge from swelling due to trauma, irritation, or infection; median nerve, which runs from the palm of the hand through the carpal or wrist tunnel into the arm, is "pinched" or compressed by other enlarged tissue in the tunnel; results in pain, numbness in digits, and arm pain	Deterioration of lumbar disk, i.e., deterioration of fibers around disk, allowing disk to "bulge out"; results in pressure on nerves along the spinal column and pain; medically analogous to carpal tunnel syndrome
Medical history:	No prior condition affecting the injury which is the basis for compensation claim	No prior condition affecting the injury which is the basis for compensation claim
Medical causation:	Repetitive motion; heavy hand movement: pronation (palm down) and supination (palm up) in work-related activities	Repetitive motion; heavy lifting, twisting, and bending in work-related activities
Effects of injury:	Weakness in wrist; inability to grasp objects in employment	Weakness in back; inability to lift objects in employment
Medical treatment:	Surgery to alleviate condition	Surgery to alleviate condition
Disability:	Inability to perform employment duties; discontinuance of employment	Inability to perform employment duties; discontinuance of employment
"Identifiable moment" of injury, i.e., a specific traumatic incident:	None	None
Compensability:	Yes	No

Thus, Dorothy Schlup experienced carpal tunnel syndrome, "a complex of symptoms resulting from compression of the median nerve in the carpal tunnel, with pain and burning or tingling paresthesias in the fingers and hand, sometimes extending to the elbow." The Sloane-Dorland Annotated

Medical-Legal Dictionary 689 (1987).

Neb. Rev. Stat. § 48-151(3) (Reissue 1988) states:

> The term occupational disease shall mean only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment and shall exclude all ordinary diseases of life to which the general public is exposed.

In *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 212, 469 N.W.2d 542, 544 (1991), this court recognized the following definition for "disease": " '[A]n impairment of the normal state of the living animal . . . body or of any of its components that interrupts or modifies the performance of the vital functions, being a response to environmental factors [such as] industrial hazards . . . .' " The preceding definition substantially coincides with the standard medical definition of "disease," namely: "[A]ny deviation from or interruption of the normal structure or function of any part, organ, or system (or combination thereof) of the body that is manifested by a characteristic set of symptoms and signs and whose etiology, pathology, and prognosis may be known or unknown." Dorland's Illustrated Medical Dictionary 385 (26th ed. 1981). Also, from a medical standpoint, an "occupational disease" is "due to factors involved in one's employment, e.g., various forms of pneumoconiosis or dermatitis." *Id.* at 392. Thus, an occupational disease is a condition which causes impairment, deviation, or interruption of the normal structure or function of a worker's body and which results from hazards or conditions peculiar to a particular occupation or employment. See *Vencil v. Valmont Indus., ante* p. 31, 473 N.W.2d 409 (1991) (Shanahan, J., dissenting).

Several courts, construing workers' compensation statutes with language identical or substantially similar to that in § 48-151(3), have concluded that injury and disability attributable to carpal tunnel syndrome which is causally related to work activities is compensable as an "occupational disease"; for instance, see, *Lettering v. Guy*, 321 Md. 305, 582 A.2d 996 (1990); *Kinney v. Tupperware Co.*, 117 Idaho 765, 792 P.2d 330 (1990); *Wood v. Allison Apparel Marketing, Inc.*, 11 Va. App.

352, 398 S.E.2d 110 (1990); *Johnson v. Spectra Physics*, 77 Or. App. 1, 712 P.2d 125 (1985), *aff'd in relevant part* 303 Or. 49, 733 P.2d 1367 (1987); *Finch v. Stayton Canning Co.*, 93 Or. App. 168, 761 P.2d 544 (1988); *Segar v. Garan, Inc.*, 388 So. 2d 164 (Miss. 1980); *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226 (Mo. App. 1988) (rehearing or transfer to Supreme Court of Missouri denied December 14, 1988); and *Jackson v. Risby Pallet and Lumber Co.*, 736 S.W.2d 575 (Mo. App. 1987) (rehearing or transfer to Supreme Court of Missouri denied September 8, 1987).

Referring to the comparison between the injuries and disabilities of Dorothy Schlup and Daniel Vencil, one immediately sees that Dorothy Schlup's work-related injury consisted of pressure on the median nerve in her carpal tunnel and resulted in her disability, while Daniel Vencil's work-related injury consisted of pressure on the nerves along his vertebral, or spinal, column and resulted in his disability. In both situations, the injury and ultimate disability were attributable to repetitive trauma sustained during the employee's work-related activities. What is the medical and legal distinction between the work-related injuries of Dorothy Schlup and Daniel Vencil? Is the distinction based on the fact that Dorothy Schlup was employed for 5 years before her disability, whereas Daniel Vencil was employed 10 years before his disability? If so, injury from repetitive trauma during employment less than 5 years is compensable, while injury from repetitive trauma during employment lasting more than 5 years is noncompensable. That infirm distinction might be best characterized as a case of acute arbitrariness. Or does compensability lie in the fact that Dorothy Schlup's injury was to her wrists and arms, whereas Daniel Vencil's injury was to his low back? If the repetitive injury is to an employee's wrist, the claim is compensable, but if the repetitive injury is to the employee's low back, the claim is noncompensable. Well, there you have it; nobody has quite explained it that way before.

Since this court continues to lie in its Procrustean bed made of "repetitive trauma" decisions based on a distorted definition of "accident" in the Nebraska Workers' Compensation Act, one hoped that Dorothy Schlup's case would have afforded

this court an "identifiable moment" for application of "occupational disease," expressed in the Workers' Compensation Act, to injuries and disability from the cumulative effect of repetitive work-related trauma. Nonetheless, one can still hope. Although "[h]ope springs eternal," employees injured by repetitive work-related trauma are a little more mortal and need a remedy under the Nebraska Workers' Compensation Act.

Nevertheless, because Dorothy Schlup clearly established that her injury and disability were attributable to carpal tunnel syndrome as an occupational disease, the judgment of the Workers' Compensation Court is otherwise correct and, therefore, must be affirmed.

WHITE and GRANT, JJ., join in this concurrence.

IN RE INTEREST OF S.R., D.R., AND B.R., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. J.R., APPELLANT.

479 N.W.2d 126

Filed January 24, 1992. No. 91-136.

1. **Parental Rights: Appeal and Error.** An appellate court reviews termination of parental rights cases de novo on the record and is required to reach a conclusion independent of the juvenile court's findings, but when the evidence is in conflict, the appellate court considers and may give weight to the fact that the juvenile court observed the witnesses and accepted one version of the facts over another.
2. **Parental Rights: Proof.** In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, termination of parental rights is permissible when the basis for such is proved by clear and convincing evidence.
3. _____: _____. In order to terminate parental rights, it must be established that such is in the child's best interests and that there exists at least one of the grounds enumerated in Neb. Rev. Stat. § 43-292 (Reissue 1988).
4. _____: _____. Although a reasonable plan of rehabilitation is not a prerequisite or condition precedent to the termination of parental rights, noncompliance with such a plan is, in and of itself, a sufficient ground for termination of parental rights, if such is shown to be in the child's best interests.

5. **Constitutional Law: Parental Rights.** The fundamental liberty interest of natural parents in the care, custody, and control of their children does not end simply because they have not been model parents or have lost temporary custody of their children to the State.
6. **Parental Rights.** When parental control fails, the State must play its part as parens patriae.
7. **Constitutional Law: Parental Rights.** Constitutional adjudication pays heed to higher values than speed, efficiency, and efficacy, but such adjudication does not require belaboring the painfully obvious.
8. **Parental Rights.** Children cannot, and should not, be suspended in foster care nor be made to await uncertain parental maturity prior to termination of parental rights.

Appeal from the Separate Juvenile Court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Affirmed.

David A. Battiato, of Burns & Associates, for appellant.

Linda S. Porter, Deputy Lancaster County Attorney, for appellee.

Mary Stoughton Wenzl, guardian ad litem.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

The separate juvenile court terminated the parental rights of the father, J.R., and of the mother, D.R., in and to their three children: S.R., a boy born July 25, 1983; D.R., a girl born October 15, 1984; and B.R., a boy born December 1, 1985. Only the father has appealed, claiming, in summary, that the juvenile court erred by finding that the evidence clearly and convincingly establishes (1) the need for terminating his rights and (2) that such serves the best interests of the children. We affirm.

Apparently because of some event not described in this bill of exceptions of 1,970 1/3 pages, the State first became interested in these children in September 1986. The record does show that the State was concerned about the condition of the home the children occupied and about the physical and medical care they were receiving. In any event, the parents at that time agreed to work with the State on their parenting, budgeting, and housekeeping skills, and the State agreed to provide them with a

family support worker and with the equipment needed to clean the family's house and clothes.

On December 16, 1986, a Lincoln police officer visited the home and found a pile of human feces on the floor and a strong odor of human waste. The children were playing on a carpet which was soaked with human waste and old food items. The food cupboards were roach infested, dirty clothes were scattered everywhere, and the children's room contained a large pile of dried feces and used toilet paper. The bedding in the baby crib was filthy. The children were thereupon placed in temporary emergency foster care.

On December 18, 1986, the State filed a petition asking the juvenile court to assert jurisdiction, alleging that the children lacked proper parental care by reason of the faults and habits of their parents and thus were subject to the juvenile court's jurisdiction under the provisions of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988). More specifically, the petition alleged that the children were improperly clothed, had head lice, were covered with dried feces and food, and emitted a smell of urine. In addition, the petition asserted that the family home was kept in a filthy condition, with feces, garbage, old food, dirty clothes, and other debris scattered throughout, and that it was infested with roaches and other bugs.

The parents admitted these allegations at the adjudication hearing held on December 23, 1986. The juvenile court thereupon took jurisdiction over the children and placed their temporary legal custody with the state Department of Social Services, granting the parents reasonable rights of visitation. At this time, the parents were ordered to correct the conditions of the home.

At the disposition hearing in January 1987, the juvenile court returned the children to the parents and ordered the implementation of a rehabilitation plan which, among other things, required the parents to provide the children with a clean, safe, and stable home and to attend counseling as well as parent training classes. Over the ensuing years, the parents received extensive assistance from the State, including the services of family support workers, placement in parenting classes, and the provision of transportation, food vouchers, appliances, and

cleaning services. For the first several months, a family support worker spent 5 to 7 1/2 hours a day 5 days a week with the parents, working on parenting, home management, and hygiene skills. Despite this assistance, the children had to be removed from their parents' home two more times, first in March 1987, just 3 months after the initial disposition, when the guardian ad litem filed a motion requesting an early review of the case, as two of the children had been hospitalized with shigellosis, "a communicable disease which can be is [sic] contracted by eating food that has been prepared under unsanitary conditions, or by being exposed to infected fecal material . . . ." By December 7, 1987, all three children had again been returned to the parents on a trial basis.

For the next year, the State continued to work with the parents on matters related to cleanliness, medical care, and nutrition. A family support worker spent several hours a day three times per week with the parents. Nonetheless, at the review hearings held in March and September 1988, the State continued to express concerns about the inadequate care the parents gave the children and the unclean conditions of the home. The juvenile court ordered further training.

In December 1988, the guardian ad litem again filed a motion requesting an early review hearing, claiming that the parents' care and supervision of the children was deficient and that the conditions of the home had deteriorated once again. A hearing was held on the motion in January 1989. The testimony revealed that despite the extensive help which had been provided them during the preceding 2 1/2 years, the parents failed to show any consistent or significant improvement in the care of their children or the conditions of their home. The children were once again placed in foster care, where they have remained ever since; the rehabilitation plan designed to reunite the family was continued in full force and effect with a few minor modifications.

From January until May 1989, the parents continued to have supervised visitation with their children. The supervision was provided by a family support worker, who continued to monitor the conditions in the home and provide the parents help with budgeting, meal planning, supervision of the

children, and parenting skills. In May 1989, the father was jailed for failure to pay child support for a child not involved in this action. When he was released from jail 3 weeks later, he returned to the family home to find that the mother had moved out and was living elsewhere with a boyfriend. As of this time, the mother virtually stopped having contact with her children. The father, however, resumed his visitations almost immediately after his release from jail and continued to visit the children at least three times a week for 2 hours at a time.

In August 1989, the father was evicted from the home for nonpayment of rent; he thereafter failed to establish another residence of his own. He spent a few months living with various friends until he began cohabiting with his girl friend and her daughter in October 1989. From October 1989 until May 1990, his visitations with the children were conducted either at his girl friend's or at various public parks. These visitations were, at the father's request, generally supervised by a family support worker. The support worker testified that the father was generally very passive during these visits and had to be consistently prompted to interact with and supervise the children.

At long last, in July 1990, 3½ years after the State first intervened in the children's lives, it filed a motion to terminate the parents' rights under the provisions of Neb. Rev. Stat. § 43-292 (Reissue 1988), alleging that the father substantially and continuously or repeatedly neglected the children and failed to give them necessary parental care and protection, and that he, despite reasonable efforts under the direction of the juvenile court, failed to correct the conditions leading to the December 1986 determination that the children were within the purview of § 43-247(3)(a).

The hearing on the termination petition took place over a period of 7 days during the months of September, October, and November 1990. In addition to the facts above stated, the evidence demonstrated that despite the father's 9 months of steady employment, at which he earned approximately $700 per month, he had not managed to put any money toward establishing a home for the children, this despite the fact that his monthly expenses should have been less than $400. In

addition, there was testimony that there was unlikely to be any improvement in the father's parenting skills, that it was unlikely he would be able to assume proper care of the children, and that there had been no bonding between the father and the children such that the children would be injured by termination of the father's relationship.

On November 26, 1990, the juvenile court entered the order here appealed.

It is well settled that this court reviews termination of parental rights cases de novo on the record and is required to reach a conclusion independent of the juvenile court's findings, but when the evidence is in conflict, this court considers and may give weight to the fact that the juvenile court observed the witnesses and accepted one version of the facts over another. *In re Interest of A.C.*, *ante* p. 734, 478 N.W.2d 1 (1991). See, also, *In re Interest of C.W. et al.*, *ante* p. 817, 479 N.W.2d 105 (1992). In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, termination of parental rights is permissible when the basis for such is proved by clear and convincing evidence. *In re Interest of M.P.*, 238 Neb. 857, 472 N.W.2d 432 (1991). In order to terminate parental rights, it must be established that such is in the child's best interests and that there exists at least one of the grounds enumerated in § 43-292. *In re Interest of A.C.*, *supra*. We, independently from the findings of the juvenile court, conclude that the evidence summarized above clearly and convincingly establishes that the statutory grounds asserted by the State for terminating the father's parental rights indeed exist and that the evidence further clearly and convincingly establishes that termination of such rights is in the children's best interests.

The father's suggestion that the evidence is lacking because there is no showing the State has "exhausted all alternatives" can only be described as logically preposterous and legally frivolous. First of all, the requirement is not that all possible alternatives be exhausted, but that *reasonable* efforts be made to reunite the juvenile and his or her family. Neb. Rev. Stat. § 43-246 (Reissue 1988); *In re Interest of M.P.*, *supra*.

The State made extraordinary efforts to reunite the family;

various caseworkers and family support workers literally spent days with the parents over protracted periods of time in an effort to teach them very basic parenting and living skills. The parents were allotted an inordinate amount of time within which to comply with a reasonable plan of rehabilitation calculated to protect the children's safety and welfare by providing them a stable, nurturing, and healthful home. The record clearly and convincingly establishes not only that this was not accomplished, but that there is no reasonable likelihood that the father will ever comply with the plan and become a fit parent. As we have observed in the past, although a reasonable plan of rehabilitation is not a prerequisite or condition precedent to the termination of parental rights, *In re Interest of A.C., supra*, noncompliance with such a plan is, in and of itself, a sufficient ground for termination of parental rights, if such is shown to be in the child's best interests. See *In re Interest of J.R.W.*, 237 Neb. 691, 467 N.W.2d 413 (1991).

The most absurd aspect of this case is that it has taken the system more than half a decade to finally make the determination which should have been obvious as inevitable much earlier in the process. It should certainly have been apparent to any reasonable person long before the guardian ad litem's second intervention in December 1988 that the parents were not likely to ever provide the children with a stable, clean, and safe home in which to grow and mature. Yet, it took the State another year and a half to seek termination of the parents' rights.

As a consequence, the children have been forced to languish for more than 27 percent of their childhood (if childhood can be said to last as long as one's minority) in the clutches of a torpid bureaucracy which was created and is maintained to rescue them and others similarly situated from unfit parents.

To be sure, the fundamental liberty interest of natural parents in the care, custody, and control of their children does not end simply because they have not been model parents or have lost temporary custody of their children to the State. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). But when parental control fails, the State must play its part as parens patriae. *Schall v. Martin*, 467 U.S. 253, 104 S.

Ct. 2403, 81 L. Ed. 2d 207 (1984). See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991).

We recognize, too, that constitutional adjudication pays heed to higher values than speed, efficiency, and efficacy. *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). But such adjudication does not require belaboring the painfully obvious. When reasonable efforts demonstrate that it is unlikely that a family can be reunited, the perishable nature of childhood requires that that which must be done gets done. As we have observed in the past, children cannot, and should not, be suspended in foster care nor be made to await uncertain parental maturity prior to termination of parental rights. *In re Interest of L.J., M.J., and K.J.*, 238 Neb. 712, 472 N.W.2d 205 (1991).

The record sustaining neither of the father's summarized assignments of error, the judgment of the separate juvenile court is affirmed.

AFFIRMED.

DIANNE CLARISSA DESJARDINS, APPELLEE, V. PHILIP DELPHIN DESJARDINS, APPELLANT.

479 N.W.2d 451

Filed January 31, 1992. No. 89-651.

1. **Modification of Decree: Alimony: Appeal and Error.** The modification of an alimony award is a matter initially entrusted to the discretion of the trial court. On appeal, such decisions are reviewed de novo on the record and are affirmed in the absence of an abuse of discretion.
2. **Modification of Decree: Alimony: Good Cause.** Alimony awards entered pursuant to a consent decree may be modified pursuant to Neb. Rev. Stat. § 42-365 (Reissue 1988), which provides that such orders may be revoked or modified for good cause shown.
3. _____: _____: _____. Good cause is demonstrated by a material change in circumstances, but any changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not justify a change or modification of an order to pay alimony.
4. **Modification of Decree: Alimony.** An increase in income is a circumstance that

may be considered in determining whether alimony should be modified.

5. **Modification of Decree: Judgments.** A consent decree is usually treated as an agreement between the parties. It is accorded greater force than ordinary judgments and ordinarily will not be modified over objection of one of the parties.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded with directions.

Steven M. DeLaney, of O'Hanlon Law Offices, for appellant.

Steven J. Lustgarten and Michael B. Lustgarten, of Lustgarten & Roberts, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The respondent, Philip Delphin Desjardins, appeals the judgment of the district court increasing his alimony obligation from $100 per month to $600 per month.

The modification of an alimony award is a matter initially entrusted to the discretion of the trial court. On appeal, such decisions are reviewed de novo on the record and are affirmed in the absence of an abuse of discretion. *Northwall v. Northwall*, 238 Neb. 76, 469 N.W.2d 136 (1991).

The record shows that the parties were married on June 12, 1959, and had four sons, the youngest of whom was born in October 1965. The marriage was dissolved on December 22, 1971. Pursuant to what is commonly known as a "consent decree," the husband was ordered to pay child support of $100 per month per child until each child was emancipated or reached the age of 21. He was further ordered to pay alimony of $200 per month from January 1, 1972, until September 1, 1972, on which date the alimony obligation would be reduced to $100 per month.

On October 5, 1988, the wife filed an application to modify the decree, asking that the alimony award be increased to $750 per month pursuant to Neb. Rev. Stat. § 42-365 (Reissue 1988). The record shows that she has not remarried, has raised the four children, and has held numerous jobs since 1971, including

fundraising, teaching aerobics classes, office cleaning, and selling real estate. Her Realtor's license is inactive, and she is currently employed as a loan officer at a bank in Bellevue. The wife has net monthly income of approximately $1,068.64, including the alimony payments.

The wife testified that she has used her wages and payments from the husband primarily to raise and educate the parties' four sons, all of whom have college educations. The child support order was terminated on January 28, 1985, after the parties entered into a separate agreement relating to the education and school expenses of the two youngest sons. Apparently, the husband agreed to pay educational expenses plus $150 per month for the two boys, who are presently living with their mother. He testified that he has done "[j]ust that" and has not made any other voluntary payments to the boys.

The husband was a major in the Air Force when the marriage was dissolved. He earned a master's degree in systems management, retired as a colonel after 28 years of service, and has been employed as a financial manager at General Dynamics since November 1983. He testified that he received $10,530.50 gross monthly income as follows: $5,558.33 from current employment, $2,296.15 in pension benefits, $513.75 in VA disability benefits, and $2,162.27 from investments. The husband now lives in San Diego, California, owns a $240,000 house, and has monthly living expenses of $1,622.28.

Alimony awards entered pursuant to a consent decree may be modified pursuant to § 42-365, which provides that such orders may be revoked or modified "for good cause shown." See, *Chamberlin v. Chamberlin*, 206 Neb. 808, 295 N.W.2d 391 (1980); *Cooper v. Cooper*, 219 Neb. 64, 361 N.W.2d 202 (1985); *Sloss v. Sloss*, 212 Neb. 610, 324 N.W.2d 663 (1982). We have said that good cause is demonstrated by a material change in circumstances, but any changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not justify a change or modification of the order. See *Cooper v. Cooper, supra*.

In increasing the husband's alimony obligation from $100 to $600 per month, the district judge found that the evidence in the

case showed a material and substantial change of circumstances not contemplated by the parties, "the disparity in income and income earning capacity being astronomical." The court further stated that "the Respondent may claim that his former wife . . . has no equitable right to share in his continued efforts, hard work and good future, but the Court finds that the fact is, by entry of the Decree as they agreed upon, he gave her this legal right."

There is no evidence in the record tending to show that the wife's situation has materially changed since the original decree was entered. The issue in this case is whether the husband's increase in income, by itself, constitutes a material and substantial change in circumstances, or "good cause," which justifies a modification of the alimony order.

An increase in a party's income is a circumstance that may be considered in determining whether alimony should be modified. *Northwall v. Northwall*, 238 Neb. 76, 469 N.W.2d 136 (1991); *Kelly v. Kelly*, 220 Neb. 441, 370 N.W.2d 161 (1985). However, in recent cases we have considered this factor in conjunction with changes in the other party's situation. See, e.g., *Northwall v. Northwall, supra* (wife alleging that husband's income had increased and that hers had decreased); *Cooper v. Cooper, supra* (increase in wife's income, together with decrease in husband's income, did not justify decreasing husband's total alimony obligation); *Sloss v. Sloss, supra* (no material change in circumstances where both parties' financial conditions improved); *Kelly v. Kelly, supra* (no material change of circumstances existed when wife's return to full-time employment and resulting increase in income were contemplated in the original decree). See, also, *Creager v. Creager*, 219 Neb. 760, 366 N.W.2d 414 (1985); *Sholl v. Sholl*, 216 Neb. 289, 343 N.W.2d 742 (1984).

Although this court has the authority to modify consent decrees, see *Chamberlin v. Chamberlin, supra*, we have held that " '[a] consent decree is usually treated as an agreement between the parties. It is accorded greater force than ordinary judgments and ordinarily will not be modified over objection of one of the parties.' " *Lawson v. Lawson*, 185 Neb. 164, 167, 174 N.W.2d 202, 205 (1970) (quoting *Detter v. Erpelding*, 176

Neb. 600, 126 N.W.2d 827 (1964)).

In the present case, the husband had his college degree before the parties were married. When the original decree was entered, he had served more than one-half the time required in order to be eligible for military retirement. He earned his master's degree after the marriage was dissolved and has displayed a talent for investing his money. When the marriage was dissolved, the parties specifically agreed that the wife would receive $100 per month alimony for life or until she remarried.

Under the circumstances, we find that the trial court abused its discretion in finding the evidence showed a material and substantial change of circumstances not contemplated by the parties at the time of the decree.

The judgment of the district court is reversed, and the cause is remanded with directions to dismiss the wife's application to modify the decree.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. DALE WILCOX, APPELLANT.

479 N.W.2d 134

Filed January 31, 1992. Nos. 90-731, 90-732.

1. **Sentences: Appeal and Error.** In a direct appeal, when a defendant has appealed to correct errors which may have entered into the defendant's conviction or sentence, the Supreme Court is empowered to set aside a sentence and remand for resentencing, when the sentence imposed is unauthorized under law and, therefore, void.
2. **Appeal and Error.** Plain error may be found on appeal when an error, unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed in part, and in part sentence vacated and cause remanded for resentencing.

Gary Hogg, Buffalo County Public Defender, for appellant.

Don Stenberg, Attorney General, and Elaine A. Chapman for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

Dale Wilcox appeals his sentences for two felony convictions, namely, his conviction for issuing a bad check in the amount of $287.49, which is Wilcox's second conviction for issuing a bad check and thus a Class IV felony, see Neb. Rev. Stat. § 28-611(1) and (2) (Reissue 1979), and his conviction for first degree assault, a Class III felony, see Neb. Rev. Stat. § 28-308 (Reissue 1989).

On December 15, 1981, the district court for Buffalo County sentenced Wilcox to 2 years' probation on his conviction for issuing the $287.49 bad check. Subsequently, on March 4, 1982, the district court sentenced Wilcox to 3 years' probation on his conviction of first degree assault. Regarding both convictions and as a term of probation in each case, Wilcox was required to make monetary restitution and was forbidden to leave the jurisdiction. Additionally, as a condition of probation for the conviction on the check charge, Wilcox was ordered to receive outpatient counseling for alcohol abuse and attend meetings of Alcoholics Anonymous.

On December 8, 1983, the State moved for revocation of Wilcox's probation on the bad check conviction and alleged that Wilcox had failed to make restitution, obtain alcohol abuse counseling, and attend Alcoholics Anonymous meetings. The district court, in revocation proceedings on January 25, 1984, concluded that Wilcox had violated probation, but extended Wilcox's probation to March 1, 1985.

On August 3, 1984, the State moved for revocation of Wilcox's probation for both convictions. Concerning the assault conviction, the State alleged that Wilcox, without notifying his probation officer, had twice left the jurisdiction during the term of his probation. The State also alleged that Wilcox violated probation on the bad check conviction by his departure from the court's jurisdiction without notifying his probation officer and by his failure to make restitution. When

Wilcox failed to appear for the revocation hearing, the district court issued a bench warrant for his arrest, and Wilcox was subsequently arrested, in May 1990. At the hearing for revocation of his probation, Wilcox voluntarily waived his right to an evidentiary hearing and admitted the violations of probation alleged in the State's motions. The court accepted Wilcox's admissions of probation violations, revoked the probation imposed for each of Wilcox's convictions, and sentenced Wilcox to imprisonment for 6 months on each conviction, with the sentences to be served concurrently in the Buffalo County Detention Center.

ASSIGNMENTS OF ERROR

Wilcox contends that the district court abused its discretion by not sentencing Wilcox to probation rather than incarceration, and that, in any event, the sentences imposed are excessive. The State counters that the court imposed an invalid sentence on the conviction for first degree assault, because Wilcox's sentence to imprisonment is for a term less than the statutory minimum.

CONVICTION ON CHECK CHARGE

Second-offense issuing a bad check is a Class IV felony, see § 28-611(2), punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both such imprisonment and fine, see Neb. Rev. Stat. § 28-105(1) (Reissue 1979); hence, a conviction for issuing a bad check carries no statutorily prescribed minimum sentence. The district court sentenced Wilcox to 6 months' imprisonment in the Buffalo County Detention Center.

" 'A sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed.' " *State v. Johnson*, 238 Neb. 206, 208, 469 N.W.2d 761, 763 (1991) (quoting from *State v. Kitt*, 232 Neb. 237, 440 N.W.2d 234 (1989)). Accord, *State v. Witt*, 239 Neb. 400, 476 N.W.2d 556 (1991); *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991). This court has also stated:

> [I]n considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment and

> includes the observations of the sentencing judge as to the demeanor, attitude, and all facts and circumstances surrounding the life of the defendant.

State v. Stranghoener, 208 Neb. 598, 603, 304 N.W.2d 679, 682 (1981). Accord, *State v. Witt, supra*; *State v. Tuttle*, 238 Neb. 827, 472 N.W.2d 712 (1991); *State v. Schall*, 234 Neb. 101, 449 N.W.2d 225 (1989). Further, "[w]hether the sentence imposed is probation or incarceration is a matter within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion." *State v. Zitterkopf*, 236 Neb. 743, 749-50, 463 N.W.2d 616, 621 (1990). Accord, *State v. Lane*, 227 Neb. 687, 419 N.W.2d 666 (1988); *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987).

Wilcox's sentence on the bad check conviction is within the range of penalties statutorily prescribed for a Class IV felony. In view of Wilcox's unwillingness to fulfill the conditions of his probation, as demonstrated by the established violations of probation before revocation, we are unable to conclude that the district court abused its discretion in the sentence imposed as the result of Wilcox's conviction for issuing a bad check.

FIRST DEGREE ASSAULT

First degree assault is a Class III felony, § 28-308(2), punishable by imprisonment from 1 to 20 years, a $25,000 fine, or both such imprisonment and fine, § 28-105(1). Thus, the minimum sentence of incarceration for a first degree assault conviction is 1 year. The district court sentenced Wilcox to 6 months' imprisonment in the Buffalo County Detention Center. The State contends that a sentence to a term of imprisonment of 6 months for a Class III felony is unauthorized by § 28-105(1), which clearly prescribes that incarceration, as punishment for conviction of a Class III felony, is for a minimum term of 1 year.

In a direct appeal, when a defendant has appealed to correct errors which may have entered into the defendant's conviction or sentence, the Supreme Court is empowered to set aside a sentence and remand for resentencing, when the sentence imposed is unauthorized under law and, therefore, void. See, *State v. Wren*, 234 Neb. 291, 450 N.W.2d 684 (1990); *State v.*

Ferrell, 218 Neb. 463, 356 N.W.2d 868 (1984); *State v. Rolling*, 209 Neb. 243, 307 N.W.2d 123 (1981); *State v. Gaston*, 191 Neb. 121, 214 N.W.2d 376 (1974). "A void sentence is no sentence . . . and therefore the defendant is legally without sentence." *State v. Wren, supra* at 294, 450 N.W.2d at 687. The preceding rules apply " 'with equal force to a sentence for a shorter period than the minimum prescribed by statute.' " *State v. Gaston, supra* at 123, 214 N.W.2d at 377. Section 28-105(1) authorizes imprisonment for a minimum of 1 year on a conviction for a Class III felony; therefore, the district court lacked statutory authority to sentence Wilcox to a term of imprisonment of less than 1 year.

Additionally, our review in Wilcox's case discloses plain error in the district court's sentence on the first degree assault conviction, since the court sentenced Wilcox to serve his imprisonment in the Buffalo County Detention Center. "Plain error may be found on appeal, when an error, unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process." *In re Estate of Fischer*, 227 Neb. 722, 726, 419 N.W.2d 860, 862 (1988). Accord, *State v. Moore*, 235 Neb. 955, 458 N.W.2d 232 (1990); *State v. Thomas*, 229 Neb. 635, 428 N.W.2d 221 (1988). See, also, Neb. Rev. Stat. § 25-1919 (Supp. 1991): "The . . . Supreme Court may at its option consider a plain error not specified in appellant's brief." See, further, Neb. Ct. R. of Prac. 9D(1)d (rev. 1991): "The court may, at its option, notice a plain error not assigned." In *Katskee v. Nevada Bob's Golf of Neb.*, 238 Neb. 654, 661, 472 N.W.2d 372, 379 (1991), we stated, "Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion."

Wilcox was convicted of a Class III felony. Section 28-105(2) provides in pertinent part: "All sentences of imprisonment for Class . . . III felonies . . . shall be served in institutions under the jurisdiction of the Department of Correctional Services." The Buffalo County Detention Center is not an institution under the jurisdiction of the state Department of Correctional Services. Therefore, the district court's sentence on Wilcox's first degree

assault conviction, that is, imprisonment in the Buffalo County Detention Center, is unauthorized. See *State v. Wren, supra.*

Because the district court lacked statutory authority to impose a 6-month sentence in the county detention center for Wilcox's conviction of first degree assault, a Class III felony and a crime punishable by imprisonment for a minimum term of 1 year in an institution "under the jurisdiction of the Department of Correctional Services," see § 28-105(2), we set aside the district court's sentence imposed on Wilcox for his assault conviction.

CONCLUSION

The sentence on Wilcox's conviction for issuing a bad check is affirmed, but the sentence on Wilcox's first degree assault conviction is vacated, and this matter is remanded to the district court so that an authorized and appropriate sentence may be imposed on Wilcox.

AFFIRMED IN PART, AND IN PART SENTENCE VACATED AND CAUSE REMANDED FOR RESENTENCING.

STATE OF NEBRASKA, APPELLEE, V. JEFFREY DALE McNERNY, APPELLANT.

479 N.W.2d 454

Filed January 31, 1992. Nos. 90-1013, 90-1014.

1. **Sentences: Time.** A sentence validly imposed takes effect from the time it is pronounced.
2. **Sentences: Appeal and Error.** In the absence of a timely appeal, even an erroneous sentence cannot be corrected.
3. **Sentences.** The meaning of a sentence is, as a matter of law, determined by the contents of the sentence itself.
4. _____. Unless a court imposing a later independent sentence specifically states otherwise at the time of its pronouncement, the later sentence is to be served consecutively to any earlier imposed sentence or sentences.
5. _____. Unless specifically stated otherwise when pronounced, multiple sentences imposed at the same time run concurrently with each other.
6. **Jurisdiction.** The office of a motion is not to initiate new litigation, but to bring before the court for ruling some material but incidental matter arising in the

progress of the case in which the motion is filed; jurisdiction over a motion is therefore dependent upon the court's having jurisdiction over the case in which the motion is filed.

7. **Jurisdiction: Appeal and Error.** When a trial court lacks jurisdiction to adjudicate the merits of a claim, an appellate court likewise lacks jurisdiction to do so and may only dismiss the purported appeal.

Appeals from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Appeals dismissed.

Maurice A. Green, of Burger, Bennett & Green, P.C., for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

These purported appeals, consolidated in this court for argument and adjudication, arise from the determination of the district court judge that the sentences he imposed upon the defendant-appellant, Jeffrey Dale McNerny, in these two cases were to be served consecutively to the sentences said judge had imposed upon McNerny in two earlier cases. McNerny assigns the foregoing determination as error. We dismiss.

At a consolidated hearing held on March 18, 1987, McNerny was sentenced in one case to imprisonment for a period of not less than 1 nor more than 4 years for burglary and in the second case to like periods of imprisonment for another burglary and for an act of criminal mischief. These three sentences were ordered served concurrently with each other.

While on parole from those sentences, McNerny was sentenced, at a consolidated hearing held on November 13, 1987, in case No. 90-1013 to imprisonment for a period of 6 months because of yet another conviction for criminal mischief and in case No. 90-1014 to imprisonment for periods of not less than 2 nor more than 5 years on each of two additional convictions for burglary. These three sentences also were ordered served concurrently with each other. Nothing was said about the relationship between these sentences and those

imposed on March 18, 1987.

No appeals were taken from any of the foregoing sentences; however, on August 29, 1990, McNerny filed a motion in case No. 90-1013, seeking "an order clarifying the sentences handed down . . . at the November 13, 1987 sentencing hearing. Specifically . . . that the [district court judge] clarify as to whether the November 13, 1987 sentences shall run concurrent with or consecutive to the March 18, 1987 sentences . . . ." McNerny later filed an identical motion in case No. 90-1014.

At the hearing on those motions, McNerny asked the district court judge to "review the comments" he had made on November 13, 1987, and determine whether the sentences he imposed that day were "to run concurrent or to run consecutive to the prior order." The district court judge announced that "the sentence made in each case on November 13, 1987 was and were consecutive to the" sentences imposed on March 18.

We have ruled that a sentence validly imposed takes effect from the time it is pronounced, *State v. Foster, ante* p. 598, 476 N.W.2d 923 (1991), and that in the absence of a timely appeal, even an erroneous sentence cannot be corrected, *State v. Reichstein*, 233 Neb. 715, 447 N.W.2d 635 (1989).

Moreover, what the district court judge may have thought he meant by observing that McNerny might have to face a parole violation charge is of no consequence, for the meaning of a sentence is, as a matter of law, determined by the contents of the sentence itself. See, *Kerndt v. Ronan*, 236 Neb. 26, 458 N.W.2d 466 (1990); *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986).

Harpster v. Benson, 216 Neb. 776, 777, 345 N.W.2d 335, 336 (1984), states: "When sentence is pronounced upon one already serving a sentence from another court, the second sentence does not begin to run until the sentence which the prisoner is serving has expired, unless the court pronouncing the second sentence specifically states otherwise." Accord, *Nelson v. Wolff*, 190 Neb. 141, 206 N.W.2d 563 (1973); *Brott v. Fenton*, 120 Neb. 792, 235 N.W. 449 (1931); *State, ex rel. Allen, v. Ryder*, 119 Neb. 704, 230 N.W. 586 (1930). It is true that, here, all the sentences were imposed by the same court; however, the focus of *Harpster*, *Allen*, *Brott*, and *Nelson* is on the fact that the

sentences in question were independent from each other in the sense that they were imposed at different times. Thus, the applicable rule is that unless the court imposing a later independent sentence specifically states otherwise at the time of its pronouncement, the later sentence is to be served consecutively to any earlier imposed sentence or sentences. The rule is otherwise where multiple sentences are imposed at the same time. In such event, unless the court specifically states otherwise at the time the sentences are pronounced, they run concurrently with each other. See, *Stewart v. Delgado*, 231 Neb. 401, 436 N.W.2d 512 (1989); *Culpen v. Hann*, 158 Neb. 390, 63 N.W.2d 157 (1954).

It is important to recognize, however, that trial finality with respect to the sentences at issue took place when the sentences were imposed. See *State v. Kramer*, 231 Neb. 437, 436 N.W.2d 524 (1989) (for purposes of appeal, trial finality achieved when sentence imposed). See, also, *State v. Foster, supra*; *In re Interest of Wolkow*, 206 Neb. 512, 293 N.W.2d 851 (1980). The district court thus lacked jurisdiction to entertain a motion to modify the sentences, for the office of a motion is not to initiate new litigation, but to bring before the court for ruling some material but incidental matter arising in the progress of the case in which the motion is filed. Jurisdiction over a motion is therefore dependent upon the court's having jurisdiction over the case in which the motion is filed. See, *North Shore Hospital v. McConico*, 39 Misc. 2d 1032, 242 N.Y.S.2d 402 (1963); *Morrison v. Patterson*, 221 Iowa 883, 267 N.W. 704 (1936); *Caperton v. Winston Co. Fair Ass'n*, 169 Miss. 503, 153 So. 801 (1934).

When a trial court lacks jurisdiction to adjudicate the merits of a claim, this court likewise lacks jurisdiction to do so. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991). Under such circumstances, we only have jurisdiction to dismiss the purported appeal. *Booker v. Nebraska State Patrol*, *ante* p. 687, 477 N.W.2d 805 (1991).

Accordingly, these purported appeals are dismissed.

APPEALS DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL DOUGLASS, APPELLANT.

479 N.W.2d 457

Filed January 31, 1992. No. 90-1044.

1. **Criminal Law: Courts: Appeal and Error.** Upon appeal from county court in a criminal case, the district court acts as an intermediate appellate court, rather than as a trial court. Its review is limited to an examination of the county court record for error or abuse of discretion.
2. **Criminal Law: Appeal and Error.** Factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong.
3. **Convictions: Appeal and Error.** An appellate court will not interfere with a conviction based on evidence unless the evidence is so lacking in probative force that as a matter of law it can be said that it is insufficient to support a verdict of guilty beyond a reasonable doubt.
4. **Criminal Law: Motor Vehicles.** Any person who drives any motor vehicle in such a manner as to indicate a willful disregard for the safety of persons or property is guilty of willful reckless driving.
5. **Words and Phrases.** Willful means intentional.
6. _____. Recklessness is the disregard for or indifference to the safety of another or for the consequences of one's act.
7. **Criminal Law: Motor Vehicles.** Willful reckless driving is characterized by a deliberate disregard for the safety of others or their property.
8. _____: _____. For there to be willful reckless driving, it is not necessary that there be property damage or injury inflicted.

Appeal from the District Court for Hall County, JOSEPH D. MARTIN, Judge, on appeal thereto from the County Court for Hall County, RICHARD E. WEAVER, Judge. Judgment of District Court reversed, and cause dismissed.

O. William VonSeggern for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Following a bench trial in county court, defendant was convicted of willful reckless driving, a violation of Neb. Rev. Stat. § 39-669.03 (Reissue 1988). This conviction was affirmed following an appeal to the district court. Defendant appeals

here, claiming the conviction was contrary to the law and the facts, since the State failed to prove that the defendant demonstrated a willful disregard for the safety of persons or property. We reverse and dismiss.

Police officer Tim Meguire, on April 20, 1990, at approximately 1:15 a.m., observed a red Jeep being driven by the defendant westbound on Faidley Avenue in the city of Grand Island. The officer clocked the vehicle on his radar unit as it passed him and noticed that the reading on the radar was 44 miles per hour. However, the officer was unable to get the Jeep's speed locked in until the Jeep had slowed to 36 miles per hour. This was in a 25-mile-per-hour zone. While the officer attempted to catch up to the vehicle, he noticed it drive into the parking lane, occasionally very closely approaching the curb, and then drift back into the driving lane. There was no evidence of any automobiles' being parked in this area or of the presence of any other traffic.

After having stopped the defendant, the officer noticed an odor about the defendant, but testimony as to the nature of the odor was not received into evidence.

Defendant pleaded guilty to a charge of speeding and was found guilty of willful reckless driving after pleading not guilty.

" '[U]pon appeal from county court in a criminal case, the district court acts as an intermediate appellate court, rather than as a trial court. . . . [Its] review is limited to an examination of the county court record for error or abuse of discretion.' " *State v. Boham*, 233 Neb. 679, 683, 447 N.W.2d 485, 488 (1989).

Factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong. *State v. Lowry, ante* p. 343, 476 N.W.2d 540 (1991).

Neither this court nor the district court when acting as an appellate court will interfere with a conviction based on evidence unless the evidence is so lacking in probative force that as a matter of law it can be said that it is insufficient to support a verdict of guilty beyond a reasonable doubt. See *State v. Cook*, 212 Neb. 718, 325 N.W.2d 159 (1982).

"Any person who drives any motor vehicle in such a manner as to indicate a willful disregard for the safety of persons or

property is guilty of willful reckless driving." § 39-669.03. Willful means intentional. *State v. Boham, supra*. Recklessness is the disregard for or indifference to the safety of another or for the consequences of one's act. *State v. Green*, 238 Neb. 475, 471 N.W.2d 402 (1991). Willful reckless driving is characterized by a deliberate disregard for the safety of others or their property. *State v. Green*, 182 Neb. 615, 156 N.W.2d 724 (1968). For there to be willful reckless driving, it is not necessary that there be property damage or injury inflicted. *State v. Boham, supra*.

The question for this court to answer is whether the evidence adduced was so lacking in probative force that as a matter of law it can be said that it is insufficient to support a judgment of guilty beyond a reasonable doubt. *State v. Cook, supra*.

This court has addressed the sufficiency of evidence necessary for a conviction of willful reckless driving in at least four cases.

In *State v. Boham, supra*, defendant's motor vehicle maneuvers forced another driver first to brake his vehicle and then to be temporarily pushed onto the dirt outside the traveled portion of the highway. In addition, the defendant also prevented the other driver from passing a truck. This court held that there was sufficient evidence to support a conclusion beyond a reasonable doubt that the defendant's actions indicated an intentional disregard for the safety of the other driver.

In *State v. Cook, supra*, the defendant, who was in the process of obtaining a dissolution of her marriage, drove her automobile across the road and struck her husband's vehicle coming from the opposite direction. Immediately after the impact she told her estranged spouse that she would run into him " 'again and again.' " *Id.* at 719, 325 N.W.2d at 160. This court held the evidence was not insufficient to support a verdict of guilty beyond a reasonable doubt of willful reckless driving.

Although this court stated in *State v. DiLorenzo*, 181 Neb. 59, 146 N.W.2d 791 (1966), that speed alone does not amount to recklessness in the operation of an automobile, it did hold there was sufficient evidence to sustain a conviction of willful reckless driving where the defendant drove at speeds of 95 to

100 miles per hour on a heavily traveled public highway. The court stated that the test is "whether the particular speed is dangerous under the surroundings and attendant circumstances of the particular case." *Id.* at 63, 146 N.W.2d at 794.

Finally, in *State v. Eberhardt*, 179 Neb. 843, 140 N.W.2d 802 (1966), a police officer activated his red lights and started in pursuit of a defendant who had been observed driving without taillights. The pursuit took place mainly on gravel roads with houses and farms on both sides and at speeds of 85 to 90 miles per hour. During the chase, the defendant ran six stop signs. This court held that the evidence was sufficient to sustain a conviction of willful reckless driving.

The element that the previously cited cases have in common and that is lacking in this case is the *intentional* or *deliberate* disregard for the safety or property of others. There was no evidence of the presence of any persons or property subjected to any danger in the area. Furthermore, the defendant was driving but 36 miles per hour, compared to speeds of from 85 to 100 miles per hour in *DiLorenzo* and *Eberhardt*.

Boham and *Cook* are perfect examples of intentional disregard for the safety of others or their property; in one instance the defendant purposely tried to endanger another driver by attempting to cut him off several times, and in the other instance the defendant deliberately endangered her husband by running into his car.

The evidence in this case was insufficient as a matter of law to prove willful reckless driving by the defendant, and the findings by the lower courts to the contrary were clearly wrong. The judgment of the district court is reversed, and the cause is ordered dismissed.

REVERSED AND DISMISSED.

GRANT, J., participating on briefs.

RAUL CASTRO, APPELLANT AND CROSS-APPELLEE, V. GILLETTE GROUP, INC., DOING BUSINESS AS PACKERLAND, AND CIGNA PROPERTY AND CASUALTY CO., APPELLEES AND CROSS-APPELLANTS.

479 N.W.2d 460

Filed January 31, 1992. No. 91-223.

1. **Workers' Compensation: Appeal and Error.** Findings of fact by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
3. **Workers' Compensation: Expert Witnesses.** A medical expert's opinion is not sufficient as a matter of law to support a workers' compensation claim unless it is based on a reasonable degree of medical certainty or a reasonable probability.
4. **Workers' Compensation: Expert Witnesses: Proof.** When a physician's testimony gives rise to conflicting inferences of an *equal* degree of probability, so that the choice between them is a mere matter of conjecture, a compensation award cannot be sustained. Where, however, the inferences are not equally consistent and the more probable conclusion is that for which the claimant contends, then the claimant sustains his burden of proof on the element involved.
5. **Workers' Compensation: Appeal and Error.** The issue of causation of an injury or disability is one for determination by the trier of fact, whose findings will not be set aside unless clearly wrong.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellant.

Melvin C. Hansen and Matthew J. Buckley, of Hansen, Engles & Locher, P.C., for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

Raul Castro appeals a Workers' Compensation Court rehearing decision in which the court found that the appellant had been permanently and partially disabled as a result of an

injury during the course of his employment with appellee Gillette Group, Inc., doing business as Packerland. The court further found that claimant was entitled to future medical services, but had not sufficiently established that pain therapy was reasonably necessary treatment.

On November 28, 1988, while employed by Packerland meatpacking plant as a chuck operator, appellant suffered injuries to his left shoulder when a portion of a bull carcass swung away from him while the hook which appellant was holding in his left hand was still embedded in the carcass.

Appellees cross-appeal, contending that appellant actually injured his shoulder off the job on November 16 when he fell on the ice at home, scraping his nose and injuring his left anterior chest. Appellant's doctor wrote a note to Packerland stating that appellant should not return to work until November 28. Appellant did return to work on that date and was injured in the above-mentioned incident.

Castro assigns as error the following determinations of the Workers' Compensation Court: (1) the denial of appellant's pain clinic treatment and/or rehabilitation as a medical expense; (2) the determination that appellant had reached maximum medical improvement as of March 7, 1990; (3) the termination of appellant's temporary total disability, effective March 7, 1990; and (4) the determination of the extent of appellant's permanent disability. The appellees, Gillette and CIGNA Property and Casualty Co., cross-appeal, assigning as error the Workers' Compensation Court's determination that the appellant's injury arose out of and in the course of his employment.

Findings of fact by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong. *Cline v. County Seat Lounge, ante* p. 42, 473 N.W.2d 404 (1991). In testing the sufficiency of the evidence to support findings of fact made by the court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Id.*

Regarding the first assignment of error, which questions the court's denial of pain clinic treatment as a medical expense,

appellant has failed to establish that the Workers' Compensation Court was clearly wrong. The assigned error is without merit.

Under the Nebraska Workers' Compensation Act, Neb. Rev. Stat. § 48-120 (Reissue 1988) provides that an employer shall be liable for all reasonable medical services, as and when needed, which are required by the nature of the injury and which will relieve pain and hasten the employee's restoration to health and employment.

The evidence on rehearing showed that Dr. Wendell Ropp, when asked in his first deposition whether a pain clinic could improve appellant's condition, responded, "I would hope that it would." In his second deposition, Dr. Ropp testified, "Well, it's my opinion that he has a chronic pain condition that *might* be improved through a pain clinic" (emphasis supplied), and later commented, "[W]e should exhaust every possibility for minimizing that complaint before assessing a permanent impairment because of pain."

A medical expert's opinion is not sufficient as a matter of law to support a workers' compensation claim unless it is based on a reasonable degree of medical certainty or a reasonable probability. See *Miner v. Robertson Home Furnishing, ante* p. 525, 476 N.W.2d 854 (1991).

In *Welke v. City of Ainsworth*, 179 Neb. 496, 138 N.W.2d 808 (1965), this court set the standard for determining whether an expert's opinion is sufficient to support a workers' compensation claim. We held that when a physician's testimony

> gives rise to conflicting inferences of *equal* degree of probability so that the choice between them is a mere matter of conjecture, a compensation award cannot be sustained. Where, however, the inferences are not equally consistent and the more probable conclusion is that for which the claimant contends, then the claimant sustains his burden of proof on the element involved.

(Emphasis supplied.) *Id.* at 504-05, 138 N.W.2d at 813.

Because Dr. Ropp's testimony regarding the necessity of the pain clinic was couched in terms of possibility and hopefulness, rather than probability to a reasonable degree of medical certainty, the Workers' Compensation Court's denial of that

service was not erroneous.

As to the second, third, and fourth assignments of error, we respectively affirm. Assignments Nos. 2 and 3 essentially complain of the same determination. Substantial evidence existed to support the determination. Dr. Ropp testified that appellant's condition seemed "static and chronic at this point."

As to appellant's permanent disability, Dr. Ropp was of the opinion that appellant had shown few objective signs of residual injury, with the exception of the persisting pain that limits the use and range of movement in his left arm. Dr. Ropp had perceived no improvement in the condition of his patient over the course of a full year and considered his patient's pain to be chronic and static. Finally, Dr. Ropp had estimated appellant's permanent disability at 40 to 50 percent of the function of his upper extremity. Appellant's impairment has occurred to a scheduled member, which is an injury compensated on the basis of loss of physical function. The Workers' Compensation Court accordingly awarded the appellant a 50-percent permanent partial impairment to his left arm. The record does not support appellant's contention that he suffers from a whole-body injury.

For the aforementioned reasons, the Workers' Compensation Court deemed appellant's condition to be permanent. The assignment is not meritorious.

In view of today's holding, we must also deny appellant's request for attorney fees. Appellant may not recover attorney fees, as he did not succeed in obtaining an increase in his award, as required by Neb. Rev. Stat. § 48-125 (Supp. 1991).

As to appellees' cross-appeal of the court's determination that appellant's injury arose out of and in the course of his employment, we affirm.

A basic tenet of workers' compensation law is that the issue of causation of an injury or disability is one for determination by the trier of fact, whose findings will not be set aside unless clearly wrong. *Way v. Hendricks Sodding & Landscaping, Inc.*, 236 Neb. 519, 462 N.W.2d 99 (1990).

We have held in previous workers' compensation decisions that where the inferences are not equally consistent and the more probable conclusion is that for which the claimant

contends, then the claimant sustains his burden of proof on the element involved. See *Halbert v. Champion International*, 215 Neb. 200, 337 N.W.2d 764 (1983).

If a claimant has adduced competent evidence having probative value which preponderantly convinces the trier or triers of fact that the claimant had an accident and incurred a disability arising out of and in the course of his employment, notwithstanding that the trier or triers of fact may recognize a possibility or even a probability that this was not true, an award of compensation thereon is proper and on appeal must be sustained. *Welke v. City of Ainsworth, supra.*

While the evidence indeed suggested a possibility that Castro's shoulder injury initially arose from his fall on the ice at home on November 16, ample evidence existed through the deposed physicians to support the panel's determination that he was injured at work on November 28, and we cannot hold that the Workers' Compensation Court was clearly wrong.

AFFIRMED.

PAMELA S. EDMONDS, APPELLANT, V. IBP, INC., APPELLEE.

479 N.W.2d 754

Filed January 31, 1992. No. 91-334.

1. **Workers' Compensation: Proof.** In a workers' compensation case, the plaintiff must establish by a preponderance of the evidence that the injury for which an award is sought arose out of and in the course of employment.
2. _____: _____. An award from the Workers' Compensation Court cannot be based on mere speculation or possibility.
3. **Workers' Compensation: Evidence: Expert Witnesses.** Expert medical testimony must be based on a reasonable degree of medical certainty or a reasonable probability.
4. _____: _____: _____. While expert medical testimony need not be couched in the magic words "reasonable degree of medical certainty or reasonable probability," such testimony couched in terms of possibility is not sufficient.
5. _____: _____: _____. Expert medical testimony based on "could," "may," or "possibly" lacks the definiteness required to support an award from the Workers' Compensation Court.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Phillip G. Wright, of Quinn & Wright, for appellant.

Marie L. Welsh for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

The plaintiff-appellant employee, Pamela S. Edmonds, challenges the adequacy of the award of benefits for 6 percent permanent partial disability of each hand from the defendant-appellee employer, IBP, inc. More specifically, Edmonds claims the Workers' Compensation Court erred in failing to (1) consider certain evidence, (2) find that her thoracic outlet syndrome was proximately caused by her employment, and (3) find that she suffered a body-as-a-whole impairment which reduced her earning capacity. We affirm.

Edmonds, now approximately 30 years of age, had been working at IBP for nearly 2 1/2 years trimming the fat and tendons from various cuts of meat as they came by her on a conveyor belt. After trimming the cuts, which then weighed between 7 and 20 pounds, she threw them onto another belt. She generally worked 8-hour shifts, but on occasion would work 16 hours.

She had no disabilities related to her employment until September 19, 1988, when, she testified, "My arm would go dead and no feeling at all, and my hands tingled and would go numb and my wrists had pain in them." The compensation court's pretrial order of March 13, 1990, recites the parties agreed that "as a result of an accident arising out of and in the course of her employment by" IBP, Edmonds developed bilateral carpal tunnel syndrome, which required tunnel release surgery on her right and left wrists.

It is Edmonds' assertion that in addition to the stipulated injuries, she also suffers from thoracic outlet syndrome. The record describes the syndrome, or condition, as occurring when nerves get pinched at the space between several muscles at a point between the first rib and the clavicle. The condition develops when the "space gets narrowed, and there's less room for the nerves and the vascular structures to sit comfortably in

that space," causing pain, numbness, or tingling.

Edmonds testified that the physician who performed the tunnel release surgery referred her to Dr. Keith McLarnan, who diagnosed the thoracic outlet syndrome. McLarnan testified that in addition to bodybuilding, peculiarities in the structure of the neck, and bony prominences on the cervical vertebrae, repetitive motion "would possibly aggravate" the condition.

When asked whether, based on a reasonable degree of medical certainty, the condition was caused by Edmonds' work, McLarnan stated that "her employement [sic] may have been a factor in the development of her thoracic outlet syndrome." However, McLarnan also revealed that he did not know what Edmonds' employment entailed, saying:

> It's pretty vague, from my history. That she was working in a packing plant; and I think, frankly, that's about all the more precise information I have about what she did.
>
> Q. Okay. Do you know what she did for the packing plant?
>
> A. I didn't specify precisely in the history what she did.

On April 13, 1990, Edmonds moved to amend the pretrial order to include Dr. Paul Collicott as an expert witness and "all medical records, reports . . . which . . . Collicott may have regarding" her. On April 19, 1990, Edmonds further moved for an order to take Collicott's deposition, since he would be unavailable for the scheduled trial. IBP objected to the first motion, arguing that a report in which Collicott indicates that Edmonds has thoracic outlet syndrome was not timely filed. According to the transcript, Edmonds had in fact violated rule XX of the Nebraska Workers' Compensation Court's Rules of Procedure (1989), which requires all medical reports to be served on the opposing party, "in all events, within 30 days following the date the pretrial order is received and filed if the party intends to offer the report as evidence." She does not claim otherwise.

On April 30, 1990, the compensation court entered two separate orders. In the first, the court ruled that Collicott could be deposed and the deposition submitted to the court subsequently to the scheduled trial. In the second, the court amended its pretrial order so as to permit Edmonds to include

Collicott as an expert witness "and any and all medical records, reports, medical narrative, prognosis, diagnosis, and bills which . . . Collicott may have regarding . . . Edmonds."

At the May 3, 1990, trial, IBP again objected to the admission of the disputed medical report, arguing once more that it had not received the report within the required 30 days. The compensation court ruled:

> THE COURT: . . . And with regard to [the report], you are taking . . . Collicott's deposition, is that correct?
>
> [Edmonds' counsel]: Yes, Your Honor, that is scheduled.
>
> THE COURT: And you have received previous permission to do that by Judge Cavel, isn't that correct?
>
> [Edmonds' counsel]: Yes, Your Honor.
>
> THE COURT: All right, so do you have a date for that?
>
> [Edmonds' counsel]: May 23rd, isn't that correct?
>
> [IBP's counsel]: That's right, and I've cleared that with my calendar and that's satisfactory.
>
> THE COURT: All right. In that event, the objection to [the report] will be sustained . . . .

At Collicott's deposition, Edmonds nonetheless caused the medical report to be marked as an exhibit and offered it as evidence. IBP objected, pointing out that the court had ruled the report inadmissible. Edmonds argued that the only reason the court sustained the trial objection to the report was that Collicott was going to be deposed. Whatever the import of that argument, the report is found as an exhibit at the end of Collicott's deposition; the record contains no ruling on IBP's deposition objection to the report.

During the deposition, Edmonds had Collicott confirm that in the disputed report, he had written that she would have "70 percent partial or complete relief of her symptoms" if she had surgery. When asked whether, within reasonable medical certainty, "the repetitive action which you've described and the work history" were connected, Collicott responded affirmatively, saying that if what Edmonds told him was true, the "type of work that she did may have well precipitated this syndrome." In that regard, the report states that from a historical standpoint, "it appears that the thoracic outlet

syndrome appears to be related to the repetitive-type of work that [Edmonds] was doing at [IBP]."

Dr. Edward Schima, a neurologist, testified that although Edmonds had musculoskeletal pain in her left arm and it was possible she had thoracic outlet syndrome, he did not "see it's any more possible she should have it than any of us . . . ." Schima further testified that his examination revealed nothing abnormal and that in his opinion there was nothing to indicate that Edmonds suffered from the condition.

The compensation court concluded Edmonds had "failed to prove preponderantly that she sustained a thoracic outlet syndrome as a result of her accident and injury of September 19, 1988."

Edmonds first alleges that the compensation court erred in failing to consider the disputed Collicott medical report.

In support of her argument, Edmonds refers to *Miner v. Robertson Home Furnishing*, 236 Neb. 514, 462 N.W.2d 96 (1990), *appeal after remand* 239 Neb. 525, 476 N.W.2d 854 (1991). Therein, the plaintiff attempted to admit a note as part of an exhibit at his deposition, which was taken after the oral portion of the trial. The defendants objected to the exhibit. The compensation court admitted the deposition into evidence, without indicating whether it considered the objection or used the note, and dismissed the case. This court wrote at 236 Neb. at 517, 462 N.W.2d at 98:

> We are not faced with a question of accepting the factual findings of the Workers' Compensation Court, but with insufficient information to determine whether the court adequately made factual findings on this issue. We must remand with directions to the court to rule on the receipt of this evidence.

The controlling difference between *Miner, supra*, and the case now before us is that here, the compensation court ruled on the objection to the medical report and excluded it. *Miner* thus has no application to the matter at hand.

Although consistency in evidential rulings is "a consummation Devoutly to be wish'd," the pretrial order concerning the disputed Collicott report, whatever it may have meant, was superseded by the trial ruling, which, in the proper

exercise of the compensation court's discretion, upheld its rule of practice. Indeed, Edmonds does not argue that the trial ruling was incorrect; she merely attempts to circumvent it. This she may not do.

Moreover, the disputed report adds nothing to Collicott's deposition testimony; to write that Edmonds' thoracic outlet syndrome appears to be work related is no different from saying that the work may have precipitated the condition.

Edmonds next complains that the compensation court erred in failing to find that her thoracic outlet syndrome was caused by her employment.

In a workers' compensation case, the plaintiff must establish by a preponderance of the evidence that the injury for which an award is sought arose out of and in the course of employment. See, *Way v. Hendricks Sodding & Landscaping, Inc.*, 236 Neb. 519, 462 N.W.2d 99 (1990); *Badgett v. St. Joseph Hosp.*, 222 Neb. 467, 384 N.W.2d 302 (1986). Hence, Edmonds' evidentiary obligation was to present medical testimony which was sufficiently definite and certain to permit drawing a conclusion that there was a causal connection between the accident and the disability. See, *Gilbert v. Sioux City Foundry*, 228 Neb. 379, 422 N.W.2d 367 (1988); *Powell v. W. G. Pauley Lumber Co.*, 217 Neb. 707, 350 N.W.2d 556 (1984).

McLarnan diagnosed the existence of the thoracic outlet syndrome but could only conclude that Edmonds' employment "may" have been a factor. Moreover, he could not even state what Edmonds actually did at IBP. Collicott similarly did not conclude that Edmonds' work was the cause of her thoracic outlet syndrome but, rather, that it "may have well precipitated" the condition.

As defined in The American Heritage Dictionary 774 (2d coll. ed. 1985), "may" is "[u]sed to indicate a certain measure of likelihood or possibility." However, an award cannot be based on mere speculation or possibility. See, *Castro v. Gillette Group, Inc.*, *ante* p. 895, 479 N.W.2d 460 (1992); *Gray v. Fuel Economy Contracting Co.*, 236 Neb. 937, 464 N.W.2d 366 (1991).

Hohnstein v. W.C. Frank, 237 Neb. 974, 982, 468 N.W.2d 597, 603 (1991), declares that " 'expert medical testimony must

be based on a reasonable degree of medical certainty or a reasonable probability . . . .' " "Probably" has been defined by this court as "reasonably," "credibly," "presumably," "in all probability," and "very likely." *Hare v. Watts Trucking Service*, 220 Neb. 403, 370 N.W.2d 143 (1985), citing *Welke v. City of Ainsworth*, 179 Neb. 496, 138 N.W.2d 808 (1965). Notwithstanding, the medical expert's testimony need not be couched in the magic words "reasonable degree of medical certainty or reasonable probability," *Hohnstein, supra* at 982, 468 N.W.2d at 603, but "medical testimony couched in terms of 'possibility' is not sufficient," *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 411, 308 N.W.2d 503, 512 (1981). The *Hohnstein* court found the medical expert's conclusion adequate, based on his medical opinion to a reasonable degree that the plaintiff " 'has had these problems after the fall and one would assume they were causally related.' " *Hohnstein, supra* at 983, 468 N.W.2d at 604.

In *Fuglsang v. Blue Cross*, 235 Neb. 552, 554, 456 N.W.2d 281, 283 (1990), we held the court correctly excluded a medical opinion that " 'on a 50/50 basis' " it was " 'more likely than not' " that a particular condition predated the issuance of the policy under which coverage was sought. In so doing, we relied on *Husted v. Peter Kiewit & Sons Constr. Co.*, 210 Neb. 109, 114, 313 N.W.2d 248, 251 (1981), holding that a medical opinion amounting to nothing more "than a statement that it was 'more likely' the injury occurred" at a given time lacked "the definiteness and certainty necessary for it to be the basis for a compensation award."

In *Hatting v. Farmers Co-op Assn.*, 212 Neb. 242, 246, 322 N.W.2d 423, 425 (1982), a physician's statement that the plaintiff's injury "could have" been related to his employment and that it was "medically 'possible' " the injury could cause the disability was inadequate to establish the required causal connection. "That an injury could have possibly been caused by an employment accident is not sufficient to meet the burden imposed upon an employee in order to recover under our Workmen's Compensation Act." *Id.*

In short, expert medical testimony based on "could," "may," or "possibly" lacks the definiteness required to support

an award. "If an inference favorable to the claimant can only be reached upon the basis of possibility or speculation, he cannot recover. . . . An award cannot be based upon conflicting inferences of equal degrees of probability." *Husted, supra* at 113-14, 313 N.W.2d at 251. See, also, *Castro v. Gillette Group, Inc., supra.*

In the instant case, Schima concluded that Edmonds did not suffer from thoracic outlet syndrome, and although McLarnan and Collicott found the syndrome to exist, they were unable to give a medical opinion based on reasonable certainty that it was related to Edmonds' work. Thus, Edmonds has, as a matter of law, failed to prove a causal connection between her disability and her employment. See *Catlin v. Prairie Marketing, ante* p. 363, 476 N.W.2d 234 (1991).

In the final assignment of error, Edmonds contends that the compensation court erred in failing to find she suffers an impairment to her body as a whole which has reduced her earning capacity by at least 30 percent.

Neb. Rev. Stat. § 48-121(3) (Reissue 1988) provides that in the event of the loss or loss of use of more than one specific member of the body, such as the hands, which does not amount to total and permanent disability,

> compensation benefits shall be paid for the loss or loss of use of each such member or part thereof, with the periods of benefits to run consecutively. The total loss or permanent total loss of use of both hands . . . in one accident, shall constitute total and permanent disability and be compensated for according to the provisions of subdivision (1) of this section. In all other cases involving a loss or loss of use of both hands . . . total and permanent disability shall be determined in accordance with the facts.

In cases where the injury is to the body as a whole, compensation is determined under subsections (1) and (2) of the statute "by the employee's diminution of employability or impairment of earning power or earning capacity, and is not necessarily determined by a physician's evaluation and assessment of the employee's loss of bodily function." *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 470, 461 N.W.2d 565, 573 (1990).

Edmonds does not quarrel with the compensation court's determination with respect to the disability of her hands, but challenges its finding that she does not suffer a body-as-a-whole impairment because of her thoracic outlet syndrome. Consideration of this claim is foreclosed by our determination that if the thoracic outlet syndrome exists, Edmonds failed as a matter of law to prove it was proximately caused or aggravated by her employment.

It is certainly true the compensation court's award would have been clearer if the court had expressly stated as a finding of fact either that Edmonds did not have the thoracic outlet syndrome or that although she suffered from the condition, it was not proximately caused or aggravated by her employment. The compensation court's mixed conclusion of law and fact that Edmonds "failed to prove preponderantly" that her condition is the result of the subject accident is not particularly illuminating. Nonetheless, the record fails to sustain any of Edmonds' assignments of error.

AFFIRMED.

ELIZABETH LEITZ, ADMINISTRATOR OF THE ESTATE OF KENNETH E. LEITZ, DECEASED, ET AL., APPELLANTS, V. ROBERTS DAIRY AND UNDERWRITERS ADJUSTMENT COMPANY, APPELLEES.

479 N.W.2d 464

Filed January 31, 1992. No. 91-605.

1. **Workers' Compensation: Penalties and Forfeitures: Time: Appeal and Error.** Where a reasonable controversy exists between an employer and an employee as to the payment of workers' compensation, the employer is not liable for the penalty provided in Neb. Rev. Stat. § 48-125 (Reissue 1988) during the time the case is pending in the courts for final determination.
2. **Workers' Compensation.** Whether a reasonable controversy exists is a question of fact.
3. **Workers' Compensation: Appeal and Error.** Findings of fact made by the compensation court after rehearing have the same force and effect as a jury verdict in a civil case, and such determinations by the compensation court will not be set aside on appeal unless they are clearly erroneous.

4. **Workers' Compensation: Penalties and Forfeitures: Attorney Fees: Time.** A reasonable controversy exists between an employer and an employee if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or part. To avoid the payments assessable under Neb. Rev. Stat. § 48-125 (Reissue 1988), an employer need not prevail in opposition to an employee's claim for compensation, but must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation.
5. **Supreme Court: Final Orders.** An opinion of this court is not a final determination of the matter until a mandate has been issued by the court.
6. **Workers' Compensation: Supreme Court: Final Orders: Jurisdiction.** A mandate from this court is required to reinvest the compensation court with jurisdiction.
7. **Workers' Compensation.** An award of the compensation court cannot be enforced until it has become conclusive upon the parties at interest.
8. **Workers' Compensation: Penalties and Forfeitures: Final Orders: Time.** The penalty for waiting time under Neb. Rev. Stat. § 48-125 (Reissue 1988) applies to final adjudicated awards.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

John Kocourek, of Peterson and Kocourek Law Offices, and David R. Stickman for appellants.

Melvin C. Hansen and Matthew J. Buckley, of Hansen, Engles & Locher, P.C., for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The plaintiffs, Elizabeth Leitz and her dependent children, have appealed from the order of the Workers' Compensation Court finding that they were entitled to $1,927.05 as a penalty for the delay in payment of an award to them and entitled to an attorney fee of $500 plus interest as provided by law.

Elizabeth Leitz is the widow and administrator of the estate of Kenneth E. Leitz, who died as a result of a heart attack arising out of and in the course of his employment on April 20, 1988.

In *Leitz v. Roberts Dairy*, 237 Neb. 235, 465 N.W.2d 601 (1991), this court affirmed an award of workers' compensation

benefits to the plaintiffs. The opinion affirming the award was filed in this court on February 15, 1991. The mandate was issued on February 25, 1991. Apparently, the mandate was "entered" in the compensation court also on February 25, 1991. The controversy is when the 30-day waiting-time period commenced to run.

On March 22, 1991, the plaintiffs filed an application in the compensation court alleging that a 50-percent penalty should be added to all amounts due under the award. On May 20, 1991, the compensation court found that the 30-day period commenced to run at the time the mandate of this court was filed in the compensation court and that the payments made between March 29 and April 1, 1991, were delinquent. The plaintiffs have appealed from that order.

Where a reasonable controversy exists between an employer and an employee as to the payment of workers' compensation, the employer is not liable for the penalty provided in Neb. Rev. Stat. § 48-125 (Reissue 1988) during the time the case is pending in the courts for final determination. See, *Steward v. Deuel County*, 137 Neb. 516, 289 N.W. 877 (1940); *Abel Construction Co. v. Goodman*, 105 Neb. 700, 181 N.W. 713 (1921). Because a reasonable controversy existed between the plaintiffs and the defendants in this case, the plaintiffs were not entitled to a penalty payment during the pendency of the appeal to this court.

Whether a reasonable controversy exists is a question of fact. *Harpham v. General Cas. Co.*, 232 Neb. 568, 441 N.W.2d 600 (1989). Findings of fact made by the compensation court after rehearing have the same force and effect as a jury verdict in a civil case, and such determinations by the compensation court will not be set aside on appeal unless they are clearly erroneous. See *Tarvin v. Mutual of Omaha Ins. Co.*, 238 Neb. 851, 472 N.W.2d 727 (1991).

A reasonable controversy exists between an employer and an employee

> if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which

> conclusions affect allowance or rejection of an employee's claim, in whole or part. To avoid the payments assessable under § 48-125, an employer need not prevail in opposition to an employee's claim for compensation, but must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation.

Mendoza v. Omaha Meat Processors, 225 Neb. 771, 784-85, 408 N.W.2d 280, 288 (1987).

In the present case, the compensation court was correct in finding there was a reasonable controversy between the parties. The defendants disputed the claim and refrained from payment of compensation in the original case because of questions regarding causation of Leitz' heart attack. The evidence in this case supported reasonable but opposite conclusions as to whether Leitz' heart attack was caused by his employment or by his general health.

The plaintiffs argue that no reasonable controversy existed between the parties after the opinion of this court was filed on February 15, 1991. The opinion is not a final determination of the matter until a mandate has been issued by the court.

A mandate from this court is required to reinvest the compensation court with jurisdiction. Under Neb. Rev. Stat. § 48-188 (Reissue 1988) an award of the compensation court cannot be enforced until it has become "conclusive upon the parties at interest." The award in this case was not final and the penalty did not commence until 30 days after the mandate of this court had been filed in the compensation court.

The defendants suggest that § 48-125 does not apply to final adjudicated awards. We believe it does. See *McCrary v. Wolff*, 109 Neb. 796, 803, 192 N.W. 237, 240 (1923), where this court stated, "This provision for penalty was placed in the statute evidently with the object . . . to induce prompt payments after the award has been finally established . . . ."

This issue was recently addressed in *Amorosa v. Jersey City Welding & Mach. Works*, 214 N.J. Super. 130, 518 A.2d 529 (1986). That court found that the New Jersey statute authorizing imposition of a penalty for unreasonable or negligent delay of payment in compensation cases applies not

only to interim payments of compensation, but also to fully litigated cases.

In reaching its conclusion, the court stated:

> Because of the delay which results when a case is contested, the disabled worker's need for the prompt payment of temporary disability benefits is especially urgent after a final adjudicated award. In such instances, the employee has had to do without a weekly stipend for a longer period than when an employer does not contest the worker's right to such benefits after notice is given pursuant to *N.J.S.A.* 34:15-17. It is therefore imperative, in contested cases, to discourage additional and unnecessary delay in the payment of temporary disability benefits, and we hold that *N.J.S.A.* 34:15-28.1 should be applied to that end.

214 N.J. Super. at 137, 518 A.2d at 533.

The order of the compensation court is affirmed.

AFFIRMED.

KIM NELSON-HOLST, APPELLEE AND CROSS-APPELLANT, V. TERRANCE L. IVERSON, APPELLANT AND CROSS-APPELLEE.

479 N.W.2d 759

Filed February 7, 1992. No. 89-656.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
2. **Courts: Judgments: Appeal and Error.** In an appeal from a county court's judgment rendered in a bench trial of a law action, an appellate court conducts a review for error appearing on the record made in the county court.
3. _____: _____: _____. An appellate court reviewing a judgment in a bench trial of a law action in a county court does not reweigh the evidence, but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
4. **Assault: Battery: Damages.** The measure of recovery in a case of assault and battery is limited to compensatory damages.
5. **Damages: Appeal and Error.** Where recovery of damages is not a mere matter of computation and depends upon the intangible and quite subjective elements of pain and suffering, it will not be interfered with unless it is so excessive and so

grossly unresponsive to the evidence as to be indicative of passion, prejudice, mistake, or misconception.

6. **Verdicts: Remittitur.** Where a verdict is excessive, but not so much as to indicate passion or prejudice on the part of the jury, the error may be corrected by remittitur if the excess can be estimated with reasonable certainty.
7. **Damages: Remittitur.** Generally, where the damages awarded are greater than the amount claimed in the declaration or, from the facts disclosed by the evidence, are clearly excessive, and the illegal portion is distinguishable from the legal, the defect may usually be remedied by a remittitur of the excess if it can readily be calculated with reasonable certainty, whether the action is one of tort or on contract, and although such act of the successful litigant obviates an otherwise prejudicial error.
8. **Verdicts: Remittitur.** If there is no method by which a court can rationally ascertain the extent of the excess of a verdict, a remittitur cannot be required, for the reason that under such circumstances a remittitur is nothing more than a substitution of the judgment of the court for that of the fact finder.
9. **Verdicts: Appeal and Error.** A verdict may be set aside as excessive when, and not unless, it is so exorbitant as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.
10. **Verdicts.** Passion or prejudice is shown when the verdict shocks the conscience.
11. **Damages: Remittitur: New Trial.** When a court cannot rationally ascertain the amount of excessiveness in an award of damages, a remittitur cannot properly be required or entered; rather, the proper action is setting aside the excessive damages award and granting a new trial on the issue of damages.

Appeal from the District Court for Douglas County, JAMES M. MURPHY, Judge, on appeal thereto from the County Court for Douglas County, ROBERT C. VONDRASEK, Judge. Judgment of District Court affirmed in part and in part reversed, and cause remanded with direction.

Edna R. Atkins for appellant.

Ralph E. Peppard for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

The subject of this appeal is the judgment obtained by Kim Nelson-Holst on her cause of action for assault and battery filed in the county court for Douglas County against Terrance L. Iverson. After the county court entered judgment in the amount of $7,800 for Nelson-Holst, Iverson appealed to the district court for Douglas County, which reduced the amount of

Nelson-Holst's judgment to $5,000.

Iverson has appealed to this court and claims that there is insufficient evidence for the judgment against him and that the judgment is excessive. Nelson-Holst assigns as error the district court's action in reducing the amount of the county court judgment. As the result of Nelson-Holst's assignment of error that the district court erred by reducing the judgment for damages, Nelson-Holst's response in her brief for the Iverson appeal is, in effect, a cross-appeal from the district court's judgment and is considered as a cross-appeal in this court.

STANDARD OF REVIEW

"In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous." *Oddo v. Speedway Scaffold Co.*, 233 Neb. 1, 2, 443 N.W.2d 596, 598 (1989). Accord, *Albee v. Maverick Media, Inc., ante* p. 60, 474 N.W.2d 238 (1991); *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

In an appeal from a county court's judgment rendered in a bench trial of a law action, an appellate court conducts a review for error appearing on the record made in the county court. See, *Dammann v. Litty*, 234 Neb. 664, 452 N.W.2d 522 (1990); *Mason v. Schumacher*, 231 Neb. 929, 439 N.W.2d 61 (1989); *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987). See, also, Neb. Rev. Stat. § 25-2733(1) (Reissue 1989): "In all cases other than appeals from the Small Claims Court, the district court shall review the case for error appearing on the record made in the county court . . . ." An appellate court reviewing a judgment in a bench trial of a law action in a county court does not reweigh the evidence, but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. See, *Dammann v. Litty, supra*; *Mason v. Schumacher, supra*; *Holden v. Urban, supra*.

THE ASSAULT AND BATTERY

The following facts were established in the county court as a basis for Nelson-Holst's judgment against Iverson:

Nelson-Holst and Iverson are parents of Eric, their 15-month-old son, who at the time of the incident was in Nelson-Holst's physical custody subject to visitation by Iverson. On September 6, 1987, when Iverson failed to return Eric after visitation in Iverson's home, Nelson-Holst went to Iverson's place to get Eric.

When Nelson-Holst arrived, Iverson, who had been drinking alcohol, became abusive, refused to let her take Eric, and began to beat her with his fists. In the course of the quarrel, Iverson threw Nelson-Holst against the door and dragged her out of the house by her hair, stopping only when his mother intervened. As the result of the beating by Iverson, Nelson-Holst sustained bodily injury, which included a black eye, swelling of her head, a bruised nose, and multiple contusions on her body. Police were summoned on account of the quarrel. Nelson-Holst required medical attention for her injuries sustained in the beating. Her doctor's bill was $28. After the incident, Nelson-Holst experienced nightmares for which she was receiving counseling.

The county court entered judgment in the amount of $7,800 for Nelson-Holst and against Iverson on Nelson-Holst's cause of action for assault and battery. Iverson appealed to the district court and, in his appeal to that court, assigned errors similar to those which he has now assigned in his appeal to this court. The district court, without comment or explanation other than a notation on its docket sheet, reduced Nelson-Holst's damages award to $5,000. Iverson has appealed to this court, and, under the circumstances, we construe Nelson-Holst's brief as a cross-appeal.

SUFFICIENCY OF EVIDENCE

From the foregoing facts, we conclude that the evidence sustains the finding that Iverson tortiously assaulted and battered Nelson-Holst, who sustained damages as the result of the beating inflicted by Iverson. The county court's judgment, which has the effect of a verdict, is supported by the evidence and is not clearly erroneous.

DAMAGES AWARDED TO NELSON-HOLST

We have held that "[t]he measure of recovery in a case of

assault and battery is limited to compensatory damages. *Haumont v. Alexander*, 190 Neb. 637, 211 N.W.2d 119 (1973). Such damages include the nature of the injuries, and pain and suffering." *Duncza v. Gottschalk*, 218 Neb. 879, 880, 359 N.W.2d 813, 815 (1984). Moreover, as the court expressed in *Duncza*:

> Where recovery is not a mere matter of computation and depends upon the intangible and quite subjective elements of pain and suffering, it will not be interfered with unless it is so excessive and so grossly unresponsive to the evidence as to be indicative of passion, prejudice, mistake, or misconception. *Stewart v. Ritz Cab Co.*, 185 Neb. 692, 178 N.W.2d 577 (1970).

218 Neb. at 880, 359 N.W.2d at 814. We note that judgment for the plaintiff in *Duncza* was in the amount of $6,500 for damages sustained as the result of an assault and battery which caused a black eye to the plaintiff, bruised her face, and caused emotional upset to the plaintiff.

Since the district court in Nelson-Holst's case reduced the county court judgment from the amount of $7,800 to $5,000, but did not state or indicate the basis or reason for such reduction in the amount of the judgment, we can only conclude that the district court entered a remittitur of $2,800 without any reason expressed for the remittitur.

In *Barbour v. Jenson Commercial Distributing Co.*, 212 Neb. 512, 516-17, 323 N.W.2d 824, 826 (1982), this court stated:

> The law is well established that where a verdict is excessive, but not so much as to indicate passion or prejudice on the part of the jury, the error may be corrected by remittitur, if the excess can be estimated with reasonable certainty. *Hays v. County of Douglas*, 192 Neb. 580, 223 N.W.2d 143 (1974).
>
> . . . .
>
> Generally, where the damages awarded are greater than the amount claimed in the declaration, or, from the facts disclosed by the evidence, are clearly excessive, and the illegal portion is distinguishable from the legal, the defect may usually be remedied by a remittitur of the excess, if it can be readily calculated with reasonable certainty,

> whether the action is one of tort or on contract, and although such act of the successful litigant obviates an otherwise prejudicial error.

In *Barbour v. Jenson Commercial Distributing Co., supra*, a remittitur entered in the trial court was appropriate and was sustained on appeal, where the jury's verdict was for an amount in excess of the amount of damages established by the plaintiff's evidence. Since the amount of the verdict was too large in view of the undisputed evidence on contract damages, this court held that "the record establishes the amount of the excess with reasonable certainty" and sustained the remittitur entered in the trial court. 212 Neb. at 517, 323 N.W.2d at 827.

However,

> if there [is] no method by which a court [can] rationally ascertain the extent of the excess of a verdict, a remittitur [cannot] be required, for the reason that under such circumstances a remittitur [is] nothing more than a substitution of the judgment of the court for that of the [fact finder].

Main v. Sorgenfrei, 174 Neb. 523, 539, 118 N.W.2d 648, 658 (1962).

Recently, in *Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 643, 452 N.W.2d 270, 280 (1990), which was a wrongful death action, we stated:

> A verdict may be set aside as excessive when, and not unless, it is so exorbitant as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. *Pitt v. Checker Cab Co.*, 217 Neb. 600, 350 N.W.2d 507 (1984). . . . We have also suggested that passion or prejudice is shown when the verdict shocks the conscience. See, *Woitalewicz v. Wyatt*, 229 Neb. 626, 631, 428 N.W.2d 216, 219 (1988) (stating that "[t]here is nothing to indicate that the award by the jury is the result of either passion or prejudice, nor does the verdict shock the conscience"); *Steinauer v. Sarpy County*, 217 Neb. 830, 841, 353 N.W.2d 715, 723 (1984) (explaining that "[t]o be sure, at some point the verdict may shock the conscience and, therefore, obviously be excessive").

Further, in *Crewdson v. Burlington Northern RR. Co., supra*,

we also stated: "Unless a court can rationally ascertain the extent of an excessive verdict, a remittitur cannot properly be required. A remittitur would amount only to a substitution of the judgment of the court for that of the jury. *Main v. Sorgenfrei*, 174 Neb. 523, 118 N.W.2d 648 (1962)." 234 Neb. at 645, 452 N.W.2d at 281. Finally, although we determined that the award in *Crewdson v. Burlington Northern RR. Co., supra*, was "clearly excessive, we [were] unable to determine the extent of the excess," and, therefore, the excessive verdict was set aside and the cause was remanded for a new trial on the issue of damages only. 234 Neb. at 645, 452 N.W.2d at 281.

When we consider the nature of Nelson-Holst's injuries sustained as the result of the beating by Iverson, including her pain and suffering from that ordeal, a judgment for $7,800 is not an amount that shocks the conscience of this court under the circumstances. To grant a remittitur in these circumstances would only be to substitute the judgment of this court for the judgment of the county court as the fact finder in Nelson-Holst's case. However, such a substitution of judgment is apparently what was done by the district court in reducing the amount of the judgment obtained by Nelson-Holst in the county court. As we pointed out in *Crewdson v. Burlington Northern RR. Co., supra*, when a court cannot rationally ascertain the amount of excessiveness in an award of damages, a remittitur cannot properly be required or entered; rather, the proper action is setting aside the excessive damages award and granting a new trial on the issue of damages. Even if the award of damages in Nelson-Holst's case was determined by the district court to be excessive, the district court, as an appellate court in Nelson-Holst's case, did not reverse the county court judgment and order a new trial on damages only but, instead, entered a remittitur, which was improper under the circumstances.

CONCLUSION

The judgment for Nelson-Holst in the county court is sustained by the evidence and is not excessive under the circumstances. As the result of the improper remittitur by the district court and reduction on appeal of the county court

judgment, we must reverse the judgment of the district court and remand this cause to the district court with direction to reinstate and affirm the county court judgment obtained by Nelson-Holst in the principal amount of $7,800.

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

SHANAHAN, J., not participating in the decision.

IN RE APPLICATION OF NORTHLAND TRANSPORTATION, INC. NORTHLAND TRANSPORTATION, INC., APPELLANT, V. HERMAN BROTHERS, INC., ET AL., APPELLEES.

479 N.W.2d 764

Filed February 7, 1992. No. 89-673.

1. **Public Service Commission: Appeal and Error.** In an appeal from a decision of the Public Service Commission, the Supreme Court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question is unreasonable or arbitrary.
2. _____: _____. The Supreme Court does not act as an appellate public service commission and will sustain the action of the commission if there is evidence in the record to support it.
3. **Motor Carriers: Words and Phrases.** A contract carrier is one, other than a common carrier, which furnishes transportation service to meet the special needs of an individual shipper or shippers.
4. **Public Service Commission: Motor Carriers.** The Public Service Commission, in determining whether to issue a permit for contract carrier authority, must weigh the distinct needs of the shipper or shippers against the effect on and adequacy of existing common carrier service.
5. **Public Service Commission: Motor Carriers: Evidence.** Evidence that existing common carriers can satisfy the distinct needs of a shipper as well as a contract carrier renders issuance of a contract carrier permit inconsistent with the public interest, but proof that the services of common carriers are merely adequate to fulfill those needs is not conclusive when the applicant's service is better designed to fit the shipper's special requirements.
6. **Public Service Commission: Motor Carriers: Words and Phrases.** The "consistent with the public interest" standard for obtaining a contract carrier

permit is much less exacting than the "public convenience and necessity" standard for issuance of a common carrier certificate. The former means only that the proposed service does not conflict with the legislative policy of the state regarding transportation by motor vehicles.

7. **Public Service Commission: Motor Carriers: Evidence: Proof.** In a proceeding before the Public Service Commission to determine whether to issue a contract carrier permit, the initial burden is on the applicant to produce competent evidence that the proposed service is specialized and needed. Protesting common carriers may then present evidence that they are willing and able to perform the same specialized service. Upon production of such evidence by the protestants, the burden is again on the applicant to establish that it is better equipped and qualified to meet the special needs of the shipper or shippers than are the protestants.
8. **Public Service Commission: Motor Carriers: Federal Acts: Appeal and Error.** This court looks to decisions interpreting the federal Motor Carrier Act in construing the Nebraska statutes governing intrastate trucking.
9. **Public Service Commission: Appeal and Error.** When the Public Service Commission decides a case using an improper legal standard, it acts arbitrarily and therefore commits reversible error.
10. **Public Service Commission: Motor Carriers: Proof.** The Public Service Commission improperly tips the scales in favor of existing common carriers when it assigns to an applicant for contract carrier authority the burden of showing the inability of existing carriers to provide the same service the applicant proposes and when the commission exhibits a preference for common carriers over contract carriage.

Appeal from the Nebraska Public Service Commission. Reversed and remanded with directions.

Marshall D. Becker for appellant.

Jack L. Shultz and Gregory D. Barton, of Heron, Burchette, Ruckert & Rothwell, and James E. Ryan, P.C., for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

Northland Transportation, Inc. (Northland), appeals from a decision of the Public Service Commission denying its application for a contract carrier permit allowing it to transport fertilizer from the facilities of Farmland Industries in Hastings and Beatrice, Nebraska, to Wilcox, Nebraska, and points within a 25-mile radius of Wilcox.

Northland originally applied for a common carrier

certificate, but at a hearing held on March 9, 1989, amended its application to a request for contract carrier authority only. Protests to the application were filed by Wheeler Transport Service, Inc.; Central Transportation Company, Inc. (Central); Herman Brothers, Inc.; Wynne Transport Service, Inc.; and Schroetlin Tank Line, Inc. After Northland amended its application, Wheeler withdrew its protest. Of the remaining protestors, only Central and Herman Brothers appeared at the hearing.

FACTUAL BACKGROUND

The Wilcox Cooperative Association (the Association) is a farmers' cooperative in the business of buying and selling fertilizer products and grain for use by its approximately 300 members. The Association purchases its fertilizer from Farmland Industries, which has plants in both Hastings and Beatrice. The Hastings plant is located approximately 60 miles from Wilcox and supplies 95 percent of the Association's fertilizer needs.

Beginning in 1981, Central was responsible for hauling dry fertilizer, liquid fertilizer, and anhydrous ammonia from Farmland's plants to the Association's six storage facilities located in and around the Wilcox area. Central is a licensed common carrier authorized to haul each of these products. However, Central did not use its own equipment to haul the Association's fertilizer. Instead, Central leased trailers and the tractor trucks used to pull those trailers from Northland. In turn, Northland procured most of the tractors used for the Association account through a series of annual leases with Lester Johnson, an independent owner-operator who lived in Wilcox. Thus, Central did not dispatch trucks for the Association account. When the Association needed something hauled, it called either Northland or Johnson himself. Central's participation was limited to performing the billing functions and procuring the required insurance, though there is evidence that Northland actually acquired its own insurance. For providing these services, Central retained 7 percent of the revenue earned from the Association account.

Northland is authorized as a contract and common carrier of

bulk commodities by both the Interstate Commerce Commission and the Public Service Commission. However, neither Northland nor Johnson is authorized to haul anhydrous ammonia within the State of Nebraska. In the spring of 1988, a commission inspector notified Northland that Johnson could not legally haul anhydrous ammonia in Northland trailers based only on authority derived from Central through the leases. Northland's vice president and chief executive officer testified that prior to this notification, he was unaware that Northland's dealings with Johnson and the Association violated the commission's rules. Northland filed the application at issue in an effort to resolve this problem.

In support of its application, Northland introduced its balance sheet, which shows assets of $469,807, liabilities of $153,921, and total retained earnings of $285,886 for the year ending January 31, 1988. Northland also produced evidence that the amount of anhydrous ammonia hauled for the Association nearly tripled between 1985 and 1988 and was projected to increase again in 1989. The Association's general manager stated that he expected the Association's fertilizer business to keep growing due to its addition of a satellite facility south of Wilcox, a change of ownership at a competitor's plant, and a decrease in the number of acres set aside under a government farm program.

Northland also pointed to certain services specifically tailored to the Association's needs which common carriers cannot provide. The most fundamental of these services is Northland's willingness to allocate equipment exclusively to the Wilcox account during the peak fertilizer application period each spring. Northland developed the practice of loading three trailers in Hastings at the end of each day and then returning them to Wilcox for the night in order to get a headstart each morning. The Association's general manager testified that it is "essential" to his business that this practice continue. Because the Wilcox plant consists of six relatively small tanks rather than one large tank, an individual tank supplying a farmer can run out of ammonia in a very short time. Stationing Northland's trailers in Wilcox enables Johnson to deliver a load to that tank within 30 minutes, whereas if the Association had

to call Hastings for a common carrier the delivery might take half a day. Unlike Northland, which preloads its equipment and holds it overnight in Wilcox free of charge, common carriers will not do so without charging a demurrage fee.

Northland also noted that the limited capacity of the Association's tanks can result in the presence of too much fertilizer. A farmer may order a load of fertilizer for delivery on a particular morning only to encounter bad weather or an equipment breakdown that day. In such situations, Johnson and his drivers either divert the delivery to another tank, split the delivery among several tanks, or simply leave the loaded trailer sitting in Wilcox until a tank which can accommodate the load is available. The ability to respond in this manner results from a combination of Johnson's thorough knowledge of the current capacity of each tank and Northland's willingness to dedicate its trailers exclusively to the Wilcox account. There is evidence that if faced with a similar situation, a common carrier would either divert the load to another account or take it back to Hastings, charging the Association for the wasted trip. Such carriers will not allow their trailers to remain in a given location until an open tank is available, and their drivers may lack the detailed knowledge possessed by Johnson necessary to divert the load to another tank.

Finally, Northland presented evidence that it possesses the equipment necessary to service the Association's account. The Association requires pressure trailers for anhydrous ammonia, pneumatic trailers for dry fertilizer, and stainless steel trailers for liquid fertilizer. Northland possesses all three types of trailers, including 13 pneumatic units for use on the Association account. Northland's vice president and chief executive officer noted that the use of pneumatic equipment is becoming more prevalent in Wilcox because of a decrease in rail service there.

Central's general manager testified that his company is authorized to provide all the Association's trucking needs and that his company is willing and able to do so. He stated that the use of leased drivers is common in the industry and that Central is willing to continue the lease agreement with Johnson. He also stated that Central owns or operates 50 to 60 tractor units and 150 to 160 trailers, and has equipment suitable for the shipment

of fertilizer stationed throughout the Wilcox area. He testified that his company could dedicate such equipment to the Wilcox plant "on a dispatch basis" and "might" even allocate equipment there if the situation demanded it. He admitted that Central does not operate any pneumatic equipment, though he stated it would purchase or lease such equipment if the need arose. He concluded that Central opposed Northland's application to prevent the loss to Northland of business normally handled by Central.

The Midwest regional manager for Herman Brothers echoed the points made by Central. He noted that Herman Brothers holds the necessary authority for the Association account and is desirous of gaining that business. Herman Brothers possesses trailers suitable for hauling all three types of fertilizer used by the Association, and that equipment was not operating at full capacity at the time of the hearing. It has four ammonia "bottles" located in Holdrege, Nebraska, which is only 8 miles from Wilcox, as well as additional ammonia bottles and pneumatic tanks located in Grand Island, Nebraska. Herman Brothers' Midwest regional manager indicated that the placement of ammonia bottles in Holdrege enabled the company to "pick up some additional business out there." He also expressed a willingness to lease equipment operators during the peak season and stated that Northland's evidence revealed no service which his company could not also provide.

Obviously, the advantages to the Association of Johnson's presence in Wilcox is one of the key aspects of this case. Indeed, Johnson actually performed many functions normally the responsibility of the Association, such as keeping a running inventory of the area tanks and taking it upon himself to get them filled when necessary without waiting for a farmer to call. There is evidence that Johnson would prefer to continue leasing his services to Northland rather than some other common carrier. The peak season for applying fertilizer occurs during March and April of each year, when 85 to 90 percent of all anhydrous ammonia transported during the year is hauled. Northland's annual leases guaranteed Johnson work during the remainder of the year, and he expressed a reluctance to lease his services to another common carrier for fear he would lose this

additional income.

ASSIGNMENTS OF ERROR

Northland's 10 assignments of error combine to argue that the commission erred in (1) failing to find that the authority sought would provide a unique service designed to meet the distinct needs of the supporting shipper and (2) finding that the evidence does not show that granting the application sought would be consistent with the public interest.

STANDARD OF REVIEW

In an appeal from a decision of the Public Service Commission, the Supreme Court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question is unreasonable or arbitrary. *In re Application of Koch Service*, 228 Neb. 631, 423 N.W.2d 767 (1988). This court does not act as an appellate public service commission and will sustain the action of the commission if there is evidence in the record to support it. *In re Application of Silvey Refrig. Carr.*, 226 Neb. 668, 414 N.W.2d 248 (1987).

CONTRACT CARRIAGE IN NEBRASKA

A contract carrier is defined as one, other than a common carrier, which furnishes transportation service to meet the special needs of an individual shipper or shippers. *Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp.*, 188 Neb. 584, 198 N.W.2d 195 (1972) (*Wells Fargo II*), citing Neb. Rev. Stat. § 75-302 (Reissue 1972). To qualify for a contract carrier permit, an applicant must show (1) that it is fit, willing, and able to properly perform the service of a contract carrier and to conform to the applicable statutes and lawful requirements, rules, and regulations of the commission and (2) that the proposed operation will be consistent with the public interest by providing services designed to meet the distinct needs of each customer or class of customers. Neb. Rev. Stat. § 75-311 (Reissue 1986).

In *Hagen Truck Lines, Inc. v. Ross*, 174 Neb. 646, 119 N.W.2d 76 (1963), this court discussed the relationship between contract and common carriers. In that case Hagen Truck Lines

applied for authority as a contract carrier to haul meat and dairy products for various packing plants in Nebraska. The packing plants desired the service because the applicant could provide refrigerated equipment and truck-to-store service not offered by common carriers. Several common carriers protested, asserting that they could provide the desired service and that granting the application would reduce their profits, in derogation of the public interest. The commission granted the application, and the protestants appealed to this court.

In affirming the commission's decision, the court held that the potential loss of revenue by common carriers resulting from issuance of a contract carrier permit does not necessarily render the permit inconsistent with the public interest. Though that is a relevant factor, the court indicated that if the desirability of satisfying the shipper's distinct needs outweighs the detrimental effect on existing carriers, granting the authority sought is consistent with the public interest.

Thus, the commission, in determining whether to issue a permit for contract carrier authority, must weigh the distinct needs of the shipper or shippers against the effect on and adequacy of existing common carrier service. *In re Application of Koch Service, supra*; *Wells Fargo II, supra*; *Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp.*, 186 Neb. 261, 182 N.W.2d 648 (1971) (*Wells Fargo I*); *Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp.*, 183 Neb. 229, 159 N.W.2d 310 (1968); *Hagen Truck Lines, Inc., supra.* Though evidence that common carriers can satisfy the *distinct* needs of a shipper as well as a contract carrier renders issuance of a permit inconsistent with the public interest, mere proof that the services of common carriers are *adequate* to fulfill the shipper's needs is not conclusive when the applicant's service is better designed to fit the shipper's special requirements. *Wells Fargo II, supra.* Moreover, the "consistent with the public interest" standard for obtaining a contract carrier permit is much less exacting than the "public convenience and necessity" standard for issuance of a common carrier certificate. The former means only that the proposed service does not conflict with the legislative policy of the state regarding transportation by motor vehicles. *Wells Fargo I, supra*; *Samardick of Grand*

Island-Hastings, Inc., supra; *Hagen Truck Lines, Inc., supra.*

In *Wells Fargo II, supra*, this court set forth the proper procedure for determining whether a grant of contract carrier authority is consistent with the public interest. We held that the initial burden is on the applicant to produce competent evidence that the proposed service is specialized and needed. Protesting common carriers may then present evidence that they are willing and able to perform the same specialized service. Upon production of such evidence by the protestants, the burden is again on the applicant to establish that it is better equipped and qualified to meet the special needs of the shipper or shippers than are the protestants. *Id.*, citing *Samardick of Grand Island-Hastings, Inc., supra.*

THE COMMISSION'S ORDER

In its order denying Northland's application, the commission stated, "[T]he evidence falls short of the required showing that a grant of additional authority would be consistent with the public interest. Applicant showed no reason why the owner-operator . . . . could not lease his equipment to one of the common carriers already in the field . . . ."

Later in its order, the commission also stated, "It is not in the public interest to siphon away choice customers from common carriers and institute contract carriage. The transportation system the Legislature has charged this Commission to foster and protect is based upon sound common carriers." Because these findings reflect a misapplication of the aforementioned substantive and procedural principles, we reverse.

The original version of § 75-311 was enacted in 1937, see Neb. Rev. Stat. § 75-235 (Reissue 1943), and the current version is found at § 75-311 (Reissue 1989). The statute has been patterned after its counterpart in the Motor Carrier Act, passed by Congress in 1935. See Motor Carrier Act, ch. 498, § 209(b), 49 Stat. 543, 553 (1935) (current version at 49 U.S.C. § 10923 (1988)). For this reason, and because it is the policy of the Legislature to cooperate with the federal authorities in administering and enforcing the Motor Carrier Act, this court looks to decisions interpreting the federal act for guidance in construing our own statute. See, *Preisendorf Transp., Inc. v.*

Herman Bros., Inc., 169 Neb. 693, 100 N.W.2d 865 (1960); Neb. Rev. Stat. § 75-301(6) (Reissue 1986).

In *I. C. C. v. J-T Transport Co.*, 368 U.S. 81, 82 S. Ct. 204, 7 L. Ed. 2d 147 (1961), J-T Transport Company and Elvin L. Reddish applied separately for authority to haul certain goods as contract carriers. The Interstate Commerce Commission denied both applications. In denying J-T Transport's application, the ICC stated that " '[t]here is, in effect, a presumption that the services of existing carriers will be adversely affected by a loss of "potential" traffic, even if they may not have handled it before.' " *Id.* at 368 U.S. at 84, quoting *J-T Transport Co., Inc., Extension—Columbus, Ohio*, 79 M.C.C. 695 (1959). The ICC concluded that J-T Transport failed to establish the inability of existing carriers to meet the shipper's special needs and therefore failed to rebut the presumption. The ICC relied on similar reasoning in rejecting Reddish's application.

The U.S. Supreme Court held that the ICC erred in both cases. The Court interpreted the Motor Carrier Act as requiring a weighing of the distinct need of a shipper for contract carriage against the effect on and adequacy of existing services. The purpose of the act, the Court determined, is not to protect the status quo of existing carriers, but to establish a system whereby new contract carriage is allowed if the distinct needs of the shipper indicate its desirability. Finally, the Court delineated the proper procedure for determining whether to grant a permit for contract carrier authority. The Court stated that the applicant must first demonstrate that the proposed service is specialized and tailored to a distinct need, at which point the protestants may present evidence as to their willingness and ability to meet that distinct need. If that is done, the Court noted, the burden shifts to the applicant to show it is better equipped to fulfill the shipper's needs.

Having reviewed the substantive and procedural rules governing applications for contract carrier permits, the Court held that the ICC erred in denying the authority sought. The Court reasoned that the ICC's presumption of an adverse effect on existing carriers and its assignment to the applicants of the burden of proving the inadequacy of existing services

improperly tipped the scale in favor of the protestants.

It is evident that the substantive and procedural standards enunciated in *J-T Transport Co.* closely resemble those governing applications for contract carrier authority under § 75-311. Here, as in that case, the commission improperly tipped the scales in favor of the protestants in denying Northland's application.

The commission concluded that Northland failed to show any reason why Johnson could not lease his equipment to one of the common carriers already in the field. It is not the applicant's burden to establish the inability of existing common carriers to provide the same specialized service it proposes to provide. As noted earlier, Northland's initial burden was merely to show that the proposed services are specialized and tailored to the Association's distinct needs. See *Wells Fargo II, supra.* Northland satisfied this burden with evidence of its willingness to dedicate equipment to the Association account, to station trailers in Wilcox overnight without charging a demurrage fee, and to provide flexibility in the delivery of fertilizer to the first available tank, as well as with evidence regarding its relationship with Johnson and its possession of the necessary equipment. Once such evidence was adduced, the burden was then on the protestants to show they could provide the same specialized service. *Id.* We conclude, therefore, that the commission erred in assigning to Northland the burden of explaining why the protestants could not provide the same services.

Another basis relied upon by the commission was its finding that it is not in the public interest to "siphon away" choice customers from common carriers and that the transportation system is "based upon sound common carriers." Though the commission did not expressly use the word "presumption," as did the ICC in *J-T Transport Co.*, this finding reflects at least a preference for common carriers over contract carriage, inconsistent with Nebraska law. It is well settled that in deciding whether to grant a contract carrier permit, the commission is to weigh the special needs of the shipper desiring the contract carriage against the adequacy of and effect on existing common carrier service. *In re Application of Koch Service*, 228 Neb. 631,

423 N.W.2d 767 (1988); *Wells Fargo II, supra*; *Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp.*, 183 Neb. 229, 159 N.W.2d 310 (1968); *Hagen Truck Lines, Inc. v. Ross*, 174 Neb. 646, 119 N.W.2d 76 (1963). The fact that existing common carriers will lose revenue if the permit is granted is not necessarily dispositive. The proposed service may still be consistent with the public interest if it is needed and the applicant can meet the shipper's distinct needs better than can the protesting common carriers. We conclude that the commission's implicit suggestion that it is *always* inconsistent with the public interest to grant a contract carrier permit when existing common carriers can adequately serve the shipper improperly tipped the scales against Northland in this case.

When the commission decides a case using an improper legal standard, it acts arbitrarily and therefore commits reversible error. See *Dilts Trucking, Inc. v. Peake, Inc.*, 197 Neb. 459, 249 N.W.2d 732 (1977). The decision is therefore reversed and the cause remanded with directions to the commission to issue the contract carrier permit to Northland.

REVERSED AND REMANDED WITH DIRECTIONS.

CLARENCE E. FISHER, APPELLEE, V. CITY OF GRAND ISLAND, NEBRASKA, APPELLANT.

479 N.W.2d 772

Filed February 7, 1992. No. 89-682.

1. **Statutes.** Where one statute refers to another and incorporates it, and the incorporated statute is subsequently repealed, the statute repealed, having been incorporated as part of the one referring to it, remains in force so far as the adopting statute is concerned.
2. **Municipal Corporations: Pleadings: Time: Claims: Appeal and Error.** In an appeal pursuant to Neb. Rev. Stat. § 16-727 (Reissue 1987), the plaintiff is required to file a petition in the district court within 50 days after the denial of the claim.
3. **Municipal Corporations: Stipulations: Pleadings: Good Cause: Dismissal and Nonsuit: Appeal and Error.** Unless the parties stipulate that the cause may be tried on the pleadings below, and in the absence of good cause shown, the

plaintiff in an appeal under Neb. Rev. Stat. § 16-727 (Reissue 1987) who fails to file a petition in the district court shall become nonsuited.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Reversed and remanded with directions to dismiss.

Keith Sinor, Grand Island City Attorney, for appellant.

Daniel M. Placzek, of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The City of Grand Island (City) has appealed from the judgment of the district court finding that the claimant, Clarence E. Fisher, was entitled to receive pension benefits under Neb. Rev. Stat. § 16-1039(1) (Reissue 1987) before reaching the age of 55 years.

The record shows that Fisher began employment by the City as a firefighter on February 1, 1965. On that date, the pension provided for firefighters in cities of the first class having a paid fire department was set out in Neb. Rev. Stat. § 35-201 (Cum. Supp. 1963) (Plan A). Effective August 7, 1965, a second pension plan was established for firefighters in first-class cities by 1965 Neb. Laws, L.B. 415, codified at Neb. Rev. Stat. §§ 35-204 to 35-215 (Cum. Supp. 1965) (Plan B). Both plans allowed firefighters to retire after 21 years of service and to receive pension payments after reaching the age of 55. Under both plans, pension payments were to be at least 50 percent of the salary the retiring firefighter received at the time he retired. Neb. Rev. Stat. § 35-216 (Cum. Supp. 1965) provided:

> Any firemen serving in the paid fire department of a city of the first class on August 7, 1965 may elect whether to become subject to the provisions of sections 35-204 to 35-214 or to remain subject to the provisions of sections 35-201 to 35-203.01. *Such election shall be made in writing not later than thirty days after August 7, 1965 and shall be irrevocable.*

(Emphasis supplied.)

On October 20, 1965, Fisher signed a form electing to be subject to the provisions of Plan B. Fisher testified in district court that Chief Simpson told him to either sign this document "or hit the door."

A third pension system became effective January 1, 1984. See Neb. Rev. Stat. §§ 16-1020 et seq. (Reissue 1987). Section 16-1039(1) provides:

> All cities of the first class having a paid fire department *shall* pension all firefighters . . . who were serving as such on August 7, 1965, *and who did not elect coverage under the provisions of sections 35-204 to 35-215 as they existed prior to January 1, 1984* [Plan B], whenever such firefighters shall have first served in such fire department for the period of twenty-one years and shall elect to retire from active service and go upon the retired list.

(Emphasis supplied.)

On February 1, 1986, Fisher completed 21 years of service and was 47 years old. When he resigned on September 29, 1987, Fisher was being paid a salary of $806.76 every 2 weeks. He had contributed $2,202.62 to the firefighters' pension fund since February 1, 1986.

On December 16, 1987, Fisher submitted a claim for pension benefits from the City and sought reimbursement for all contributions he had made to the pension plan after February 1, 1986, pursuant to §§ 16-1039 and 16-1040. The city council informed Fisher of the denial of his claim in a letter dated March 1, 1988, and Fisher appealed to the district court, pursuant to Neb. Rev. Stat. § 16-727 (Reissue 1987). The City's special appearance and subsequent motion for nonsuit were denied.

After a hearing, the district court entered judgment in favor of Fisher and against the City for pension benefits of $403.38 every 2 weeks from and after September 29, 1987, and entered judgment in favor of Fisher and against the City for the refund of $2,202.62 in pension contributions, plus prejudgment interest. The judgment was based on the court's finding that the election of benefits made by Fisher on October 20, 1965, was involuntary and not made within 30 days after August 7, 1965, and, therefore, was ineffective, invalid, and void. From that

judgment the City has appealed.

Fisher contends that § 16-1039(1) does not require that he be 55 years old before becoming eligible for pension payments. However, because we determine that the district court should have nonsuited Fisher for failure to file a petition in the district court, we do not consider the parties' arguments relating to § 16-1039.

The City contends that Fisher should have been nonsuited for failure to file a petition in the district court. Fisher timely appealed the denial of his claim, pursuant to the procedure set out in Neb. Rev. Stat. §§ 16-727 et seq. (Reissue 1987). Section 16-729 provides that such appeals "shall be entered on the docket of the court, tried, and determined as appeals from *justice courts*."

As we have noted in previous cases, justice courts were abolished in this state by the passage of 1972 Neb. Laws, L.B. 1032. See, e.g., *Estate of Tetherow v. State*, 193 Neb. 150, 226 N.W.2d 116 (1975) (eminent domain proceeding); *Knoefler Honey Farms v. County of Sherman*, 193 Neb. 95, 225 N.W.2d 855 (1975) (appeal from county board of equalization), *overruled on other grounds, United Way of the Midlands v. Douglas County Board of Equalization*, 199 Neb. 323, 259 N.W.2d 270 (1977) (construction of Neb. Rev. Stat. § 77-202.04 (Reissue 1990)); *Singleton v. South Platte Nat. Resources Dist.*, 215 Neb. 504, 339 N.W.2d 751 (1983) (eminent domain proceeding). Section 16-729 clearly incorporates the former statutes relating to appeals from justice courts. In general, "where one statute refers to another and incorporates it, which incorporated statute is subsequently repealed, the statute repealed, having been incorporated as part of the one referring to it, remains in force so far as the adopting statute is concerned." *Estate of Tetherow v. State, supra* at 155, 226 N.W.2d at 119.

As stated above, Neb. Rev. Stat. §§ 27-1301 through 27-1315 (Reissue 1964), pertaining to justice courts, were repealed in 1972. Under § 27-1301, the perfection of an appeal from a justice court vested in the district court "jurisdiction of all the issues presented to the justice of the peace by the pleadings" or, in this case, to the city council by Fisher's notice of claim.

Section 27-1305 provided that "[t]he plaintiff in the court below shall be the plaintiff in the district court; and the parties shall proceed, in all respects, in the same manner as though the action had been originally instituted in such court." Sections 27-1305 and 27-1306 required that new pleadings be filed in the district court unless the parties stipulated to the contrary. See *Traill v. Ostermeier*, 140 Neb. 432, 300 N.W. 375 (1941). Specifically, the plaintiff was required to file a petition "as required in civil cases in the district court" within 50 days from and after the date of the rendition of the judgment in the court below. Finally, § 27-1307 provided that if the plaintiff in the action before the justice of the peace perfected an appeal to the district court but failed to file a petition within 50 days from the date of the judgment of the justice court, "the plaintiff *shall* become nonsuited" absent a showing of good cause. (Emphasis supplied.)

Although the filing of a petition within the 50-day period was not a jurisdictional step, see *Estate of Tetherow v. State, supra*, the parties did not stipulate that the case be tried without new pleadings, and the district court erred in failing to grant the City's motion for nonsuit because Fisher did not file a petition in the district court.

The judgment of the district court is reversed, and the cause is remanded with directions to dismiss Fisher's appeal. We make no determination on the merits concerning the parties' contentions relating to § 16-1039.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

WHITE, J., dissenting.

I dissent for the reasons set forth in my dissent in *School Dist. No. 17 and Westside Comm. Schools v. State*, 210 Neb. 762, 316 N.W.2d 767 (1982).

GRANT, J., joins in this dissent.

SHANAHAN, J., dissenting.

Not since "Lazarus, come forth" has there been such a summons for the dead to associate with the living, for this court raises from Nebraska's dead statutes a procedure, killed by repeal in 1972, which is today used to defeat Clarence Fisher's

action for pension benefits. The deceased procedure concerning an appeal from a justice of the peace court which departed statutory life nearly 20 years ago is, nonetheless, resurrected by judicial invocation of the "Lazarus Rule" expressed by the majority: "In general, 'where one statute refers to another and incorporates it, which incorporated statute is subsequently repealed, the statute repealed, having been incorporated as part of the one referring to it, remains in force so far as the adopting statute is concerned.' "

In Fisher's case, there are two statutes which existed before and during 1972 and, according to the majority, dispose of Fisher's appeal. First, there is Neb. Rev. Stat. § 16-727 (Reissue 1987), which authorizes a claimant's appeal from a city council's disallowance of a claim, an appeal that is commenced and perfected by the claimant's serving a notice of appeal on the city clerk and executing the appropriate surety bond for the appeal. Correspondingly, Neb. Rev. Stat. § 16-728 (Reissue 1987) allows a taxpayer to appeal from allowance of a claim against a city. The second crucial statute, according to the majority, is Neb. Rev. Stat. § 16-729 (Reissue 1987), which states:

> The [city] clerk, upon such appeal being taken, and being paid the proper fees therefor, including fees for filing the same in the district court, shall make out a transcript of the proceedings of the council, mayor, and other officers as relate to the presentation and allowance or disallowance of such claim, and shall file the same with the clerk of the district court within thirty days after the decision allowing or disallowing the claim and paying the proper commencement fees. Such appeal shall be entered on the docket of the court, tried, and determined as appeals from justice courts, and costs shall be awarded thereon in like manner. No appeal bond shall be required of the city by any court in the case of an appeal by the city, and judgment shall be stayed pending such appeal.

The majority applies the Lazarus Rule in view of 1972 Neb. Laws, L.B. 1032, legislation enacted almost 20 years ago for abolition of the justice of the peace courts in Nebraska. In 1972, L.B. 1032 was a massive overhaul of the judicial system of the

State of Nebraska. Motivation for L.B. 1032 was a desire to completely eliminate the state's justice of the peace courts in response to a presidential report which had thoroughly discredited the justice of the peace courts as a part of the judicial system throughout the United States. After amendment of the Nebraska Constitution to eliminate the justice of the peace courts, the Legislature reorganized the judicial system in view of the abolished justice of the peace courts in Nebraska. Resulting legislation comprised 287 separate sections, which were printed on 121 single-spaced pages. During floor debate on L.B. 1032, some of the Legislature acknowledged that the bill was so voluminous and extensive that errors and omissions were inevitable.

In *Leach v. Dept. of Motor Vehicles*, 213 Neb. 103, 327 N.W.2d 615 (1982), this court, recognizing the basic unfairness of the Lazarus Rule, held that the rule applies only when a designated statute was, by reference to that specific and, therefore, identified statute, incorporated into another statute. Therefore, in *Leach*, the court held that statutory incorporation of other legislation which is part of a general scheme of statutory law on a subject fails to restrict the incorporating statute to the material incorporated by reference, or, as the *Leach* court stated: "We believe that when a statute adopts the general law on a particular subject rather than a specific statute, it adopts not only the existing law but later legislation on the subject." 213 Neb. at 107, 327 N.W.2d at 618.

Section 16-729 (Reissue 1987), invoked by the majority as a basis for its decision, provided that appeals such as Fisher's "shall be entered on the docket of the [district] court, tried, and determined as appeals from justice courts, and costs shall be awarded thereon in like manner." Because § 16-729 made no specific reference to any particular statutory provision in the previous act pertaining to appeals from justice of the peace courts, § 16-729 incorporated only the general and composite law pertaining to the former justice of the peace courts and, therefore, adopted all later legislation abolishing justice of the peace courts and, consequently, eliminating the procedure for an appeal from those courts.

In fashioning and utilizing the Lazarus Rule, this court has

continually failed to explain why a generic statutory expression incorporated into another statute remains effectual in the incorporating and subsisting statute after repeal of the statute which was the source for the incorporation. Legal logic dictates that reference to a general subject in the incorporated statute also vanishes when the incorporated statute disappears by repeal. If general reference to appeals under the repealed justice of the peace act were deleted, as common sense requires, § 16-729 (Reissue 1987) would provide in relevant part: "Such appeal shall be entered on the docket of the [district] court, tried, and determined ~~as appeals from justice courts,~~ and costs shall be awarded[.] ~~thereon in like manner.~~" (Deletion indicated by lined-out language.) Fortunately for the future, it is precisely that deletion which an awakened Nebraska Legislature achieved by L.B. 1, introduced and passed during the 1991 session, legislation effective as of September 6, 1991, for amendment of § 16-729 in pertinent part regarding an appeal from a city council's action on a claim: "*Such appeal shall be entered on the docket of the court, tried, and determined and costs awarded thereon in the manner provided in sections 25-1901 to 25-1937.*" (Emphasis supplied.) § 16-729 (Supp. 1991).

Bearing in mind that Fisher's appeal to the district court was perfected on March 2, 1988, and that the district court's judgment awarding pension benefits to Fisher was entered on April 11, 1989, § 16-729 (Supp. 1991) had been effective for 3 months before this court heard the present appeal on December 6, 1991. Therefore, when this court heard the appeal in Fisher's case and, consequently, at the time of its decision in this appeal, § 16-729 no longer referred to the procedure applicable to an appeal from a decision in a justice of the peace court; rather, § 16-729, as amended in 1991, directs that appeals such as the Fisher case are governed by Neb. Rev. Stat. §§ 25-1901 to 25-1937 (Reissue 1989 & Supp. 1991), none of which authorize the Draconian action taken by this court to defeat Fisher's claim and deprive him of pension benefits recognized in the district court's judgment against the city. In *Lindgren v. School Dist. of Bridgeport*, 170 Neb. 279, 283, 102 N.W.2d 599, 604 (1960), which involved a question of timeliness for a bill of exceptions

on appeal, this court stated: " 'A litigant has no vested right in the mode of procedure, and an action commenced before an enactment changing the procedure in the court where the action is pending, after the enactment becomes effective, is properly triable under the changed method.' " (Quoting from *Lovelace v. Boatsman*, 113 Neb. 145, 202 N.W. 418 (1925).) See, also, *Hancock v. State ex rel. Real Estate Comm.*, 213 Neb. 807, 331 N.W.2d 526 (1983) (standard of review, as a procedural matter, is governed by statutes in effect when the appeal is heard); *Happy Hour, Inc. v. Nebraska Liquor Control Commission*, 186 Neb. 533, 184 N.W.2d 630 (1971); *Lovelace v. Boatsman*, *supra*.

Section § 25-1937 (Supp. 1991), mentioned in the 1991 amendment to § 16-729, states:

> When the Legislature enacts a law providing for an appeal without providing the procedure therefor, the procedure for appeal to the district court shall be the same as for appeals from the county court to the district court in civil actions. Trial in the district court shall be de novo upon the issues made up by the pleadings in district court. Appeals from the district court to the Court of Appeals shall be taken in the same manner provided by law for appeals from the district court in civil cases. This section shall not apply if the Administrative Procedure Act otherwise provides.

Use of § 25-1937, even before the 1991 amendment of § 16-729, accommodates the commonsense expectations of courts and lawyers who examined Nebraska's legislation to ascertain a procedure for an appeal in situations such as Fisher's, a procedure which allowed an orderly progression of appeals concerning a city council's action on a claim against the city. It is apparently that rational process which Fisher's lawyer actually pursued. In Fisher's case, however, experience and ordinary expectations betrayed the practitioner.

As matters now stand, the Lazarus Rule, utilized by the majority, arguably amounts to a denial of due process required by the Constitutions of the United States and Nebraska because

> due process requires the government to give notice to individuals of government actions which would deprive

> those individuals of a constitutionally protected life, liberty, or property interest. When individual interests are adversely affected by legislative action, there is no notice issue, because publication of a statute is *normally* considered to put all individuals on notice of a change in the law of a jurisdiction.

(Emphasis supplied.) J. Nowak, R. Rotunda, & J. Young, Constitutional Law § 13.8 at 489 (3d ed. 1986).

The situation in Fisher's case is decidedly abnormal in view of reference to statutes which have been repealed for nearly 20 years and which exist only in dust-covered books in a dark, musty backroom of a law library, conducive to raising mushrooms, or which have been placed beneath an uneven table leg to stop wobbling.

However, since this court wishes to rely on the Lazarus Rule and act as a magisterial mortician, caring for a body of law long since demised, it is noteworthy that § 16-729 (Reissue 1987) is inapplicable to preclude Fisher's action, since § 16-729 supplies directives to a city clerk and the district court which hears an appeal. Regarding appeals brought under § 16-727 (claimant's appeal) or § 16-728 (taxpayer's appeal), § 16-729 directs that a city clerk, within 30 days after a city council's decision on a claim, must provide the district court with a transcript of the proceeding in question. Thereafter, the district court resolves the appeal. Also, § 16-729 exempts a city from an appeal bond. However, the all-important and pivotal point in Fisher's case is that while § 16-729 governs conduct of a city clerk and the district court, § 16-729 imposes no obligation on an appellant.

Nevertheless, Fisher's written claim, contained in the transcript filed with the district court, clearly expressed the nature of his claim for pension benefits and the relief sought. By supplying that information to the court, Fisher's claim qualified as a petition. See *In re Interest of L.D. et al.*, 224 Neb. 249, 258, 398 N.W.2d 91, 98 (1986): "A petition, as a pleading, is a plaintiff's or claimant's written statement of fact which invokes the jurisdiction of a court, sets out a cause of action, and seeks relief." See, also, *Paxton v. State*, 59 Neb. 460, 81 N.W. 383 (1899). " 'Proper pleading requires a petition to state in logical and legal form the facts which constitute the

plaintiff's cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute.' " *League v. Vanice*, 221 Neb. 34, 43, 374 N.W.2d 849, 855 (1985). Accord, *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987); *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984); *Russell v. First York Sav. Co.*, 218 Neb. 112, 352 N.W.2d 871 (1984).

Moreover, even in an appeal from a justice of the peace court, absence of a petition on appeal, under the now defunct procedure for an appeal from a justice of the peace court, did not automatically authorize nonsuit or dismissal of an appellant's action in the district court; rather, an appellant was permitted to show "good cause" for the absence of a petition filed on appeal. See Neb. Rev. Stat. § 27-1307 (Reissue 1964) (repealed 1972). See, also, *City of Seward v. Gruntorad*, 158 Neb. 143, 62 N.W.2d 537 (1954) (pursuant to § 27-1307, a district court must determine whether good cause has been shown for the absence of a petition on appeal); *In re Estate of Meyers*, 152 Neb. 165, 40 N.W.2d 536 (1950). In any event, if the procedure for an appeal from a justice of the peace court were applicable, as espoused by the majority, Fisher is entitled to the opportunity for showing good cause regarding an absent petition, assuming that there is such an absence. Yet, the majority's decision deprives Fisher of the opportunity to show good cause, a right granted under the very law used by the majority to deny Fisher's pension benefits.

Because L.B. 1032 in 1972 repealed the statutory provisions for an appeal from the former justice of the peace courts and resulted in an absence of a procedure for an appeal from a city council's disallowance of a claim, and, moreover, since the 1991 amendment of § 16-729 has removed reference to an extinct procedure relative to justice of the peace courts, the procedure set forth in § 25-1937 governed Fisher's appeal. Under the circumstances, the City of Grand Island was not entitled to dismissal of Fisher's action in the district court. For that reason, the district court's judgment should have been affirmed.

Consequently, while the Legislature has commendably removed the living dead from § 16-729, nevertheless, as far as the dead justice of the peace procedure is concerned, its ghost

walks in this court's decisions.

GRANT, J., joins in this dissent.

MICHAEL JAY WYMORE, SR., APPELLANT, V. KATHRYN JULIA WYMORE, APPELLEE.

479 N.W.2d 779

Filed February 7, 1992. No. 89-857.

1. **Divorce: Time: Jurisdiction.** The 60-day waiting period before a divorce suit can be heard, tried, or decided is a jurisdictional requirement.
2. _____: _____: _____. For purposes of measuring the 60-day waiting period in a divorce suit, the rule is to exclude the first day and include the whole of the last day in said period.
3. **Divorce: Evidence: Trial: Time.** A divorce decree based upon evidence adduced at a null and void hearing is itself a nullity, even if it is entered after expiration of the waiting period.
4. **Actions: Jurisdiction.** Either party to an action may raise the jurisdictional issue at any time.
5. **Courts: Judgments: Appeal and Error.** When the record indicates that the decision of the trial court is correct, although for reasons different from those relied upon below, an appellate court will affirm the trial court's decision.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

S. Caporale for appellant.

Rita L. Melgares, of Qualley & Associates, and, on brief, Joseph Lopez Wilson for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

This appeal involves a dissolution of marriage proceeding in the Douglas County District Court. On January 27, 1989, the petitioner-appellant, Michael Jay Wymore, Sr., filed a petition for dissolution of his marriage to the respondent-appellee, Kathryn Julia Wymore. The appellee filed a voluntary appearance on March 13, waiving service of process and

reserving her statutory time for filing a responsive pleading. Thereafter, the appellee failed to answer or otherwise plead. The trial court held a hearing on May 10 and the next day entered a default decree dissolving the marriage, awarding custody of the parties' only child to the appellee, and dividing the marital property.

Though the May 11 decree awarded custody to the appellee, it also included a finding that the best interests of the child favored awarding custody to the appellant. In an apparent effort to rectify this inconsistency, the trial court, on May 19, issued an "amended decree" identical in every respect to the May 11 decree except that it awarded custody to the appellant rather than the appellee and changed the finding regarding the place of marriage from "Natchez Adams, Missouri" to "Natchez, Adams County, Mississippi."

The appellee filed a motion on July 5 to set aside the aforementioned decrees. In support of her motion, she alleged that neither party had resided in Nebraska for at least 1 year prior to the filing of the petition, as required by Neb. Rev. Stat. § 42-349 (Reissue 1988), and that she signed the voluntary appearance based on promises by the appellant that he would not seek custody of the child. After an evidentiary hearing was held on August 10, the court granted the appellee's motion, finding that the parties were domiciled in Texas during May 1988. The court also opined that "perhaps the decree . . . was obtained improperly." The appellant perfected an appeal to this court.

On appeal, the appellant argues that the trial court (1) abused its discretion in vacating the decrees, (2) erred in finding that he was domiciled in Texas, and (3) erred in finding that he obtained the default decree by fraud. We do not reach these assignments of error, however. Instead, we sustain the decision vacating the decrees, based upon the trial court's lack of jurisdiction to enter them.

Neb. Rev. Stat. § 42-363 (Reissue 1988) provides in part that "[n]o suit for divorce shall be heard or tried until sixty days after perfection of service of process, at which time the suit may be heard or tried and a decree may be entered." In *Garrett v. State*, 118 Neb. 373, 224 N.W. 860 (1929), this court held that

the waiting period for obtaining a divorce is a jurisdictional requirement. See Comp. Stat. § 42-305 (1929) ("no suit for divorce shall be heard or tried for a period of six (6) months after service has been had or perfected") (repealed by 1933 Neb. Laws, ch. 50, § 2, p. 267). In that case, the wife perfected service of summons on October 19, 1926, and the divorce hearing was held on April 19, 1927. The trial court filed its decree 2 days later. On appeal, this court held that when a certain period of time must elapse before a court is vested with the power to act, "the rule is to exclude the first day and include the whole of the last in said period." *Garrett, supra* at 376, 224 N.W. at 861. Applying this rule, the court concluded that the 6-month period did not end until midnight on April 19, 1927, and thus the trial court's action in hearing, trying, and deciding the case on that date was without jurisdiction and a nullity.

Here, the 60-day period prescribed in § 42-363 began to run on March 13, 1989, the date the appellee filed her voluntary appearance. See Neb. Rev. Stat. § 25-516.01(1) (Reissue 1989) (the voluntary appearance of a party is equivalent to service of process). Under the rule established in *Garrett*, the trial court lacked jurisdiction to hear the case or enter a decree until midnight on May 12, 1989. Therefore, the May 10 hearing and the May 11 decree are null and void. The only remaining question is whether the May 19 decree is invalid as well.

Section 42-363 prohibits *hearing* the case within the prescribed period as well as entering the decree. Logic dictates that a divorce decree based upon evidence adduced at a null and void hearing is itself a nullity, even if it is entered after expiration of the waiting period. See, *Garrett, supra*; *Feuquay v. Industrial Commission*, 107 Colo. 336, 111 P.2d 901 (1941); *Pavell v. Pavell*, 168 S.W.2d 288 (Tex. Civ. App. 1942) (Combs, J., concurring).

The record in this case reveals that the May 19 decree is based upon findings made at the May 10 hearing. Though the May 19 decree states that a hearing was held and evidence was adduced on that date, the trial court's journal entries for May 10 and May 19 clearly reveal that no such hearing occurred. This conclusion is bolstered by the appellant's characterization of the May 19 decree as an "order nunc pro tunc" intended merely

to correct the original decree to accurately reflect the court's findings. We conclude that the trial court relied on the May 10 hearing in issuing its May 19 decree and therefore the latter is a nullity.

The appellee first questioned the trial court's power to enter the decrees during oral argument before this court. However, it is settled that either party may raise the jurisdictional issue at any time. *Anthony v. Pre-Fab Transit Co., ante* p. 404, 476 N.W.2d 559 (1991). Moreover, when the record indicates that the decision of the trial court is correct, although for reasons different from those relied upon below, an appellate court will affirm the trial court's decision. See *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990). Thus, we affirm the trial court's decision vacating the May 11 and May 19 decrees, on the basis that the trial court lacked jurisdiction to enter them.

AFFIRMED.

CAPORALE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. RUSSELL DETHLEFS, ALSO KNOWN AS RUSSEL DETHLEFS, APPELLANT.

479 N.W.2d 780

Filed February 7, 1992. No. 90-1083.

Sentences. The most practical rationale underlying allocution is that it provides an opportunity for the offender and defense counsel to contest any disputed factual basis for the sentence.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed.

John S. Mingus, of Mingus & Mingus, for appellant.

Susan M. Koenig, Deputy Hall County Attorney, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

Russell Dethlefs appeals his sentences after pleading guilty to one count of distribution of a controlled substance (cocaine), a Class II felony, punishable by 1 to 50 years' imprisonment, and one count of distribution of a controlled substance (marijuana), a Class III felony, punishable by 1 to 20 years' imprisonment, a $25,000 fine, or both. Dethlefs was sentenced to concurrent terms of 18 to 24 months' imprisonment on the first count and 1 year's imprisonment on the second count.

Dethlefs alleges, in summary, that the district court erred in (1) not soliciting a proper allocution, i.e., the court did not specifically ask Dethlefs prior to sentencing whether he had anything to say as to why judgment should not be passed upon him; (2) considering a presentence investigation report that stated Dethlefs was not a good candidate for probation because probation would depreciate the seriousness of the offense and that did not have or take into consideration a psychiatric evaluation of Dethlefs; and (3) failing to grant probation and administering excessive sentences.

As the basis for his appeal, appellant first alleges a judicial violation of Neb. Rev. Stat. § 29-2201 (Reissue 1989), which requires that prior to sentencing, defendant "be informed by the court of the verdict . . . and asked whether he has anything to say why judgment should not be passed against him."

The record reflects that the court received Dethlefs' guilty pleas and the following exchange transpired:

> THE COURT: Mr. Dethlefs, this is your opportunity to say anything to me, sir, that you'd like to say. I'd like to hear from you.
>
> . . . .
>
> MR. DETHLEFS: — I ask that you recognize that I haven't been in trouble lately for — since before the arrest, and I'd like to be able to work and support my family.

As we have previously stated, " ' "Today the most practical rationale underlying allocution is that it provides an opportunity for the offender and defense counsel to contest any disputed factual basis for the sentence . . . ." ' " *State v. Bunner*, 234 Neb. 879, 890, 453 N.W.2d 97, 103 (1990), quoting A. Campbell, Law of Sentencing § 72 (1978). We find that an

opportunity was afforded the appellant to offer comments why judgment should not be passed upon him. The judge complied with the intent of the statute, and the statute does not require that the specific words set out in the statute be used. The assignment is without merit.

Secondly, appellant alleges that the court erred both in considering a presentence investigation report that stated appellant was not a good candidate for probation because probation would depreciate the seriousness of the offense and in failing to consider a psychiatric evaluation of the appellant. Both of these contentions are without merit.

As a matter of law, no defendant, once convicted, is entitled to be placed on probation. *State v. Johnson*, 209 Neb. 308, 307 N.W.2d 525 (1981). Such a decision is a matter of discretion for the trial court, and unless the defendant demonstrates an abuse of discretion, this court will not overturn a sentence. See *State v. Swails*, 195 Neb. 406, 238 N.W.2d 246 (1976). Despite the fact that these offenses resulted in the appellant's first felony convictions, we find no abuse of discretion in the court's failure to grant probation.

Dethlefs asserts that according to Neb. Rev. Stat. § 29-2261(5) (Reissue 1989), the court "may order the offender to submit to psychiatric observation and examination" and that "may" should be interpreted as "must," or "shall," imposing a statutory duty upon the trial court. While we are cognizant that in many instances the assertion is true, closer examination of the statute reveals that, to paraphrase, only where psychiatric observation and examination have been conducted *shall* such a report be submitted to the court. It is evident to us that the Legislature clearly intended a distinction to be drawn when it used both "may" and "shall" in the same statutory provision. Dethlefs has no inherent right to a psychiatric evaluation, and we find no abuse of discretion in the court's failure to order a psychiatric evaluation.

Finally, appellant asserts that the sentences imposed were excessive. "[T]he imposition of a sentence within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion." *State v. Morley, ante* p. 141, 156, 474 N.W.2d 660, 670 (1991).

Dethlefs was sentenced to terms of 18 to 24 months' imprisonment on the first count and 1 year on the second count. The appellant's sentences are well within the statutory limits, and we find no abuse of discretion. The judgment below is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RANDY E. WEGENER, APPELLANT.

479 N.W.2d 783

Filed February 7, 1992. No. 90-1115.

1. **Police Officers and Sheriffs: Arrests: Probable Cause.** The existence of probable cause justifying a warrantless arrest is tested by the collective information possessed by all the officers engaged in a common investigation.
2. _____: _____: _____. An officer who does not have personal knowledge of any of the facts establishing probable cause for an arrest may nevertheless make the arrest if the arresting officer is merely carrying out directions of another officer who does have probable cause.
3. **Arrests: Evidence.** Although the diminishment over time and the ultimate elimination of alcohol in the bloodstream are not willful or intentional, this metabolic process constitutes the destruction of evidence such as to provide a basis for effecting a warrantless arrest under the provisions of Neb. Rev. Stat. § 29-404.02 (Reissue 1989).
4. **Criminal Law: Motions to Dismiss: Evidence.** On a criminal defendant's motion to dismiss for insufficient evidence, the State is entitled to have all its relevant evidence accepted as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor.
5. **Criminal Law: Directed Verdict.** In a criminal case, a trial court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged, or the evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained.

Appeal from the District Court for Thayer County, ORVILLE L. COADY, Judge, on appeal thereto from the County Court for Thayer County, DANIEL BRYAN, JR., Judge. Judgment of District Court affirmed.

Joseph H. Murray, of Germer, Murray & Johnson, for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Defendant, Randy E. Wegener, asserts the district court erred in affirming his county court conviction of driving while under the influence of alcohol, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1988). More specifically, he asserts that the district court erred in failing to find the county court erred on the record by (1) admitting into evidence the results of a test of his blood and (2) failing to dismiss the case at the close of the plaintiff-appellee State's case. We affirm.

Shortly before midnight on October 8, 1989, Officer David Lee of the Thayer County Sheriff's Department was dispatched to the scene of a one-vehicle accident. He there found a station wagon which had collided with a bridge guardrail. The wagon was stopped on the shoulder of the road, and Wegener, bleeding from his nose and from a cut over his left eye, was standing beside the wagon.

Lee detected a strong odor of alcohol on Wegener's breath and thus suspected, even before the two engaged in conversation, that Wegener had been drinking. Upon inquiry, Wegener said he had been driving, had been alone in the wagon, and had been drinking. Although Lee had difficulty understanding Wegener, Lee administered no field sobriety tests, as he could not be certain the difficulty was not the result of Wegener's injuries. Thus, Wegener was transported by rescue unit to a hospital while Lee remained at the scene to complete his investigation.

In the course of his work, Lee discovered some beer bottles in the wagon. Three were full, one was empty, and the others had been shattered. Lee could not tell whether the shattered bottles had been full or empty when they broke, but three of the other bottles were still cold.

The presence of the beer, combined with the other information he had acquired, led Lee to believe that Wegener had been driving while under the influence of alcohol. Lee thus

radioed the dispatcher to report a possible drunk driver, and requested that an officer go to the hospital to which Wegener was being transported and obtain a blood sample from him.

Deputy Kenneth Cool then went to the hospital and awaited Wegener's arrival. After Wegener had been treated for his injuries, Cool placed Wegener under arrest. Cool then read to Wegener an implied consent form which is not contained in the record. Wegener signed the document, and Cool thereafter, approximately an hour and a half after the accident had taken place, caused a sample of Wegener's blood to be drawn. (Neb. Rev. Stat. § 39-669.08 (Reissue 1988) provides that one arrested for acts allegedly committed while driving under the influence of alcohol may be required to submit to a blood test.)

Cool, observing that some masking odors may have been present in the room, detected no odor of alcohol when standing approximately 4 to 5 feet from Wegener while reading the implied consent form; he did, however, smell alcohol on Wegener's breath when Wegener was placed in the squad car after the blood sample had been drawn. As Cool was acting on the basis of a radio message, he did not closely observe Wegener before placing him under arrest. Nor did Cool engage Wegener in any casual conversation, and nothing was said as to Wegener's drinking or driving. Cool did notice, however, that Wegener was coherent and in some pain and that he joked with the nurses.

Prior to trial, Wegener filed a motion to suppress the blood test results on the grounds that there was no probable cause to either arrest him or require him to provide a blood sample and that any statements he made were obtained unconstitutionally. Following a hearing, at which the above evidence was presented, the motion was overruled.

In addition to the foregoing evidence, the jury heard that the accident occurred on a flat stretch of highway, the guardrail Wegener struck was 5 1/2 feet from the white shoulder line of the road, Lee found no skid marks, and there was severe damage to the front of the wagon on the passenger side.

Further, a member of the rescue unit team testified that he did not detect any alcohol odor while riding with Wegener, but thought he had detected such an odor when bandaging him.

This worker also stated that while at the accident scene, Wegener "talked probably a little louder than normal." Another member of the rescue unit also characterized Wegener as loud and rambling, but admitted he had not known Wegener previously and thus was not familiar with Wegener's normal speech.

Wegener objected to the receipt into evidence of the blood test results by renewing his earlier motion to suppress that evidence. After the objection was overruled, a laboratory technician testified that Wegener's blood alcohol content was .182 gram per one hundred milliliters.

At the close of the State's case, Wegener moved for dismissal on the ground that the evidence was insufficient to support a conviction. Upon the overruling of that motion, Wegener rested without adducing any evidence.

With respect to the first assignment of error, Wegener asserts the warrantless arrest was unconstitutional because Cool, as the arresting officer, had made no independent probable cause determination.

The existence of probable cause justifying a warrantless arrest, however, is tested by the collective information possessed by all the officers engaged in a common investigation. See, *State v. Halligan*, 222 Neb. 866, 387 N.W.2d 698 (1986), quoting *State v. Klingelhoefer*, 222 Neb. 219, 382 N.W.2d 366 (1986); *State v. Nowicki*, 209 Neb. 640, 309 N.W.2d 89 (1981). See, also, *U.S. v. Bertrand*, 926 F.2d 838 (9th Cir. 1991); *Dykhouse v. Mugge*, 735 F. Supp. 1377 (C.D. Ill. 1990); *U.S. v. Hoyos*, 892 F.2d 1387 (9th Cir. 1989); *United States v. Webster*, 750 F.2d 307 (5th Cir. 1984); *United States v. Bernard*, 607 F.2d 1257 (9th Cir. 1979); *Poindexter v. Wolff*, 403 F. Supp. 723 (D. Neb. 1975) (it is the collective knowledge of the police force and not just the personal knowledge of the arresting officers that is to be used to test the sufficiency of probable cause).

Under this "collective knowledge" doctrine, an officer who does not have personal knowledge of any of the facts establishing probable cause for the arrest may nevertheless make the arrest if the arresting officer is merely carrying out directions of another officer who does have probable cause.

Charles v. Smith, 894 F.2d 718 (5th Cir. 1990).

Therefore, the question is whether the information available to the sheriff's department at the time of the arrest was such that a reasonably prudent person would believe that Wegener had driven while under the influence of alcohol. The defendant in *State v. Halligan, supra*, had been involved in a one-vehicle accident and was transported to the hospital. His breath smelled of alcohol, there were three full cans of beer in the vehicle, his eyes were bloodshot, and his speech was slow and slurred, but he was responsive to questions. A nurse testified that the defendant admitted he had had one too many beers, and there was testimony that he had behaved in a sexually aggressive manner toward the nurse. This court found such evidence not only sufficient to establish probable cause to arrest without a warrant, but also sufficient to convict.

Here, Lee, who made the request that the blood sample be taken, knew that Wegener had been drinking and had driven several feet off a straight stretch of highway and collided with a guardrail. Lee also knew that Wegener produced a strong odor of alcohol and that his speech seemed hampered. Moreover, at least one empty and three full bottles of beer were on the floor on the passenger side in the vehicle. Under these circumstances, only an imprudent person could conclude other than that Wegener probably had been driving while under the influence of alcohol.

Neb. Rev. Stat. § 29-404.02 (Reissue 1989) authorizes peace officers such as Lee and Cool to make a warrantless arrest when there is reasonable cause to believe that the person to be arrested has committed a misdemeanor and where

> the officer has reasonable cause to believe that such person either (a) will not be apprehended unless immediately arrested, (b) may cause injury to himself or herself or others or damage to property unless immediately arrested, (c) may destroy or conceal evidence of the commission of such misdemeanor, or (d) has committed a misdemeanor in the presence of the officer . . . .

Wegener alleges that as none of these criteria were present in this case, Cool was not authorized to make a warrantless arrest;

therefore, the blood test was obtained as the result of an illegal arrest.

However, Lee testified he was aware of the body's ability to metabolize alcohol. Although the diminishment over time and the ultimate elimination of alcohol in the bloodstream are not willful or intentional, this metabolic process nonetheless constitutes the destruction of evidence such as to provide a basis for effecting a warrantless arrest under the provisions of § 29-404.02. As noted in *State v. Marcotte*, 233 Neb. 533, 539, 446 N.W.2d 228, 233 (1989), citing *State v. Bishop*, 224 Neb. 522, 399 N.W.2d 271 (1987), "because evidence of a defendant's intoxication would be lost if the police had to wait to obtain a search warrant, a warrantless arrest is valid." See, also, *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) (warrantless seizure of a blood sample from a suspected drunk driver appropriate because delay attendant to obtaining a warrant threatened the destruction of evidence due to the diminishment of the alcohol in the blood).

Wegener contends that his case is distinguishable from *Marcotte* because Lee and Cool testified that they did not feel the immediate arrest of Wegener was necessary to prevent the destruction or concealing of evidence. However, the jury could have found this testimony related to the intentional manipulation of the evidence, such as Wegener removing his vehicle or disposing of the beer bottles found at the scene.

In his second and last assignment of error, Wegener claims it was error to overrule his motion to dismiss. On a criminal defendant's motion to dismiss for insufficient evidence, the State is entitled to have all its relevant evidence accepted as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor. *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989). In a criminal case, a trial court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged, or the evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained. *State v. Morley, ante* p. 141, 474 N.W.2d 660 (1991).

The evidence outlined earlier is more than enough to make

the issue of whether Wegener drove while under the influence of alcohol one of fact to be resolved by the jury.

There being no merit to either of Wegener's assignments of error, the judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF B.B., K.M., J.M., AND A.M., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. S.M., APPELLANT.

479 N.W.2d 787

Filed February 7, 1992. Nos. 91-137, 91-138, 91-139, 91-140.

1. **Parental Rights: Appeal and Error.** Our review in termination of parental rights cases is de novo on the record, and we are required to reach a conclusion independent of the trial court's findings; however, where the evidence is conflicting, we consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Parental Rights: Proof.** A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent with the child is an independent reason to justify termination of parental rights.
3. **Parental Rights.** When a parent is unable or unwilling to rehabilitate herself within a reasonable period of time, the best interests of the child require termination of parental rights.

Appeal from the County Court for York County: CURTIS H. EVANS, Judge. Affirmed.

Kevin V. Schlender for appellant.

Charles W. Campbell, York County Attorney, for appellee.

George E. Brugh, guardian ad litem.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

These four cases are appeals from the January 24, 1991, orders terminating the parental rights of the appellant and her

husband to the following children: B.B., born January 16, 1982; K.M., born September 8, 1983; J.M., born January 27, 1985; and A.M., born June 27, 1986. The cases have been consolidated for briefing and argument in this court.

Although the mother of the children, her husband, and the intervenor, B.T., filed separate notices of appeal, only the mother, the county attorney, and the guardian ad litem filed briefs in this court.

B.B., K.M., and A.M. came to the attention of the Nebraska Department of Social Services (DSS) in November 1987, when the appellant took them into the York DSS office, alleging abuse of the children by her husband. In February 1988, those three children were adjudicated to be within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) because they were in a situation dangerous to life or limb. J.M. was brought to the court's attention when the appellant was evicted from her residence. On March 31, 1988, J.M. was adjudicated to be within the meaning of § 43-247(3)(a) in that he was homeless or destitute.

The children remained in the physical possession of the appellant and her husband until September 1989, when they were placed in foster homes because of concerns about the parents moving and the disruption it would cause the children. All four children have been in the same foster home since March 12, 1990, and have done very well with that family. The foster parents have expressed their desire to adopt all of the children.

The court entered orders, from time to time, directing the parents to participate in counseling designed to stabilize their marriage and teach them appropriate parenting skills and to eliminate the physical and sexual abuse to which the children had been exposed. The court also ordered the parents to provide adequate food, shelter, clothing, and medical care for the children; to give the children adequate supervision in the home; to maintain the home in a clean and safe condition; to not allow B.T. to remain in their home, stay in their home at any time, have access to their home, or have access to any of their children; and to cooperate with DSS personnel.

Supplemental petitions to terminate the parental rights of the

appellant and her husband were filed on September 24, 1990.

Hearings on the supplemental petitions to terminate parental rights were held on January 3 and 4, 1991. On January 24, 1991, the court terminated the parental rights of the appellant and her husband to all four children.

The mother assigned as error the court's findings that the State established by clear and convincing evidence that the appellant substantially, continuously, and repeatedly neglected the minors and refused to give them necessary parental care and protection; that the appellant failed, after reasonable efforts under the direction of the court, to correct conditions leading to the determination made by the court that the minors were children as defined by § 43-247(3)(a); and that it was in the best interests of the minors to terminate the appellant's parental rights to them.

We review the records in these cases de novo and are required to reach a conclusion independent of the trial court's findings; however, where the evidence is conflicting, we consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of B.M., ante* p. 292, 475 N.W.2d 909 (1991).

Throughout their involvement with DSS, the parents' continued marital status has been in question. Attempts to improve the marital situation were met with resistance by the parents, who exhibited a general lack of compliance with recommendations given to them by the therapists who saw them. The parents were inconsistent in making and keeping appointments with their various counselors.

The appellant expressed fear of her husband on numerous occasions. However, when she was offered protection, she elected to remain with her husband.

Assistance from family support workers and a caseworker was met with resistance. On several occasions the family home was found to be unclean and unsafe for the children. Medical attention was not sought for the children except in extreme emergencies. In extremely cold weather, the children were sent to school in inappropriate clothing.

After the children were placed in foster care, the parents lived in an efficiency apartment which was too small for the family.

The parents later located a trailer, which on an unannounced visit was found to be very unclean.

The children's behavior is consistent with that of children who have been physically and sexually abused. They reported to their counselors that they had been beaten by their parents.

B.B. was forced to watch his parents engage in sexual relations, and he told a counselor that he had seen his parents watch pornographic movies. J.M. also reported that he had seen his parents having sex. The appellant admitted that she and her husband had had sex in front of the children.

K.M. reported that she had been sexually molested. The appellant and her husband were not supportive of K.M.'s participation in therapy while she was in their possession. Therapy with one counselor for K.M.'s sexual abuse was discontinued by the parents.

At times, K.M. accused her father of the abuse, and at other times she accused B.T. Apparently, depending on whether the appellant was living with B.T. or her husband, at some times K.M. was told to say that the abuser was B.T., and at other times she was told to say that she had been abused by her father.

Both the appellant and B.T. claim that B.T. is the biological father of J.M. and A.M. Although the appellant was ordered to disassociate herself from B.T., she continued her relationship with him during the times when she was separated from her husband and also while she was living with her husband.

A mental health therapist testified to having concerns regarding the appellant's inability to protect her children from abuse. It was also the opinion of several counselors that the appellant was incapable of parenting her children. At one time, the appellant admitted to a psychologist that she was not capable of parenting her children.

All of the children expressed a desire not to visit with their parents. They would get sick during and after visits with their parents.

The appellant contends the trial court erred in finding she had substantially, continuously, and repeatedly neglected the minors and refused to give them necessary parental care and protection, because she had participated in counseling, attended parenting classes, and tried to implement the

techniques she learned. She claims the primary problem in the case was the abuse that the children were subjected to by their father and his refusal to change his parenting style.

The evidence shows that the appellant failed to protect her children from her husband and B.T., both of whom she had reported as having physically and/or sexually abused her children. Although the appellant repeatedly claimed that her husband was responsible for abusing her children, she continued to reside with him at various intervals, so as to subject herself and her children to that abusive environment. Likewise, she claimed at various times that B.T. was abusive, and yet even though she was ordered by the court to have no contact with him, she continued to reside with him whenever she was separated from her husband. At the time of the termination hearing, the appellant testified that she wanted the court to allow her children to bond with her, her husband, and B.T.

A psychologist who had treated the appellant noted that she lacked insight as to the trauma the children had suffered as a result of the abuse and that she lacked the motivation to protect them from further abuse. Because of her lack of insight and ambivalence regarding her husband's behavior, the appellant was unable to place the needs of her children above her own wants and needs. The appellant's indecisiveness regarding her relationships with her husband and B.T. seriously jeopardized the health and well-being of her children.

Because of the appellant's lack of insight and her lack of motivation to place the interests of her children ahead of her own, the court did not err in finding there was clear and convincing evidence to establish that the appellant had substantially, continuously, and repeatedly neglected her children and had refused to give them the necessary parental care and protection.

The appellant argues that the trial court was incorrect in finding she had failed to comply with court orders designed to correct the conditions which had led to the initial adjudication of the children, because she had attempted to comply with the court orders and DSS had failed to follow through with the recommendations of the psychologists. The record does not

support this contention.

B.B., K.M., and A.M. were adjudicated based upon the abuse that they had suffered from their father and the mother's failure to protect them from this abuse. J.M. was adjudicated when he was found to be in a situation in which the appellant lacked the ability to provide for his fundamental needs of shelter, food, and medical care.

To correct this situation, the court made various orders directing the parents to participate in counseling designed to stabilize their marriage, teach them appropriate parenting techniques, and eliminate the abuse that was a constant in their lives. The parents were also ordered to preclude contact with B.T.; to maintain safe, clean, and adequate housing; and to cooperate with DSS.

Intensive counseling and a variety of services were provided to the appellant to implement the court's plan for rehabilitation. Because of the appellant's various moves from community to community, the services being provided to the family were interrupted, which prevented the children from receiving necessary therapy, including any family therapy recommended by the various professionals.

During the entire course of the court's involvement with the case, the appellant lived with either her husband or B.T. At different times she accused both her husband and B.T. of abusing her children. The appellant has shown by her actions and her testimony that she lacks the insight and motivation to make the necessary changes to put the needs of her children ahead of her own.

" 'A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent with the child is an independent reason to justify termination of parental rights . . . .' " *In re Interest of B.M., ante* p. 292, 298-99, 475 N.W.2d 909, 913 (1991).

While the appellant may have complied with some parts of the court-ordered plans for rehabilitation, she failed to correct the conditions which led to the initial adjudication of the children. " 'The fact of participation in certain elements of the court-ordered plan of reunification does not necessarily prevent the court from entering an order of termination where

the parent has not made satisfactory progress toward reunification.' " *In re Interest of B.M., supra* at 300, 475 N.W.2d at 914, quoting *In re Interest of A.M.Y., F.E.Y., and K.C.Y.*, 237 Neb. 414, 466 N.W.2d 93 (1991).

Finally, the appellant argues that the court erred by finding there was clear and convincing evidence to establish that it was in the best interests of the children to terminate her parental rights.

Testimony from the DSS family support worker who supervised visits between the appellant and the children, from a therapist, and from one of the foster parents showed that the children feared their parents and wanted to have no further contact or visitation with them. The children have done well in the care of the foster family that is willing to adopt them.

The appellant has never demonstrated an ability to provide an environment for the children free from abuse. She has been unable to make the necessary changes which would enable her to adequately parent her children in a loving and safe home.

" '[W]hen a parent is unable or unwilling to rehabilitate herself within a reasonable period of time, the best interests of the child require termination of parental rights.' " *In re Interest of B.M., supra* at 299, 475 N.W.2d at 913.

The judgment in each of the cases is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL J. KNIGHT, APPELLANT.

479 N.W.2d 792

Filed February 7, 1992. No. 91-186.

Conspiracy: Convictions: Proof. To sustain a conviction of conspiracy, proof is required that the accused agreed with one or more persons that they or one or more of them would engage in or solicit the conduct or would cause or solicit the result specified by the definition of the offense, and that the accused or another person with whom he conspired committed an overt act in pursuance of the conspiracy.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

Michael J. Knight, pro se.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

Appellant, Michael J. Knight, was convicted of conspiracy to commit first degree murder, under Neb. Rev. Stat. §§ 28-202 and 28-303 (Reissue 1989), a Class II felony, which carries a statutory penalty of 1 to 50 years' imprisonment. Appellant was sentenced to an indeterminate term of 10 to 15 years' imprisonment and ordered to pay the costs of prosecution, and he was granted credit for 253 days already served.

Laurie Loper had lived with appellant for 4 or 5 months during an 11-month period in which she was separated from her husband, Kevin. Two months after appellant had moved out of Laurie Loper's home, her husband moved into that same apartment.

Mickey Koss testified at trial that he and Knight had met in the penitentiary and had known each other for 2 years. He claimed that in May 1990, he and Knight were both housed in the "trusty dorm" of the Lancaster County jail, in which dorm inmates have 24-hour access to a telephone.

According to Koss' testimony, Knight had discussed with him that he was still in love with Laurie Loper, but that her husband would soon be released from the penitentiary and reuniting with her. Koss testified that Knight was furious about losing Laurie Loper to her husband.

Knight asked Koss to assist him in "having Mr. Loper's legs broken." Later, Knight told Koss that he wanted Kevin Loper "offed" and asked whether Koss knew anyone who might do that. Koss responded that he might.

Koss called Charlie Daniels of the Lincoln Police Department and explained to him what had been transpiring. Officer Daniels met with Koss and learned from him that Knight wanted Kevin Loper offed and that Knight wanted the key to the dead bolt to the Lopers' apartment retrieved.

The following day, Koss told Knight that he had found a person named "Bill" to take care of Knight's problem and that Koss was to call Bill between 5 and 5:30 p.m. that evening. Koss testified that it had been his understanding that the person named "Bill" would be a police officer. Knight was agreeable with the plan and wanted Koss "to go through with the plan."

Koss placed the phone call shortly after 5:30 p.m. Once he had reached the person who identified himself as Bill, Koss handed the telephone over to Knight.

After his telephone conversation with Bill, Knight asked Koss to loan him $500 to pay Bill, and Knight also talked about paying Bill off in drugs. Later that evening, a note was brought to Knight which stated that there was an emergency at home and that he was to call a particular number. Koss had overheard Knight tell Bill to use this method to contact Knight. Knight requested that Koss dial the number; then Knight engaged in another telephone conversation for 10 to 15 minutes. Following this conversation, Knight asked Koss if the person on the phone was reliable. Koss assured Knight that he was. Koss left the jail the following day when the Lincoln Police Department posted his $50 bond.

Det. Sgt. Gregory Sorensen testified that on May 14, 1990, he was assigned to portray a hired killer and talked to Knight by telephone about killing Kevin Loper. At approximately 5:30 p.m., Sorensen received a phone call from a person who identified himself as Mick, and subsequently, a 20-minute tape-recorded conversation ensued with Knight. This tape was played to the jury.

Sorensen set up a second recorded telephone conversation by calling the jail and leaving a number for Knight to call. A few minutes later a person identifying himself as Mick returned the call. After speaking with Mick, Sorensen had another telephone conversation with Knight. In this conversation, which lasted 10 to 15 minutes, Sorensen and Knight discussed

the murder plans. The next day, in a third recorded phone conversation, Sorensen told Knight that he had everything set up for the murder. Sorensen discussed how he was to be paid and how he intended to deliver Kevin Loper's keys to Knight. These two recorded conversations were also played to the jury.

Knight alleges in what we have summarized as eight assignments of error that the district court abused its discretion by (1) overruling his plea in abatement, (2) overruling his demurrer, (3) sustaining the State's objection to his cross-examination of Koss regarding Koss' attempts to avoid incarceration, (4) overruling his motion to dismiss at the close of the State's case, (5) overruling his motion for directed verdict at the close of the evidence, (6) sustaining a verdict that was not supported by sufficient evidence and was contrary to law, (7) imposing a sentence that was excessive and disproportionate to the severity of the offense when considered with his background and prior record, and (8) overruling his motion for a new trial.

Appellant did not argue the first, second, and eighth assignments of error, and we consider them no further. See *In re Interest of P.M.C.*, 231 Neb. 701, 437 N.W.2d 786 (1989). Neb. Ct. R. of Prac. 9D(1)d (rev. 1991) states that "consideration of the case will be limited to errors assigned *and* discussed." (Emphasis supplied.)

Appellant's third assignment of error addresses the court's failure to allow him to cross-examine Koss on Koss' desires and attempts to get out of jail or on Koss' motivations for initiating police involvement and continuing his cooperation. While normally it is appropriate and expected to allow cross-examination of a witness on biases and motivations for testifying against a party, the court may preclude such from entering into evidence if its probative value is outweighed by its prejudicial effect, marginal relevance, or its potential for fostering confusion of issues for the jury. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). No evidence existed to cast either a valid entrapment defense or an argument that Koss had enticed the appellant into the conspiracy. The court did not err in the exclusion of the cross-examination of Koss on these issues.

The fourth, fifth, and sixth assignments of error question the sufficiency of the evidence to overrule appellant's motion to dismiss and his motion for directed verdict and to sustain his conviction. We find that the evidence was sufficient and affirm the district court's determinations.

With Nebraska's adoption of § 28-202, there came a shift from a bilateral approach to conspiracy to a unilateral approach. Where we once required for conviction of conspiracy "a meeting of the minds," or joint intent, we now require only that the accused

> agrees with one or more persons that they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense; and (b) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy.

§ 28-202(1). Under the present scheme, which follows the Model Penal Code's interpretation of conspiracy, the fact that none of the "coconspirators" at any time planned to follow through with the plan has no impact on the culpability of the appellant.

The testimony that appellant initiated conversations about "offing" Kevin Loper and his participation in three telephone conversations with "Bill" about his plan and specific instructions to assist in bringing the plan to fruition provide sufficient evidence of overt acts to sustain the conspiracy conviction.

Finally, appellant asserts that the sentence imposed was excessive. "[T]he imposition of a sentence within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion." *State v. Morley, ante* p. 141, 156, 474 N.W.2d 660, 670 (1991). Appellant's sentence is well within the statutory limits. Conspiracy to commit murder is a Class II felony. See §§ 28-202(4) and 28-303. A minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment is authorized for this class of offense. Neb. Rev. Stat. § 28-105 (Reissue 1989).

Appellant's contention that the seriousness of his offense did not warrant the 10- to 15-year indeterminate sentence imposed

upon him is without merit. Appellant conspired to commit murder while in jail on another charge and was unsuccessful in his conspiracy only because he was unwise in his choice of a coconspirator. Koss testified that the appellant had told him that if he ever "needed anything or anybody taken care of, that [Knight] would do that" for Koss if Koss would come up with the money to pay off the hit man who was to kill Kevin Loper.

We are convinced that the appellant's crime is sufficiently serious to warrant the sentence received, which is well within the statutory limits. We find no abuse of discretion, and accordingly, we affirm the judgment in its entirety.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. DONALD W. WININGHAM, RESPONDENT.

479 N.W.2d 467

Filed February 7, 1992. No. 91-916.

Original action. Judgment of disbarment.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Three disciplinary complaints were filed with the Counsel for Discipline of the Nebraska State Bar Association against Donald W. Wininghamm.

To protect the public and the reputation of the bar, this court temporarily suspended respondent on October 7, 1991, pending investigation of the complaints against him.

On November 25, 1991, formal charges were filed against the respondent, setting forth three counts alleging violations of the following provisions of the Code of Professional Responsibility: DR 1-102(A)(1) and (6), DR 6-101(A)(3), and DR 7-101(A)(2). Respondent was also charged with two counts of violating DR 1-102(A)(5) and DR 9-102(B)(4). On November

26, more charges were filed against respondent, supplementing the original charges with three additional counts for violations of DR 1-102(A)(1) and (6), DR 6-101(A)(3), and DR 7-101(A)(2).

Respondent has failed to file an answer to either the initial formal charges or the additional formal charges. Pursuant to Neb. Ct. R. of Discipline 10(I) (rev. 1989), we enter our judgment on the pleadings.

Accordingly, the respondent is hereby disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

DAVID M. HAYES, APPELLEE, V. EQUINE EQUITIES, INC., APPELLANT, AND JOHN P. CHUDY, APPELLEE.

480 N.W.2d 178

Filed February 14, 1992. No. 89-705.

1. **Contracts: Rescission: Fraud: Time.** The purchaser of a chattel who desires to rescind the contract of sale for fraud must act promptly, and while the rule does not require immediate action on his part after discovery of the grounds warranting rescission, it does require him to act within a reasonable time, taking all of the circumstances into consideration.
2. **Evidence: Appeal and Error.** When the evidence on material questions of fact is in irreconcilable conflict, this court may, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and adopted one version of the facts rather than the other.
3. **Contracts: Rescission: Fraud: Proof.** The party seeking to rescind a contract must allege and prove (1) the material representation of fact that was made, (2) that it was false, (3) that the aggrieved party believed the representation to be true, (4) that he relied and acted upon it, and (5) that he was thereby injured.
4. **Fraud.** A person is justified in relying on a representation made to him or her where the representation is a positive statement of fact and an investigation would be required to discover the truth.
5. _____. While actionable fraud may not be predicated upon sales talk, puffing, or the expression of a mere opinion as to value honestly made under circumstances that do not give another the right to rely thereon, representations of positive facts pertaining to the quality of the thing sold and relied upon by the purchaser, which are calculated to mislead and deceive, if proved false, constitute actionable fraud.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed in part, and in part reversed and remanded with directions.

Frederick S. Cassman, of Abrahams, Kaslow & Cassman, for appellant.

Reed A. Grandgenett, of Gaines, Mullen, Pansing & Hogan, for appellee Hayes.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

This action arose out of a controversy concerning the sale of an interest in a registered quarter horse gelding named "Chocolate Marquis" by the defendant Equine Equities, Inc., to the plaintiff, David M. Hayes. The plaintiff sought to rescind his purchase and recover his cash payment of $22,000, together with his equity in a "trade-in" quarter horse named "Smokeys Gray Too." The trial court found that the defendant John P. Chudy had made fraudulent representations to Hayes and that Hayes was entitled to a rescission of his purchase of Chocolate Marquis, a return of his $22,000 cash payment, and $7,500 cash for Smokeys Gray Too. The court entered judgment against Equine Equities in the total sum of $29,500 and dismissed the action as against Chudy.

Equine Equities has appealed, contending the district court erred (1) in failing to find as a matter of law that Hayes' delay of 21 months before seeking rescission constituted a waiver and barred his right of rescission, (2) in failing to discredit Hayes' testimony, (3) in finding that representations as to cost or value or that there was an interested buyer afforded the basis for rescission, and (4) in awarding Hayes the sum of $7,500, representing Hayes' equity in Smokeys Gray Too.

An action for rescission is equitable in nature and is reviewable by this court de novo on the record. *Haumont v. Security State Bank*, 220 Neb. 809, 374 N.W.2d 2 (1985).

The record shows that defendant Chudy is mainly in the business of designing and building commercial and industrial buildings for sale. He became involved in horses in 1984 when

he acquired the quarter horse stallion named "Smokeys Gray Too" on a debt. Chudy had to find a place to board the horse and was referred to Gary Clow.

In 1985, Chudy acquired a 50-percent interest in the appellant, Equine Equities, a quarter horse breeding business operated by Clow near Elkhorn, Nebraska. According to Chudy, Clow suggested that they form the corporation, with Chudy contributing the stallion and Clow contributing some broodmares as capital.

The plaintiff, Hayes, first met Chudy in 1985 when he purchased an office condominium from Chudy. During their discussions, Hayes expressed an interest in showing horses, and Chudy referred Hayes to Clow. Chudy also introduced Hayes to a former employee, Kathy Jondle. On January 28, 1986, Hayes and Jondle formed H - J Partnership for the purpose of acquiring, owning, and maintaining Smokeys Gray Too. The partnership purchased Smokeys Gray Too from Equine Equities for $25,000, with a cash downpayment of $12,500 and the balance carried on a note. Hayes provided $7,500 and Jondle paid $5,000 of the downpayment.

Early in 1986, Clow negotiated the purchase by Equine Equities of Chocolate Marquis, a registered quarter horse gelding, from the Wachter Ranch in Bismarck, North Dakota. The corporation paid $1,300 for Chocolate Marquis, and Clow told Chudy he purchased Chocolate Marquis for that amount. Clow testified that he did not believe Chocolate Marquis was a good racing prospect and that the value of Chocolate Marquis when purchased by Equine Equities was "a matter of extreme speculation." According to Clow, he and Chudy planned to train Chocolate Marquis as a show horse and then sell him for a profit of about $5,000. Chudy, on the other hand, testified that he and Clow intended to sell Chocolate Marquis for as much as $52,000.

Hayes testified that he first heard about Chocolate Marquis in the first week or two of March 1986. According to Hayes, Chudy told him that Equine Equities purchased Chocolate Marquis and some equipment for $50,000 from a ranch in South Dakota, that he and Chudy could buy Chocolate Marquis from Equine Equities for $50,000, and that Chudy had

a buyer ready to purchase Chocolate Marquis for $75,000. To finance the deal, Hayes was to trade his interest in Smokeys Gray Too and pay $22,000 in cash toward the purchase of Chocolate Marquis. Chudy was going to contribute $22,000 toward the purchase of Chocolate Marquis. Hayes testified that he thought he was buying the horse together with Chudy, that he and Chudy would sell it to Chudy's buyer 2 weeks later for $75,000, and that he and Chudy would split the profits, with Hayes getting 60 percent and Chudy 40 percent of the profits after their investment.

In reality, there was no such purchaser. Hayes testified that he asked Chudy about selling Chocolate Marquis "[c]onstantly for the two weeks so [he] could get [his] money back." According to Hayes, no one came to look at the horse except a former associate of Chudy's, a Mr. Leece from Grand Island. Hayes claims that Leece did not offer to buy Chocolate Marquis. Leece, however, testified that in early April 1986 he offered to pay $35,000 for Chocolate Marquis.

Chocolate Marquis foundered in June or July of 1986 and began limping. Foundering is a condition from which a horse may or may not recover, but the record shows that Chocolate Marquis was not showable after July 1986. A second person offered to buy Chocolate Marquis, for $2,000, in the summer of 1987, after the horse had foundered. At that time, Hayes "realized that the fifty thousand dollar horse that Mr. Chudy and I had purchased was not worth fifty thousand dollars," and demanded his money back from Chudy. At the end of their conversation, Hayes was under the impression that Chudy was going to get some more potential buyers. Employees of the defendant Equine Equities continued to treat Chocolate Marquis' condition, and Hayes pursued the matter of sale with Chudy. However, there were no further inquiries, and Hayes filed this lawsuit in December 1987.

We first consider Equine Equities' contention that Hayes' delay of 21 months before seeking rescission constituted a waiver and barred his right of rescission. In general,

> the purchaser of a chattel who desires to rescind the contract of sale for fraud . . . must act promptly, and while the rule does not require immediate action on his part after

> discovery of the grounds warranting rescission, it does require him to act within a reasonable time, taking all of the circumstances into consideration.

McGuire v. Thompson, 152 Neb. 28, 36-37, 40 N.W.2d 237, 243 (1949). See, also, *Russo v. Williams*, 160 Neb. 564, 71 N.W.2d 131 (1955). The trial court found that Hayes' delay in bringing the action was excused by "1) the continued reassurances by Chudy (not disputed)[;] 2) the later discovery of the horse's true cost to Equine; and 3) the foundering of the horse, which presented a new uncertainty, pending his possible recovery." Taking all of the circumstances into consideration, we conclude Hayes did not waive his right to rescind the contract.

Equine Equities also contends the trial court erred in failing to discredit Hayes' trial testimony because Hayes "materially changed his testimony on vital points in order to meet the necessities of the trial." See, *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981); *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991). Hayes' testimony during cross-examination was shown to be inconsistent with portions of his deposition testimony, but the deposition itself is not included in the record.

Despite the demonstrated inconsistencies, the trial judge filed a memorandum specifically stating, "I have no difficulty at all in finding positive misstatements of fact as to the cost to Equine Equities of Chocolate Marquis and the $75,000 buyer waiting in the wings . . . ." We have said that

> [w]hen the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and adopted one version of the facts rather than the opposite.

Haumont v. Security State Bank, 220 Neb. 809, 810, 374 N.W.2d 2, 4 (1985). See, also, *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990). Having reviewed the record de novo, and being unable to review Hayes' deposition in its entirety, we determine that the inconsistencies complained of are not sufficient to discredit Hayes' testimony as a matter of law.

Equine Equities next contends the district court erred in

finding that Chudy's representations as to cost or value or that there was an interested buyer afforded the basis for rescission. In general, a contract which is voidable because it was induced by fraud may be rescinded. 17A Am. Jur. 2d *Contracts* § 567 (1991); 17A C.J.S. *Contracts* § 418(1) (1963). The party seeking to rescind a contract must allege and prove (1) the material representation of fact that was made, (2) that it was false, (3) that the aggrieved party believed the representation to be true, (4) that he relied and acted upon it, and (5) that he was thereby injured. *Perry v. Rogers*, 62 Neb. 898, 87 N.W. 1063 (1901); *Russo v. Williams, supra*; *Fricke v. Hart*, 206 Neb. 590, 294 N.W.2d 737 (1980). A person is justified in relying on a representation made to him or her in all cases where the representation is a positive statement of fact and where an investigation would be required to discover the truth. *Perry v. Rogers, supra*; *Russo v. Williams, supra*; *Fricke v. Hart, supra*; *Forker Solar, Inc. v. Knoblauch*, 224 Neb. 143, 396 N.W.2d 273 (1986); *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

Hayes' amended petition alleges that

> [p]rior to March 14, 1986, John P. Chudy . . . represented to Plaintiff that (a) Chocolate Marquis had just been purchased by Chudy and Equine Equities, Inc. for the sum of $50,000 and (b) that if Plaintiff would purchase such horse with him . . . Chudy had a ready, willing and able purchaser for the horse in the amount of $75,000. . . .
>
> . . . The representations were false and untrue in fact at the time they were made, and were known by [Chudy and Equine Equities] to be false. Plaintiff relied upon such statements to his detriment.

Although Chudy denied making these statements, that issue has been resolved against the appellant. In the alternative, Equine Equities contends that the statements complained of were not representations of fact, but were merely sales talk, puffing, or Chudy's opinion as to the value of Chocolate Marquis, which do not constitute a basis for fraud. In that regard, we have said:

> While actionable fraud may not be predicated upon sales talk, puffing, or the expression of a mere opinion as to value honestly made under circumstances that do not

> give another the right to rely thereon, representations of positive facts pertaining to the quality of the thing sold and relied upon by the purchaser, which are calculated to mislead and deceive, if proved false, constitute actionable fraud.

(Syllabus of the court.) *Vavricka v. Mid-Continent Co.*, 143 Neb. 94, 8 N.W.2d 674 (1943). The circumstances in this case are somewhat similar to those in *Vavricka*, where agents of the defendant company falsely represented the quality of the company's stock by making positive statements concerning payment of dividends, the extent of corporate assets, corporate expenses, and the existence of a reserve which would entitle the plaintiff to sell his stock to the company at any time after 1 year at its liquidating value.

Chudy's statements were positive representations of fact upon which Hayes could rely, and the statements did not constitute sales talk or puffing in the sense which the law implies.

Finally, Equine Equities contends that the district court erred in awarding Hayes the sum of $7,500, representing Hayes' equity in Smokeys Gray Too. The record shows that Smokeys Gray Too was the property of H - J Partnership and did not belong to Hayes individually. See Neb. Rev. Stat. § 67-308(1) (Reissue 1990). Neither the partnership nor Hayes' partner, Jondle, was a party to this lawsuit, and there is no evidence that the partnership has been formally dissolved. Although the trial court's judgment would equitably tend to restore the parties to their former positions, Hayes was not entitled to receive compensation for Smokeys Gray Too absent proof that the horse belonged to him.

That part of the trial court's judgment granting rescission of the contract and awarding Hayes $22,000 is affirmed. The award of $7,500 to Hayes, representing his equity in Smokeys Gray Too, is reversed, and the cause is remanded with directions to the trial court to enter judgment in conformity with this opinion.

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

GRANT, J., not participating.

SHANAHAN, J., dissenting.

Although I do not necessarily disagree with the conclusion reached in this appeal, I do object to the simplistic approach taken by the majority in disposing of this appeal.

The subject action arises out of a contract for the sale of a horse and, therefore, arises out of a contract for the sale of goods, governed by the Nebraska Uniform Commercial Code-Sales, Neb. U.C.C. §§ 2-101 et seq. (Reissue 1980 & Cum. Supp. 1988). However, the majority fails to make any reference to the U.C.C. but, rather, resolves all issues on the basis of a common-law equitable action and remedy, notwithstanding the U.C.C. and apparent availability of a legal remedy under the code. A correct analysis and disposition under the appropriate standard of review depends on, and is determined by, the nature of the action and decision reviewed, that is, whether this court is reviewing an equity action and equitable remedy or whether the review relates to a law action based on the U.C.C. with its legal remedy or remedies. Consequently, as guidance in future actions, this court should have discussed applicability or inapplicability of the U.C.C. in relation to the result reached in this appeal. See, § 2-608; *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981) (distinction between law and equity in reference to an action based on the U.C.C.; rescission vs. revocation of acceptance; exhaustion of statutory legal remedy before invocation of equity); 1 J. White & R. Summers, Uniform Commercial Code § 8-1 (3d ed. 1988).

The fact that the majority ignored the U.C.C. does not negate existence of the U.C.C. and a remedy in a law action under the code.

JULIAN K. SPITTLER AND DOROTHY J. SPITTLER, APPELLEES, V. HARRY D. NICOLA ET AL., APPELLEES, AND ROBERT W. HYDE AND FRANCES HYDE, APPELLANTS.

479 N.W.2d 803

Filed February 14, 1992. No. 89-771.

1. **Judgments: Records: Appeal and Error.** Meaningful appellate review requires a record that elucidates the factors contributing to the lower court judge's decision.
2. **Summary Judgment: Appeal and Error.** When reviewing a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from that evidence.
3. **Summary Judgment: Proof.** A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.
4. **Contracts: Guaranty.** A guaranty is interpreted using the same general rules as are used for other contracts.
5. **Contracts: Guaranty: Consideration.** A promise to be surety for the performance of a contractual obligation, made to the obligee, is binding if the promise is in writing and signed by the promisor and recites a purported consideration.
6. **Contracts: Pleadings.** Matters which seek to avoid a valid contract are affirmative defenses.
7. **Contracts: Pleadings: Consideration.** Failure of consideration is an affirmative defense.
8. **Pleadings: Proof.** The burden of proving an affirmative defense rests upon the defendant.
9. **Contracts: Guaranty: Consideration.** Generally, when a contract of guaranty is entered into independently of the transaction that created the original or present debt or obligation, the guarantor's promise must be (1) in writing and (2) supported by a consideration which is distinct from that of the present debt.
10. **Contracts: Guaranty: Consideration: Time.** That there must be separate and distinct consideration for a guaranty if it is executed subsequent to the principal obligation is not an absolute rule. If a guaranty promise was made at a time subsequent to the creation of the principal obligation, the guaranty promise is still founded upon a consideration if the promise was given as the result of a previous arrangement, the principal obligation having been induced or created on the faith of the guaranty.
11. **Contracts: Time.** Instruments made in reference to and as a part of a transaction

should be considered and construed together. It is not important that the instruments were made or dated at different times if they are related to and were a part of the transaction.

12. **Contracts: Consideration.** There is sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. The benefit rendered need not be to the party contracting, but may be to anyone else at the contracting party's procurement or request.
13. **Contracts.** As a general rule, the proper construction of a written contract is a question of law.
14. _____. The meaning of an unambiguous contract presents questions of law.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Donn C. Raymond for appellants.

Thomas E. Brogan, of Brogan & Stafford, P.C., for appellees Spittler.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Robert W. and Frances Hyde appeal a summary judgment holding them liable for rents, real estate taxes, utility bills, insurance premiums, maintenance costs, and interest because of their guaranty of a lease and its addendum.

We affirm the $30,429.50 summary judgment entered in favor of the appellees Julian K. and Dorothy J. Spittler by the district court for Madison County.

THE FACTS

In 1974, the appellees Spittler owned land in Madison County, Nebraska, upon which Grampy's International, Inc., a Nebraska corporation, (Grampy's) wished to operate a "Grampy's" restaurant. The parties entered into a long-term lease. It required the Spittlers to construct, and they did so construct, a restaurant building to Grampy's specifications. Grampy's, as lessee, agreed to pay rent, real estate taxes, and the cost of utilities, maintenance and insurance beginning June 1, 1974. The lease, accompanied by an addendum, was executed by the parties on April 15, 1974. There is no mention of a guaranty in either the lease or the addendum.

On April 20, 1974, a guaranty was executed and delivered to the Spittlers. It reads:

GUARANTY AGREEMENT

> We, the undersigned, being interested in the business success of GRAMPY'S INTERNATIONAL, INC., A Nebraska Corporation, and *desiring to assist said Corporation in obtaining a Lease from JULIAN K. SPITTLER and DOROTHY J. SPITTLER*, Husband and Wife, on a Tract of land upon which a Grampy's Restaurant is to be constructed, *do hereby request and authorize Julian K. Spittler and Dorothy J. Spittler, Husband and Wife, to enter into a Lease, together with an Addendum thereto, with the Corporation* on a Tract of land located in the NW4NW4, of Section 34, Township 24 North, Range 1 West of the 6th P.M., Madison County, Nebraska, as more specifically described in said Lease, *and in consideration of said Lease, hereby guarantee all of the obligations of Grampy's International, Inc., as contained in said Lease and Addendum thereto.* This Guaranty shall be joint and several and the undersigned specifically waive notice of default and consent to extensions of time of performance in connection therewith.
>
> Dated this 20th day of April, 1974.

(Emphasis supplied.)

The guaranty was signed personally by Harry D. Nicola and Mary Pat Nicola, husband and wife; William S. Whitehead and Margaret H. Whitehead, husband and wife; Robert W. Hyde and Frances Hyde, husband and wife, who are the appellants; and Donn C. Raymond and Virginia M. Raymond, husband and wife. Robert W. Hyde executed the lease and addendum as president of Grampy's.

THE PLEADINGS AND TRIAL COURT RULING

The Spittlers filed this lawsuit on the guaranty in the district court for Madison County on June 29, 1988. They alleged that they had entered into a lease and an addendum to the lease on April 15, 1974, with Grampy's; that the appellants and others, on April 20, 1974, executed and delivered to the Spittlers an

agreement which guaranteed all of Grampy's obligations under the lease and addendum; and that beginning in December 1987, Grampy's had failed to meet its obligations under the lease and addendum. The Spittlers' petition further alleged that demand for payment under the guaranty agreement had been made upon the guaranty's signatories, but that the signatories had made no payments. The Spittlers prayed for judgment against the guarantors "and each of them."

In their joint answer, the Hydes and the Raymonds claimed that the guaranty was executed separately from the lease and that they received no separate consideration for executing the guaranty agreement. Therefore, the Hydes and Raymonds contended that the guaranty agreement was void. The Raymonds additionally claimed that they received a discharge in bankruptcy on July 17, 1986, and that they were entitled to a judgment of dismissal as a matter of law.

The Hyde-Raymond answer also alleges that there had been assignments of the lease and a subsequent sublease which discharged their responsibilities under the guaranty agreement. The Hydes and Raymonds moved for leave to file a third-party complaint against one of the assignees. The motion was denied, and that ruling is not an issue in this appeal.

The status of the defendants Nicola and Whitehead is not reflected in the record. No responsive pleadings on their behalf were filed.

On May 17, 1989, following a hearing on April 20 at which the lease, addendum, guaranty, and the Spittlers' affidavit were received in evidence, the trial court granted the Spittlers' motion for summary judgment and assessed damages against the Hydes in the sum of $30,429.50. The court dismissed the petition as against the Raymonds.

THE APPEAL

The Hydes assign as error the trial court's (1) finding that there was no material issue of fact, (2) sustainment of the Spittlers' motion for summary judgment, and (3) failure to grant the appellants' motion for summary judgment. Since the appellants' motion for summary judgment is not contained in the record, we will not discuss that assignment of error.

Meaningful appellate review requires a record that elucidates the factors contributing to the lower court judge's decision. See, *First Nat. Bank v. Schroeder*, 218 Neb. 397, 355 N.W.2d 780 (1984). See, also, *Stevens v. Stevens*, 228 Neb. 84, 421 N.W.2d 429 (1988). This court will not speculate upon what basis the appellants sought summary judgment.

On appeal, in substance, the Hydes argue that summary judgment should not have been entered against them because the evidence at the summary judgment hearing failed to show that there was consideration for the guaranty.

STANDARD OF REVIEW

In considering whether the trial court was correct in granting the Spittlers' motion for summary judgment, we are guided by the following principles:

When reviewing a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from that evidence. *Flamme v. Wolf Ins. Agency, ante* p. 465, 476 N.W.2d 802 (1991).

A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Id.*

A guaranty is interpreted using the same general rules as are used for other contracts. *Nogg Bros. Paper Co. v. Bickels*, 233 Neb. 561, 446 N.W.2d 729 (1989).

"A promise to be surety for the performance of a contractual obligation, made to the obligee, is binding if (a) the promise is in writing and signed by the promisor *and recites a purported consideration . . . .*" (Emphasis supplied.) Restatement (Second) of Contracts § 88 at 234 (1981).

Matters which seek to avoid a valid contract are affirmative

defenses. *Lease Northwest v. Davis*, 224 Neb. 617, 400 N.W.2d 220 (1987). Failure of consideration is an affirmative defense. See, *Pabst v. First American Distrib., Inc.*, 222 Neb. 591, 386 N.W.2d 422 (1986); *Caldwell v. Wells*, 174 Neb. 288, 117 N.W.2d 486 (1962). The burden of proving an affirmative defense rests upon the defendant. See *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982).

Generally, when a contract of guaranty is entered into independently of the transaction that created the original or present debt or obligation, the guarantor's promise must be (1) in writing, see Neb. Rev. Stat. § 36-202 (Reissue 1988), and (2) supported by a consideration which is distinct from that of the present debt, see, 38 Am. Jur. 2d *Guaranty* § 45 (1968) and *Waller v. Missouri City State Bank*, 482 S.W.2d 40 (Tex. Civ. App. 1972). See, also, *Moses v. Lawrence County Bank*, 149 U.S. 298, 13 S. Ct. 900, 37 L. Ed. 743 (1893); *Pacific Industries, Inc. v. Mountain Inn, Inc.*, 232 F. Supp. 801 (W.D. Ark. 1964); *Estate of Bogley v. United States*, 514 F.2d 1027 (Ct. Cl. 1975).

In this case, the Spittler-Grampy's lease and its addendum were in force for 5 days before the Hydes' written guaranty was executed and delivered to the Spittlers.

That there must be separate and distinct consideration for a guaranty if it is executed subsequent to the principal obligation is not an absolute rule. For instance, if a guaranty promise was made at a time subsequent to the creation of the principal obligation, the guaranty promise is still founded upon a consideration if the promise was given as the result of a previous arrangement, the principal obligation having been induced or created on the faith of the guaranty. See, *In re Estate of Tynan*, 142 Neb. 671, 7 N.W.2d 628 (1943); *United States v. Burgreen*, 591 F.2d 291 (5th Cir. 1979); *United States v. Lowell*, 557 F.2d 70 (6th Cir. 1977); *United States v. Interlakes Machine & Tool Co.*, 400 F. Supp. 59 (E.D. Mich. 1975). See, also, 38 Am. Jur. 2d *Guaranty* § 45 (1968).

Instruments made in reference to and as a part of a transaction should be considered and construed together. *Northland Mortgage Co. v. Royalwood Estates, Inc.*, 190 Neb. 46, 206 N.W.2d 328 (1973). It is not important that the instruments were made or dated at different times if they are

related to and were a part of the transaction. See *Northland Mortgage Co., supra.*

There is sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. The benefit rendered need not be to the party contracting, but may be to anyone else at the contracting party's procurement or request. *Bock v. Bank of Bellevue*, 230 Neb. 908, 434 N.W.2d 310 (1989). Here, the guaranty provided an obvious benefit to Grampy's in permitting it to obtain a lease from the Spittlers. By their own admission in the guaranty, the Hydes also received a benefit. The guaranty recites that they were "interested in the business success of GRAMPY'S INTERNATIONAL, INC., A Nebraska Corporation," and desired to assist the corporation in obtaining the lease from the Spittlers.

With the foregoing rules of law in mind and remembering that as a general rule, the proper construction of a written contract is a question of law, *Newman v. Hinky Dinky*, 229 Neb. 382, 427 N.W.2d 50 (1988), and that the meaning of an unambiguous contract presents questions of law, *Lueder Constr. Co. v. Lincoln Electric Sys.*, 228 Neb. 707, 424 N.W.2d 126 (1988), we continue to examine the Hydes' guaranty together with the lease and the addendum it guarantees.

In the guaranty, the Hydes acknowledge that they were executing the guaranty "*to assist*" Grampy's "*in obtaining a Lease*" from the Spittlers. (Emphasis supplied.) In the guaranty, the Hydes *"request and authorize" the Spittlers to enter into a lease and its addendum, "and in consideration of said Lease," the Hydes "hereby guarantee all of the obligations of Grampy's International, Inc., as contained in said Lease and Addendum thereto."* (Emphasis supplied.) These recitations in the guaranty are acknowledgments by the Hydes that at the time the lease and addendum were entered into, there was an understanding between the signatories to the guaranty, including the Hydes, and the Spittlers that the signatories to the guaranty would guarantee the lease and its addendum. The guaranty is in writing and recites a purported consideration, as required by Restatement (Second) of Contracts § 88 (1981). To contest that recitation of consideration and the evidence of consideration shown by the guaranty itself and to show that a

genuine issue of material fact existed, it was necessary for the Hydes to adduce some evidence that there was a failure of consideration for their guaranty. The record fails to reflect any evidence that there was a failure of consideration for the guaranty. That being true, there was no material issue of fact, and the trial court was correct in granting summary judgment in favor of the Spittlers.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EARL C. RUSSELL, APPELLANT.

479 N.W.2d 798

Filed February 14, 1992. No. 90-429.

1. **Postconviction: Appeal and Error.** In an appeal of a postconviction proceeding, the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction.** A court is not required to grant an evidential hearing on a motion for postconviction relief which alleges only conclusions of law or fact; nor is an evidential hearing required under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleadings of facts in a motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable.
3. **Pleas: Waiver: Effectiveness of Counsel.** Although normally a voluntary guilty plea waives every defense to a charge, whether the defense is procedural, statutory, or constitutional, a court will consider a claim that the guilty plea was the result of ineffective assistance of counsel.
4. **Postconviction: Proof.** One moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution.
5. **Postconviction.** A motion for postconviction relief must allege facts.
6. **Records: Appeal and Error.** It is incumbent on the party appealing to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court is to be affirmed.
7. **Postconviction: Sentences.** Excessive sentence is not a proper subject for postconviction relief.
8. **Sentences: Appeal and Error.** As a general rule, a sentence imposed within the limits prescribed by statute will not be set aside as excessive absent an abuse of

discretion.

9. **Sentences.** There is no requirement that the sentencing court compare the defendant's case with all other similarly charged felonies prior to imposing sentence.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Earl C. Russell, pro se.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Defendant, Earl C. Russell, appeals from the order denying, without an evidentiary hearing, his motion for postconviction relief brought in the district court pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1989). We affirm.

In an appeal of a postconviction proceeding, "the findings of the district court will not be disturbed unless they are clearly erroneous." *State v. Blank, ante* p. 188, 190, 474 N.W.2d 689, 691 (1991). Additionally:

> " 'A court is not required to grant an evidential hearing on a motion for postconviction relief which alleges only conclusions of law or fact; nor is an evidential hearing required under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleadings of facts in a motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable.' "

State v. Rehbein, 235 Neb. 536, 538-39, 455 N.W.2d 821, 824 (1990).

On December 2, 1983, the defendant pleaded guilty to a two-count information charging him in count I with assault in

the first degree, in violation of Neb. Rev. Stat. § 28-308(1) (Reissue 1989), and in count II with robbery, in violation of Neb. Rev. Stat. § 28-324(1) (Reissue 1989). Before accepting this plea, the trial court questioned him extensively to make sure he knowingly and voluntarily waived his rights in pleading guilty. The trial court explained to Russell the possible pleas he might enter. The court established that the defendant was not under the influence of drugs or alcohol. The court established that Russell understood and waived his right to be presumed innocent until proven guilty beyond a reasonable doubt, his right to a public trial by jury, his rights to confront witnesses and to compulsory process to procure their attendance, his right against self-incrimination, and his right to the suppression of illegally obtained confessions. Russell acknowledged his understanding of all these rights. He also answered, "Yes," when the court asked if he understood and was voluntarily waiving his rights. The trial court also advised Russell of the maximum sentences he faced and determined that he understood the possible sentences. The trial court then found a factual basis existed upon which to accept the pleas of guilty, accepted them, and found defendant guilty on both counts. Russell was sentenced on February 27, 1984, to 6 to 20 years on count I and 15 to 50 years on count II, the sentences to run consecutively. The statutory penalties provided for these crimes are imprisonment for 1 to 20 years and 1 to 50 years, respectively.

As his assignments of error, Russell claims (1) trial counsel was ineffective in failing to inform the trial court of a plea agreement; (2) counsel was ineffective in raising only frivolous issues on appeal; (3) the trial court imposed sentences which were cruel and unusual, in violation of his right to equal protection; and (4) the trial court failed to consider Russell's lack of education and his mental instability in sentencing him.

Although normally a voluntary guilty plea waives every defense to a charge, whether the defense is procedural, statutory, or constitutional, a court will consider a claim that the guilty plea was the result of ineffective assistance of counsel. *State v. Stranghoener*, 212 Neb. 203, 322 N.W.2d 407 (1982).

Russell's first assignment of error depends upon the truth or

falsity of the allegation that there was a plea agreement between his trial counsel and the State which was not brought to the trial court's attention. After determining that the defendant was pleading guilty because he was guilty, the trial court asked if a plea agreement had been reached:

> THE COURT: Mr. McKenney, has there been any plea negotiations in this case and if so what were they?
>
> MR. McKENNEY [deputy county attorney]: None, Your Honor.
>
> THE COURT: Is that correct, Mr. Pruss?
>
> MR. PRUSS [Russell's counsel]: That's correct.
>
> THE COURT: And is that your understanding, Mr. Russell, that there has been no plea negotiations in this case?
>
> THE DEFENDANT: Yes, sir.

As may be seen from the portion of the bill of exceptions quoted above, the primary evidence that no agreement existed comes from Russell himself. In addition to the statement made above, Russell twice stated that no promises had been made to him.

Russell now argues on appeal that his trial counsel advised him to mislead the trial court by stating that no promises had been made nor plea agreement reached. This "fact" was not alleged in Russell's postconviction motion. "One moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution." *State v. Otey*, 236 Neb. 915, 925, 464 N.W.2d 352, 360 (1991). It follows that the postconviction court cannot make any determination based upon a fact not presented, and therefore this "fact" cannot be considered by this court on appeal.

This court faced an assigned error similar to the one Russell now complains of in *State v. Rehbein*, 235 Neb. 536, 455 N.W.2d 821 (1990). There, a defendant seeking postconviction relief alleged that he pleaded guilty only because his counsel represented to him that he would get better treatment in jail after pleading guilty. This court reviewed the plea proceedings, at which the defendant stated that he had been made no promises, was pleading guilty freely and voluntarily, and was

satisfied with his counsel. It was held that an evidentiary hearing was unnecessary, and in doing so, this court stated, "To ignore the repeated assertions made and the answers given 6 years ago in favor of a story which has been developed following 5 years behind bars would make a mockery out of our judicial proceedings." *Id.* at 544, 455 N.W.2d at 827.

Although the more prudent course to follow may be to grant an evidentiary hearing if a defendant makes a factual allegation supporting a claim of ineffective assistance of counsel, where the record presents nothing to overcome the presumption that the defendant was telling the truth at the time of his plea when he told the trial court the facts were different from those now alleged, that would indeed make a mockery out of our judicial process. As stated in *State v. Scholl*, 227 Neb. 572, 580, 419 N.W.2d 137, 142 (1988):

> If the dialogue which is required between the court and the defendant whereat, as here, the court receives an affirmative answer as to whether the defendant understands the specified and full panoply of constitutional rights . . . is to be impugned by a mere recantation made after the doors of the prison clang shut, we are wasting our time and that of the trial judges, making a mockery out of the arraignment process.

In his second assignment of error Russell claims the court, during postconviction proceedings, failed to find that defense counsel rendered ineffective assistance of counsel by raising only frivolous issues on direct appeal. However, Russell's motion simply states the bald conclusion that his counsel presented only frivolous arguments. He did not inform the court what those arguments were, nor did he allege any facts from which the district court could determine the frivolity of the issues presented on direct appeal. A motion for postconviction relief must allege facts. *State v. Otey, supra.*

Russell argues on appeal that his appellate counsel, in moving to withdraw, conceded that all issues raised in Russell's direct appeal were frivolous. However, the record Russell provided this court does not contain this motion. It is incumbent on the party appealing to present a record which supports the errors assigned; absent such a record, as a general

rule, the decision of the lower court is to be affirmed. *Bert Cattle Co. v. Warren*, 238 Neb. 638, 471 N.W.2d 764 (1991).

The district court correctly refused an evidentiary hearing on this issue, as " ' "the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant . . . ." ' " *State v. Rehbein, supra* at 538, 455 N.W.2d at 824. The second assignment of error fails.

Russell's third and fourth assignments of error relate to his sentences: whether the district court erred in failing to find Russell's sentences cruel and unusual, and whether the district court erred in failing to find that the trial court failed to consider defendant's lack of education and his mental instability in sentencing him. Russell is also asking this court to find his sentences excessive because they are disproportionate to others imposed based on the same charges and because the trial court did not consider or give proper weight to certain factors Russell urges were mitigating.

Excessive sentence is not a proper subject for postconviction relief. *State v. Isikoff*, 223 Neb. 679, 392 N.W.2d 783 (1986). Russell's third and fourth assignments of error fail for this reason.

Moreover, there is no underlying basis supporting either of these assignments of error were they properly before the court. "As a general rule, a sentence imposed within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion." *State v. Haynie, ante* p. 478, 490, 476 N.W.2d 905, 914 (1991). The sentences were within the limits prescribed by statute.

As to the crime itself, the victim was an 87-year-old woman whose home Russell invaded on the pretext of using the telephone, after his original plan to burglarize the home failed. He pushed her to the floor, picked up her cane, and beat her so severely with it that she had to be hospitalized in critical condition, ultimately lost an eye, and suffered psychiatric stress requiring hospitalization. After beating the victim, Russell stole a clock from her home.

Furthermore, the record reveals that Russell has been convicted of several thefts and possession of marijuana and

drug paraphernalia. The sentencing court took into consideration the nature of the crime; Russell's previous criminal record, as well as his lack of education; his substance abuse; and his disadvantageous family life.

Finally, as to Russell's claim that he was sentenced disproportionately to those involved in similar cases, "there is no requirement that the [sentencing] court compare the defendant's case with all other similarly charged . . . felonies prior to imposing sentence." *State v. Carlson*, 227 Neb. 503, 507, 418 N.W.2d 561, 563 (1988). There was no abuse of discretion and no merit to any of the defendant's arguments.

The judgment of the district court, dismissing Russell's action for postconviction relief, was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JIMMIE LEE WILLIAMS, APPELLANT.

480 N.W.2d 390

Filed February 14, 1992. No. 90-525.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, an appellate court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.
2. **Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, a guilty verdict will not be set aside in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may a guilty verdict be set aside as unsupported by evidence beyond a reasonable doubt.
3. **Criminal Law: Witnesses: Marriage: Waiver.** During the existence of the marriage, a husband and wife can in no criminal case be a witness against the other. This privilege may be waived only with the consent of both spouses. These privileges may not be claimed in any criminal case where the crime charged is a crime of violence.
4. **Criminal Law: Words and Phrases.** The phrase "crime of violence" is not vague in the context of Neb. Rev. Stat. § 27-505 (Reissue 1989).

5. **Due Process: Trial: Juries.** Due process under the 14th amendment requires that the accused receive a trial by an impartial jury free from outside influences. In any individual case, the observance of this guarantee is evaluated in light of the totality of the circumstances of the case.
6. **Juror Qualifications.** A qualified juror need not be totally ignorant of the facts and issues involved. A venireperson is qualified to sit on the jury, even when he or she has previous knowledge of the case, if that juror can lay aside his or her impression or opinion and render a verdict based on the evidence presented in court.
7. **Presumptions: Jurors.** Although adverse pretrial publicity can create a presumption of prejudice in a community such that the jurors' claims that they can be impartial should not be believed, partiality may be presumed only in situations where the general atmosphere in the community or courtroom is sufficiently inflammatory.
8. _____: _____. A jury's extrajudicial knowledge that a codefendant has pleaded guilty is not in and of itself grounds to presume juror prejudice.
9. **Criminal Law: Venue.** Venue in a criminal case can be transferred on the defendant's motion where it shall appear to the court that a fair and impartial trial cannot be had in the county in which the crime was committed.
10. **Venue.** The factors to be considered in determining whether a change of venue is required due to pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated in the areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in selection of the jury, the number of challenges exercised during voir dire, the severity of the offenses charged, and the size of the area from which the venire is drawn.
11. **Venue: Appeal and Error.** A trial court's ruling on a motion for change of venue will not be disturbed absent an abuse of discretion.
12. **Trial: Waiver: Juries.** Failure to insist on a ruling on an objection waives the objection. Logic dictates that the same principle would apply to a failure to insist on a ruling on a challenge for cause.
13. **Trial: Joinder: Juries: Indictments and Informations.** Where two or more offenses are properly joined, a trial court does not err in limiting the defendant to the number of peremptory challenges statutorily available for the most serious of the offenses. A defendant is not entitled to additional peremptory challenges because the indictment charges separate offenses in separate counts.
14. **Jury Instructions: Appeal and Error.** In considering claimed error regarding an instruction, all instructions given must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.

Appeal from the District Court for Hamilton County: WILLIAM H. NORTON, Judge. Affirmed.

James A. Wagoner for appellant.

Don Stenberg, Attorney General, Mark D. Starr, and, on brief, Susan M. Ugai for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Following a trial by jury the defendant, Jimmie Lee Williams, was convicted of the April 22, 1989, first degree murder of Richard Dale Kinikin, as well as a second count of use of a weapon to commit a felony. He was sentenced to a term of life imprisonment, as well as a consecutive term of 6½ to 20 years on the second count. Defendant has appealed to this court, assigning 17 alleged errors, which may be combined to constitute the following: (1) insufficiency of the evidence, (2) testimony of defendant's spouse in violation of spousal immunity, (3) failure to grant defendant's request for change of venue, (4) failure to sustain defendant's challenge for cause of a juror, (5) failure to grant defendant six extra peremptory challenges, (6) errors in the admission of evidence, (7) error in giving an instruction regarding self-defense, and (8) error in considering victim impact information during the sentencing phase of trial. We affirm.

Although the testimony of the various witnesses is contradictory to some degree, there appears to be no reasonable doubt that defendant deliberately and with premeditation shot and killed Kinikin.

Defendant was proceeding westerly on Interstate 80 in his tractor-trailer unit, which was then being driven by his wife. He got into a conversation over his CB radio with another truckdriver, which was described as degenerating into a "cuss fight." Defendant testified that the voice on the other radio stated, "I got a mind to make you put that big old blue freight shaker [truck] in the ditch." He also testified that he, the defendant, said, "I got a good mind to have my wife just come on, go around you and you can take your garbage mouth somewhere else." The other driver, or the other voice on the CB, was said to have stated, "You come on up here and if you are still sitting there in that seat . . . I'll blow a hole in you."

Defendant then testified that he got his rifle from behind the

seat and said over the radio, "You are not going to hurt me. I am not going to let you. You just go on." He then asked his wife to pull over and stop.

The testimony of defendant's wife differed somewhat from that of her husband. She testified that defendant "was just like . . . egging him [the other driver] on. . . . He wanted the truck driver to answer him . . . and the truck driver wouldn't answer him." The other driver finally responded by telling the defendant that "he was supposed to get in the back of the bunk . . . ."

Williams' truck stopped behind that of Kinikin. Defendant testified that Kinikin walked around the front of his truck and stopped at the passenger side. Kinikin then opened the passenger side door and reached inside. While Williams started to get out of his truck, he saw Kinikin stick something in the back of his pants. It looked to Williams like Kinikin was tucking the object between his body and his "britches." Kinikin then reached up, pushed the latch down on the door, shut it, and walked toward Williams' truck. Williams could not see what Kinikin had put in his pants, but defendant thought it was a weapon.

Defendant testified that when he got out of his truck, he was wearing on his feet his white socks without his boots. Kinikin was shaking his left finger at Williams while walking toward him, having his other hand clenched at his side. Williams said he became frightened and tried to load his rifle. After a few seconds, he was able to put a cartridge in the chamber. Williams then put the gun up to his shoulder and pointed it at Kinikin.

Kinikin then stopped walking toward Williams, according to defendant. Kinikin looked at Williams for a second and said, "Now, we'll see," which caused Williams to jump back. Defendant said Kinikin appeared angry and shouted. Williams then stated that he realized that this voice belonged to the man with whom he had had the "cuss fight" over the radio. According to Williams, Kinikin reached behind his back with his right hand. Williams reacted by stepping backward, bringing the gun upward, and shooting Kinikin. After Williams had pulled the trigger, he got back in his truck and told his wife to go.

Williams' wife testified that she did not see anything in Kinikin's hands. She saw her husband put a bullet in the rifle. Defendant then put the rifle to his shoulder and fired. When Williams came back to the truck, his wife said, "My God, did you have to shoot him?" The defendant did not respond to that question, but later told her that "[t]hat was the stupidest thing I ever did."

The defendant's wife also testified that he instructed her as to the story they would tell if stopped by the police. In the main it consisted of a recitation that he was asleep in the bunk, that she started to pull over behind Kinikin's truck to help a truckdriver who was stopped on the side of the road, but that defendant told her not to stop, so she therefore pulled back onto the highway.

There were several other witnesses whose testimony pointed to the killing of Kinikin by Williams. Kinikin died of the gunshot wound, according to the testimony of a pathologist.

In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. *State v. Laymon, ante* p. 80, 474 N.W.2d 458 (1991).

On a claim of insufficiency of the evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Laymon, supra.*

The evidence, even limiting it to the testimony of the defendant himself, supports a finding of guilty beyond a reasonable doubt.

The defendant assigns error to the overruling of his objection to the testimony of his wife. There was no error in admitting that testimony. Neb. Rev. Stat. § 27-505 (Reissue 1989) provides in part as follows:

> (2) During the existence of the marriage, a husband and

wife can in no criminal case be a witness against the other. This privilege may be waived only with the consent of both spouses.

(3) These privileges may not be claimed:

(a) In any criminal case where the crime charged is a crime of violence. . . .

Defendant questions the validity of that statute, alleging it is unconstitutionally vague. He concedes that in *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), *cert. denied* 484 U.S. 872, 108 S. Ct. 206, 98 L. Ed. 2d 157 (1987), this court held that the phrase "crime of violence" is not vague in the context of § 27-505, but apparently asks this court to overrule *Palmer*. We decline to do so. This assignment of error is without merit.

Williams claims that prejudicial publicity in Hamilton County "prevented him from receiving a fair trial by an impartial panel." Brief for appellant at 28. Specifically, Williams argues that he was entitled to a change of venue because of the sheer number of venirepersons admitting knowledge of the case from the media, because he was "newsmaker of the year in the arena of trial," because he was "unfairly drawn into disputes regarding Sheriff treatment of prisoners and cost of trial," and because he was "prejudicially associated with the Co-Defendant's [defendant's wife] admission of guilt." *Id.*

"Due process [under the 14th Amendment] requires that the accused receive a trial by an impartial jury free from outside influences." *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). In any individual case, the observance of this guarantee is evaluated in light of the totality of the circumstances of the case. See *Murphy v. Florida*, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975).

The fact that many, most, or even all of the jurors knew something about the case in advance would not entitle Williams to a change of venue. The U.S. Constitution does not guarantee a criminal defendant a jury totally ignorant of the facts and circumstances of his or her case. *Murphy v. Florida, supra* at 421 U.S. at 799-800 ("[q]ualified jurors need not . . . be totally ignorant of the facts and issues involved"). A venireperson is qualified to sit on the jury, even where he has previous

knowledge of the case, if he " 'can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' " 421 U.S. at 800 (quoting *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961)).

Only one of 40 venirepersons—and no one actually seated on the jury—expressed any reservation about her ability to decide the case solely on the evidence, and Williams' challenge for cause to that venireperson apparently was not upon that ground. Williams points to nothing in the record indicating that any particular juror was biased, and an independent review of the record does not disclose actual partiality.

It is true that "adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed." *Patton v. Yount*, 467 U.S. 1025, 1031, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984). Partiality may be presumed only in situations where "the general atmosphere in the community or courtroom is sufficiently inflammatory." *Murphy v. Florida, supra* at 421 U.S. at 802.

Sheppard v. Maxwell, supra, while involving extensive pretrial print publicity such as Williams claims existed in this case, required more than just that publicity in order to create the presumption of juror prejudice. *Sheppard* involved a highly publicized criminal case—the trial of Dr. Sam Sheppard for the alleged murder of his wife. The pretrial publicity in the case included repeated assertions that Sheppard had refused to take a lie detector test; detailed allegations of Sheppard's marital unfaithfulness; accusations that Sheppard, his family, and his lawyers were "stalling" the investigation; and editorial calls for further investigation and for Sheppard's arrest and prosecution. Most of the courtroom space was assigned to the press corps members, whose presence hindered orderly proceedings; testimony and photographs of exhibits were published daily during the trial, in which jurors were not sequestered; and the prosecution disclosed certain anticipated testimony, which was repeated in the press, that failed to materialize at trial. The Court held that this "totality of circumstances" was " 'inherently lacking in due process,' " and did not require " 'a showing of identifiable [juror]

prejudice to the accused.' " 384 U.S. at 352.

In *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963), the defendant in a capital murder case was interrogated by the local sheriff and confessed to the crime in a film which was broadcast three times and viewed by no less than 53,000 of the 150,000 people in the parish in which he was tried and convicted. The Court did

> not hesitate to hold, without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised "interview."

373 U.S. at 727. *Estes v. Texas*, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965), addressed a situation of the pervasive intrusion of television into a criminal trial. A pretrial hearing on motions to restrict media coverage and for a continuance was broadcast on television. At least 12 cameramen were present in the courtroom, and the courtroom was cluttered with television equipment and microphones. Portions of the trial were broadcast live, and the entire trial was filmed by cameras in a large booth at the back of the courtroom. The Court found that the intrusion of the press into the proceedings threatened the "solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial," 381 U.S. at 540, and reversed the conviction.

The pretrial publicity of which Williams complains included articles from the Aurora News-Register, the Grand Island Daily Independent and the Grand Island Sunday Independent, and the Omaha World-Herald, all newspapers of general circulation in Hamilton County. These stories consisted predominantly of news articles detailing Kinikin's death, the subsequent investigation, the arrest of Williams and his wife, and the pretrial court proceedings, including defendant's motion for a change of venue. Another news item contained a "[y]ear end review" article from the News-Register, consisting of a photo of Williams in handcuffs and leg irons being led by a uniformed peace officer, along with two brief paragraphs relating that the Nebraska State Patrol was searching for a "blue semi truck

tractor with an anteater cab" and that Williams had been arrested "in connection with" Kinikin's death. There was also a News-Register article regarding a budget dispute between the Hamilton County Board and the county sheriff, containing a brief reference to the cost of Williams' pretrial detention and upcoming trial. Additionally, there was an article reporting Williams' wife's plea of guilty to the accessory charge, under the headline "Williams enters plea of guilty."

The trial court reserved ruling on Williams' pretrial motion for a change of venue until after voir dire. The court later noted that the evidence adduced at the hearing on the motion, standing alone, "[would] not support a finding in favor of the defendant on this motion."

The record in this case discloses none of the yellow journalism, investigatorial bias, or prosecutorial misconduct evident in *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). Neither was Williams televised confessing to the crime of which he was accused, as in *Rideau*, nor does the record reveal any intrusion of the electronic media into the court proceedings, as in *Estes*.

Nor does the publicity given Williams approach the level of that found in *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961), in which the Supreme Court presumed juror bias arising solely from pretrial publicity. In that case, six murders had been committed in the Evansville, Indiana, area. Media coverage of the crimes—which extended into Gibson County, where Irvin was ultimately tried—included "curbstone opinions" as to Irvin's guilt and the appropriate punishment; "a barrage of newspaper headlines, articles, cartoons, and pictures [in newspapers] delivered regularly to approximately 95% of the dwellings in Gibson County," 366 U.S. at 725; radio and television newscasts detailing Irvin's criminal history; police lineup identification of Irvin; the fact that Irvin had taken a lie detector test; Irvin's confession to all six of the Evansville area murders; and his offer, rejected by the state, to plead guilty to avoid a death sentence.

Williams stresses the news article mentioning him in the context of the intragovernmental budget dispute and the headline "Williams enters plea of guilty." Neither of these items

is of the kind found in *Irvin* to be predicative of presumed prejudice. Williams fails to explain how jurors might be predisposed to believe he is guilty just because it cost the county money to detain him before trial. Common sense would tell any juror in a case where the defendant was held before trial that such incarceration costs the government money. Likewise, common sense would tell any venireperson or potential venireperson in the courtroom before Williams' trial that since he was proceeding to trial, Jimmie Lee Williams was not the "Williams" who had pleaded guilty. Furthermore, the jury's extrajudicial knowledge that a codefendant has pleaded guilty is not in and of itself grounds to presume juror prejudice. See, *U.S. v. De La Vega*, 913 F.2d 861 (11th Cir. 1990); *U.S. v. Beniach*, 825 F.2d 1207 (7th Cir. 1987); *United States v. Martin*, 740 F.2d 1352 (6th Cir. 1984).

The pretrial publicity in this case did not rise to the level of that in *Irvin*, such as would compel a presumption of juror partiality. This conclusion is supported by the recent analysis of the U.S. Supreme Court in *Mu'Min v. Virginia*, ____ U.S. ____, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991). Mu'Min was a prisoner serving time for a previous murder, accused of murdering a woman while on prison work release. Press reports focused on the negligence of prison officials such as would have allowed Mu'Min to escape and commit the murder. Additionally, "a great deal of . . . media coverage . . . was devoted to Mu'Min and the details of his crime." 111 S. Ct. at 1910 (Marshall, J., dissenting.) Specifically, local media disclosed that the victim was "discovered in a pool of blood, with her clothes pulled off and semen on her body," 111 S. Ct. at 1911 (Marshall, J., dissenting); that Mu'Min returned to the prison work detail and had lunch after the crime; that Mu'Min, a "murderer," had confessed to the crime; that Mu'Min had had disciplinary problems in prison, including allegations that he beat another prisoner; and that a fellow inmate described Mu'Min as a " ' "lustful" ' individual who did ' "strange stuff." ' " *Id.* While Mu'Min did not claim presumed juror prejudice, the majority of the Court compared the publicity in his case unfavorably to that in *Irvin v. Dowd, supra*, in determining that he was not constitutionally entitled to voir dire

questions regarding the content of pretrial publicity to which venirepersons had been exposed.

The publicity in *Mu'Min* was far more inflammatory and prejudicial to that defendant than anything Williams presents in support of his claim of error, yet the U.S. Supreme Court in *Mu'Min* made it clear that the publicity there fell on the other side of the presumed prejudice line from the publicity in *Irvin*. This further compels the conclusion that Williams had no constitutional right to a change of venue.

Under Nebraska law, venue in a criminal case can be transferred on the defendant's motion where "it shall appear to the court . . . that a fair and impartial trial cannot be had" in the county in which the crime was committed. Neb. Rev. Stat. § 29-1301 (Reissue 1989). The factors to be considered in determining whether a change of venue is required due to pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated in the areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in selection of the jury, the number of challenges exercised during voir dire, the severity of the offenses charged, and the size of the area from which the venire is drawn. *State v. Red Kettle, ante* p. 317, 476 N.W.2d 220 (1991). "A trial court's ruling on a motion for change of venue will not be disturbed absent an abuse of discretion." *State v. Boppre*, 234 Neb. 922, 935, 453 N.W.2d 406, 419 (1990).

The publicity in this case was exclusively factual. Indeed, most of the publicity did not reveal any of the evidence to be adduced against Williams at trial. There were no editorial expressions of hostility or animosity toward Williams. The nature of the publicity does not compel a change of venue. See, *State v. Boppre, supra* (news accounts which are factual and do not reveal hostility or animosity to the defendant do not serve as a basis for a change of venue); *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987) (factual news accounts reporting the occurrence of crime, one defendant's call for an ambulance, the charging of defendants, and the appointment of special prosecutor did not furnish a basis for change of venue); *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986) (factual newspaper

articles reporting the killing, the defendant's arrest and bond hearing, the personal history of parties, and the funeral date of victim did not require change of venue).

Most of the news coverage of the Kinikin killing was distant in time from Williams' trial. Of all the news articles offered into evidence in support of Williams' motion, only two appeared within 3 months of the trial. One of these was the year end review feature in the Aurora News-Register on January 3, 1990. It contains a photo of Williams in handcuffs and leg irons and the following passages:

> APRIL
>
> . . . .
>
> —The Nebraska State Patrol was searching for a blue semi truck tractor with an anteater cab inconnection [sic] with the death of a 42-year-old Arkansas struck [sic] driver who was shot along busy Interstate 80 in Hamilton County east of Aurora.
>
> MAY
>
> . . . .
>
> —Hurley, S.D., truck driver Jimmie Lee Williams, 49, was arrested near Houston, Texas, in connection with the death of trucker Richard Dale Kiniken [sic] on Interstate 80 in April.

The other article appeared in the Aurora News-Register on February 28, 1990, and detailed Williams' pretrial motions for change of venue and to exclude, in limine, testimony regarding the incident reconstruction. It is significant that the articles Williams singles out as most prejudicial—the one involving the county board dispute and the one bearing the "Williams enters plea of guilty" headline—appeared on November 22, 1989, and June 14, 1989, respectively, 3 1/2 and 9 months before the trial. See *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990) (change of venue not warranted where only five articles appeared in the 4 months immediately preceding trial).

The record of the voir dire examination details the care taken and ease had in seating jurors, and does not support Williams' assignment of error in this regard. Although as many as 35 of the 40 venirepersons called in the case had been exposed to media accounts, only one professed an inability to put what she

had read or heard aside, and she was excused for cause. Four of the jurors actually sworn to serve were specifically questioned about publicity; all either had not formed opinions or were willing to set their opinions aside. In light of these reassurances, the failure to grant a change of venue was not an abuse of discretion. See *State v. Boppre, supra.*

Williams claims error in that the trial court failed to sustain his cause challenge as to certain venirepersons. The only argument offered in support of this assignment is the repetition of the assignment with a citation to the bill of exceptions at page 190, line 12, where Williams challenged venireperson Hansen. However, following Hansen's statement that he could be fair and impartial, Williams did not renew his cause challenge or insist on a ruling on his earlier challenge. Failure to insist on a ruling on an objection waives the objection. *State v. Nowicki, ante* p. 130, 474 N.W.2d 478 (1991). Logic dictates that the same principle would apply to a failure to insist on a ruling on a challenge for cause. The most logical inference from the defendant's silence is that he was satisfied that the juror had rehabilitated himself by professing his impartiality, and the defendant was withdrawing his challenge.

Williams was granted 12 peremptory challenges. Neb. Rev. Stat. § 29-2005 (Reissue 1989) grants that number of challenges to a defendant charged with a crime punishable by death or imprisonment for life. However, he now claims that he should have been awarded six additional challenges, for the count charging him with use of a weapon in the commission of a felony.

The defendant makes much of the fact that the charge of use of a weapon was not part of the original complaint. However, he ignores the fact that the joinder of the two counts took place by means of the filing of the second amended complaint before any proceedings were had in the case. Williams also ignores the law of joinder in Nebraska, which focuses not upon the procedural aspects of the individual charges, but upon whether the separate offenses charged arose from the same transaction. See Neb. Rev. Stat. § 29-2002(1) (Reissue 1989). The murder count and the use of a weapon to commit a felony were properly joined because they arose out of the same act or transaction,

and it is wholly irrelevant to the issue of the propriety of their joinder whether the documents charging each offense were filed separately or contemporaneously.

Where, as here, two or more offenses are properly joined, a trial court does not err in limiting the defendant to the number of peremptory challenges statutorily available for the most serious of the offenses. "[A] defendant is not entitled to additional peremptory challenges because the indictment charges separate offenses in separate counts." *State v. Benzel*, 220 Neb. 466, 475, 370 N.W.2d 501, 509 (1985).

Williams assigns as error the admission of exhibits 13, 18, 19, 21, 23, 29, 30, 31, and 32. The only meaningful argument made in support of the assignment of error relates to exhibit 13, the T-shirt Kinikin was wearing when he was killed. With regard to the other exhibits, Williams simply asserts that "no foundation or relevance was made prior to their respective evidentiary introduction." Brief for appellant at 31.

The assignment of error with regard to the other exhibits is not properly presented in this court. Williams' entire argument in this respect is as follows:

> Likewise, Appellant objects to the introduction of Exhibits 18, 19, 21, 23, 29, 30, 31, and 32 as no foundation or relevance was made prior to their respective evidentiary introduction [citations to bill of exceptions for location and admission of each exhibit]. *United States v. Blackburn*, 389 F.2d 93 (6th Cir. 1968).

Brief for appellant at 31. "This court will not consider assignments of error which are not discussed in the brief." *State v. Spiegel, ante* p. 233, 234, 474 N.W.2d 873, 875 (1991).

Even if Williams had properly presented his arguments about foundation and relevance, there was no error in receiving the exhibits in evidence. Exhibit 21 was identified by the State's firearms expert as a "British .303 No. 4 Mark I rifle," which, defendant's wife testified, "look[ed] exactly like the gun" Williams had. She testified that she was present when he purchased the gun and that the serial number on the rifle he bought was 13592, which agreed with the serial number on the exhibit.

Exhibit 23 was identified by the expert as a box of

ammunition for the rifle, which, defendant's wife testified, had come from her and Williams' house and which she had mailed to the State's investigator.

Exhibits 18 and 19 are photos of the Shelton-Kenesaw exit off Interstate 80. Defendant's wife testified that she pulled the truck off the Interstate at the exit depicted in the photographs, and the State's investigator testified that the photos showed the exit and the location of the rifle when he found it.

Four of the exhibits, 29, 30, 31, and 32, were relevant because they showed where the rifle was found and the condition it was in at the time and were properly identified by the State's investigator.

Finally, exhibit 13, Kinikin's T-shirt, was not received solely to "inflame the passions of the Jury as it contained no probative evidentiary force," as Williams contends. Brief for appellant at 31. Rather, it showed the entry and exit sites of the bullet. Also, when considered along with the State's investigator's testimony, it served to show the distance at which the fatal shot was fired and tended to negate Williams' self-defense claim. The investigator testified that the rifle deposited powder and lead on a cloth surface when he test fired it at that surface at a distance of 4 feet or less. He further testified that he tested the T-shirt for powder and lead residue and found none. The T-shirt was evidence that the shot that killed Kinikin was fired from more than 4 feet away.

Error is assigned in the giving of the following, instruction No. 17, relating to the claimed defense of self-defense:

> An element in this case is that the defendant did not act in self-defense. The defendant did not act in self-defense if the state proved beyond a reasonable doubt that any one of the following did not occur:
>
> (1) Richard Dale Kinikin threatened serious bodily harm; or,
>
> (2) The defendant neither consented to any such use of force against him nor provoked any such use with the intent of using deadly force in response; or,
>
> (3) The defendant reasonably believed that his use of deadly force was immediately necessary to protect him against serious bodily harm; or

> (4) Before using deadly force the defendant either tried to get away or did not try because he reasonably did not believe he could do so in complete safety.
>
> The fact that the defendant may have been wrong in estimating the danger does not matter so long as there was a reasonable basis for what he believed and he acted reasonably under the circumstances as they existed at the time.

In considering claimed error regarding an instruction, " '[a]ll of the instructions given must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.' " *State v. Johnson*, 236 Neb. 831, 842, 464 N.W.2d 167, 175 (1991).

Williams argues that instruction No. 17 misstates the law in two ways. First, he argues that the controlling statute, Neb. Rev. Stat. § 28-1409 (Reissue 1989), requires that self-defense be evaluated from the defendant's point of view, whereas instruction No. 17 compels the jury to evaluate the evidence of what the "other person" (in this case Kinikin) did. Second, he argues that subparagraph (4) of instruction No. 17 requires that the defendant attempt retreat, whereas § 28-1409 requires only that the defendant reasonably believe he could retreat in safety and does not require the defendant actually to attempt retreat. Additionally, he argues that the instruction is constitutionally infirm in that it shifts the burden of proving self-defense onto him and in that it is vague in its use of double negative language.

Defendant's first argument regarding whose point of view is important fails upon a full reading of the instruction. Whether Kinikin threatened Williams with serious bodily harm must be viewed in the eyes of the beholder—the last paragraph of the instruction permits the defendant to have been wrong in estimating his danger as long as there was a "reasonable basis for what he believed."

The instruction did not require the jury to find that Williams attempted to retreat. It merely required that defendant either tried to retreat *or* did not try because he (defendant) reasonably did not believe he could do so in complete safety.

The instruction of which complaint is made did not shift the burden of proving self-defense onto the shoulders of the defendant. Any hint that instruction No. 17 suggests such a position is nullified by instruction No. 7, which defines as an element of the charged offense of first degree murder, and of the lesser-included offenses of second degree murder and manslaughter, that "[Williams] did not act in self-defense when he killed Richard Dale Kinikin," and places upon the State the burden of proving each element beyond a reasonable doubt, which elements include the element of "no self-defense."

Williams' argument that the instruction is vague because it employs double negative language is without citation to authority and without meaningful exposition. Defendant simply states that the instruction is capable of "more than a single construction." Brief for appellant at 26. He does not suggest what alternative construction might be reached. A plain reading of the instruction shows that it is not vague or misleading. While it is drafted in negative rather than affirmative terms, this style is necessary in order to preserve the proper placement of the burden of proof. Read as a whole and in light of the other instructions, the attacked instruction does not misstate the law, is not misleading, and is not constitutionally infirm, and his assignment as to this instruction is without merit.

Finally, Williams' objection to the use of a victim impact statement is wholly without merit. In the first place, Williams received the minimum sentence, life imprisonment, considering that probation was obviously out of the question. Second, he relies on *Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), in which the U.S. Supreme Court held that victim impact statements were not admissible before a jury making a capital sentencing decision. Williams' argument obviously refers to a letter found in the presentence investigation report from a coworker of the victim Kinikin, in which she described him as a hardworking employee who was easy to work with, and she stated he would be greatly missed by his friends and associates.

The State argues that *Booth* is inapplicable to noncapital cases and to sentencing determinations made, as under

Nebraska law, by a judge. See *State v. Joubert*, 235 Neb. 230, 455 N.W.2d 117 (1990). However, we need decide nothing based on *Booth* because that case has been overturned by the U.S. Supreme Court in *Payne v. Tennessee*, ____ U.S. ____, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991).

All of the defendant's assignments of error are without merit, and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RANDY SALYERS, APPELLANT.

480 N.W.2d 173

Filed February 14, 1992. No. 90-715.

1. **Judgments: Records.** Where there is a conflict between the record of a judgment and a verbatim record of the proceedings in open court, the latter prevails.
2. **Sentences: Probation and Parole.** In imposing sentence, the court should state with care the precise terms of the sentence which is imposed. This same rule applies to the terms of probation imposed upon a defendant.
3. **Probation and Parole.** The fixing of terms and conditions of probation is a judicial duty and function and cannot be delegated to anyone, including a probation officer.
4. **Sentences: Appeal and Error.** It is error for a trial court, when imposing a straight jail sentence, to permit or require a defendant to serve his or her sentence intermittently.
5. **Probation and Parole.** There is statutory authority for intermittent incarceration as a condition of probation.
6. **Statutes.** When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning, so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
7. **Criminal Law: Statutes.** It is a fundamental principle of statutory construction that penal statutes are to be strictly construed, and it is not for the courts to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there.
8. **Legislature: Intent: Probation and Parole.** It is beyond the purview of this court to assume that the Legislature intended that Neb. Rev. Stat. § 47-502 (Reissue 1988) apply to probationers who are sentenced to intermittent sentences.

Appeal from the District Court for Platte County, JOHN C. WHITEHEAD, Judge, on appeal thereto from the County Court

for Platte County, LYLE WINKLE, Judge. Sentence vacated, and cause remanded with directions.

James C. Stecker, of Robak & Stecker, for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Randy Salyers appeals certain terms of his 3-year probation, which was imposed after he entered a plea of guilty to an amended complaint charging him with third degree assault of his wife. As a term of probation, the defendant was also ordered to pay a $500 fine.

The defendant was originally charged with the felony offense of sexual assault in the first degree of his wife, which carries a penalty of not less than 1 nor more than 50 years' imprisonment. See Neb. Rev. Stat. §§ 28-319 and 28-105 (Reissue 1989). Pursuant to a plea agreement, Salyers entered a plea of guilty to assault in the third degree. On that charge, he could have been sentenced to 1 year in jail, fined $1,000, or both, since assault in the third degree is a Class I misdemeanor. See Neb. Rev. Stat. §§ 28-310 and 28-106 (Reissue 1989).

In summary, Salyers claims the trial court, in imposing probation, erred by (1) requiring the defendant to serve the first 40 days he is not working in the county jail and (2) prohibiting the defendant from entering bowling alleys. The defendant appealed the sentence imposed by the county court to the district court for Platte County, where the sentence was affirmed. The defendant then appealed to this court.

Because the condition of probation regarding Salyers' exclusion from bowling alleys is ambiguous, we vacate the defendant's sentence and remand the cause to the district court for Platte County with directions to remand the cause to the county court for resentencing of the defendant in accord with the rules set forth in this opinion.

Before the assault involved here, bowling was a common activity for both Salyers and his wife. The defendant was

involved in bowling league activities, having served as his league secretary and as an officer in the Columbus Men's Bowling Association in 1990. He had won several individual bowling championships in 1989 and 1990. Salyers' wife had worked in the Westbrook Lanes bowling alley in Columbus in 1985 when she and the defendant first met. At the time Mrs. Salyers was assaulted, she also bowled in a league.

On the night of February 28, 1990, the defendant and his wife were at the Boulevard Lanes bowling alley in Columbus, where they attended a party for a mutual friend. Salyers "had a few beers" in the bowling alley bar or lounge. He questioned his wife's fidelity to him. The defendant's wife became angry and went home alone.

When the defendant went home, he attempted to have sexual relations with his wife. When she refused, Salyers followed her into the bathroom, where he physically and sexually assaulted her. The wife's screams awakened the couple's 2-year-old son. Mrs. Salyers convinced the defendant to let her go to attend to their son. Salyers' wife ran from her husband and hid from him in her 11-year-old son's basement room. From her hiding place, Mrs. Salyers saw her husband searching for her with a shotgun. The defendant later said the shotgun was unloaded, but that his wife did not know that it was unloaded. He told the court he wanted to "scare" his wife "to come upstairs and talk with me." Salyers admitted he picked up the shotgun to "threaten" his wife.

The wife then went to her 15-year-old daughter's room and told her everything that had happened. The police were called. After evacuating other members of Salyers' family from the residence, police found the defendant passed out in his bed, where they arrested him.

There appear to be discrepancies between what the trial judge ordered in open court and the order of probation prepared by the probation officer. As an example, in the verbatim record, the trial judge, as a part of probation, ordered that Salyers spend 40 days in jail, to be served on weekend days when he did not have to work. In the written probation order, the defendant was ordered to spend 40 days in jail on weekends. In the written order, there was no provision excusing him from

jail on days of a weekend when he had to work. In the verbatim record, the defendant was ordered to "[s]tay out of all bars, including bowling alleys, 'cause apparently you do some drinking in bowling alleys. Or otherwise whose principle [sic] business is the sale of alcohol or a considerable amount of alcohol is being consumed on the premises." In the written order, it is stated that the defendant shall "[n]ot enter any place where alcohol is primarily served or sold, nor any bowling alleys for the period of probation without written permission of your Probation Officer."

We have held that where there is a conflict between the record of a judgment and a verbatim record of the proceedings in open court, the latter prevails. *State v. Temple*, 230 Neb. 624, 432 N.W.2d 818 (1988). We have also held that in imposing sentence, the court should state with care the precise terms of the sentence which is imposed. *Id.* This same rule applies to the terms of probation imposed upon a defendant.

In addition to the conflicts between the verbatim record and the written order of probation, there is ambiguity in some terms of Salyers' probation. As an example, is Salyers ordered to stay away from bowling alleys altogether? Or is the defendant prohibited from entering bowling alleys where there is a bar on the premises or a bar connected by a doorway to the bowling alley? Or is the defendant only ordered to stay out of the bars in a bowling alley?

We further note that in the written order of probation, Salyers must "[s]atisfy other conditions of which you are notified in writing by your Probation Officer which are reasonably related to reconstructing your behavior and the protection of society." Any condition imposed under this provision of a probation order would be improper. We remind sentencing judges that the fixing of terms and conditions of probation is a judicial duty and function and cannot be delegated to anyone, including a probation officer. See *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988).

Salyers argues that his intermittent incarceration as a term of probation is erroneous. His reliance upon *State v. Texel*, 230 Neb. 810, 433 N.W.2d 541 (1989), for that position is misplaced. In *State v. Texel*, we held that it is error for a trial

court, when imposing a straight jail sentence, to permit or require a defendant to serve his or her sentence intermittently. We have found no statute authorizing a court to impose an intermittent jail sentence when a defendant is given a straight jail sentence. There is, however, statutory authority for intermittent incarceration as a condition of probation. Neb. Rev. Stat. § 29-2262 (Reissue 1989) provides:

> (2) The court, as a condition of its sentence, may require the offender:
>
> . . . .
>
> (b) To be confined *periodically* in the county jail or to return to custody after specified hours, but not to exceed (i) for misdemeanors, the lesser of ninety days or the maximum jail term provided . . . for the offense . . . .

(Emphasis supplied.)

The defendant argues that the intermittent incarceration imposed as a condition of his probation denies him the opportunity to reduce his sentence pursuant to Neb. Rev. Stat. § 47-502 (Reissue 1988), which provides:

> Any person sentenced to a city or county jail shall have his or her term reduced seven days for each twenty-one *consecutive* days during which he or she has not committed any breach of discipline or other violation of jail regulations. The reductions authorized by this section shall be granted at the end of each period of twenty-one days, with such periods to run consecutively from the date of confinement following sentencing.

(Emphasis supplied.)

The defendant contends that § 47-502 should be applied with equal force to probationers serving intermittent sentences as it is to inmates serving straight jail sentences.

In analyzing this issue, we note first that when statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning, so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning. *State ex rel. Gaddis v. Gaddis*, 237 Neb. 264, 465 N.W.2d 773 (1991). It is a fundamental principle of statutory construction that penal statutes are to be strictly construed, and it is not for the courts

to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there. See *State v. Donaldson*, 234 Neb. 683, 452 N.W.2d 531 (1990).

Section 47-502 specifically applies to jail inmates who have served 21 consecutive days. It is beyond the purview of this court to assume that the Legislature intended that § 47-502 apply to probationers who are sentenced to intermittent sentences authorized by § 29-2262 and who serve their sentences on weekends in order to accommodate their work schedules.

In his second assignment of error, Salyers attacks the provision of his probation order that, he says, restricts him from entering bowling alleys. The defendant argues that his attendance at bowling alleys was not related to his crime, nor is it related to his rehabilitation. Salyers is mistaken on both counts.

Section 29-2262 provides:

> (1) When a court sentences an offender to probation, it shall attach such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law-abiding life.
>
> (2) The court, as a condition of its sentence, may require the offender:
>
> . . . .
>
> (p) To satisfy any other conditions reasonably related to the rehabilitation of the offender.

Salyers had been drinking beer at a bowling alley before he went home and sexually assaulted his wife. The defendant was passed out on his bed when he was found by police shortly after he had assaulted his wife. In sentencing the defendant, the trial judge remarked about Salyers' 10-year history with alcohol. The court noted, and Salyers agreed, that in 1980 the defendant went to Methodist Hospital Eppley Center in Omaha for inpatient treatment. He was diagnosed as suffering from chronic alcoholism. Salyers left without completing treatment and without permission because he "didn't want to hang around there any more." The court had also reviewed the defendant's alcohol-related offenses. The defendant's record of alcohol-related offenses began in 1971 when he was fined for

being a minor in possession of alcohol. Salyers was convicted of driving while under the influence of alcoholic liquor in 1979. In 1981, the defendant was placed on probation for 1 year and incarcerated for 90 days for obstructing a peace officer. Police officers had to physically subdue Salyers. The officers became involved with Salyers after the defendant, who was intoxicated, got into a fight with his father in their home. Also in 1981, Salyers was given a year's probation and 90 days in jail for the unauthorized use of a propelled vehicle. The defendant admitted to drinking the night of that crime. As part of his probation in 1981, Salyers was required to attend Alcoholics Anonymous meetings for 6 months.

Following the assault on his wife, Salyers was evaluated as a "problem drinker." In sentencing the defendant, the trial court told Salyers, "[Y]our own drinking is when you get in the insane jealous moods." The court told the defendant, "[A]pparently you do some drinking in bowling alleys." It was in a bowling alley bar or lounge on February 28 that Salyers had drunk beer before going home and assaulting his wife.

It is obvious that in fixing the terms of Salyers' probation, the sentencing court was concerned with Salyers' being a "problem drinker." It is also obvious that Salyers enjoyed drinking with his friends in bowling alleys. The availability of alcoholic beverages there apparently tempted Salyers to drink. Under the circumstances of this case, drinking in a bowling alley directly related to Salyers' assaulting his wife. Since bowling alleys are where Salyers did some of his drinking, it can be said that a restriction of the defendant's attendance at bowling alleys is related to the rehabilitation of the defendant.

Although the trial court needs to be more precise in setting forth its conditions of probation, the defendant's argument that no restriction should be placed upon his entering a bowling alley is without merit.

We vacate the sentence of the defendant and remand the cause to the district court for Platte County with directions to remand it to the county court with instructions to resentence the defendant.

SENTENCE VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

GRANT, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. CLIFTON L. POPE, APPELLANT.

480 N.W.2d 169

Filed February 14, 1992. No. 90-889.

1. **Criminal Law: Investigative Stops: Police Officers and Sheriffs: Probable Cause.** The test to determine whether an investigative stop is justified is whether the police officer has a reasonable suspicion based on articulable facts which indicate that a crime has occurred, is occurring, or is about to occur and that the suspect may be involved.
2. _____: _____: _____: _____. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances must be taken into account.
3. **Motions to Suppress: Appeal and Error.** On review, a trial court's ruling on a motion to suppress will be upheld unless the findings of fact inherent in the ruling are clearly erroneous.
4. **Search and Seizure.** Although the fact that an individual is in police custody is an important consideration in determining the voluntariness of the consent to search, such factor, standing alone, does not invalidate the consent to search as long as the consent was otherwise voluntarily given.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Don Stenberg, Attorney General, and Jim Elworth for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

Defendant, Clifton L. Pope, was convicted by the district court, sitting without a jury, of unlawful possession of a controlled substance. He was sentenced to 20 months' to 5 years' imprisonment, with credit given for time served. Defendant timely appealed, assigning a single error: The "District Court erred in overruling the Defendant's motion to suppress the fruits of the stop and subsequent arrest of the Defendant." A timely objection was made at trial to the admission into evidence of the "fruits of the illegal stop." We affirm.

The record shows the following: At 10:14 p.m. on December

8, 1989, two police officers on routine patrol saw a parked car, "partially out in the westbound traffic lane on Taylor Street," obstructing the flow of traffic west of 24th Street in Omaha. At the time, "there was a lot of traffic flow on Taylor Street." The area was described as "a high drug traffic area." The car was parked "two, two and a half feet" from the curb, and "[t]he flow of traffic was having difficulty due to this vehicle." Two men were seated in it. Defendant was in the front passenger seat. The officers saw the two men get out of the car and hurriedly walk away.

The officers parked their cruiser and walked toward the car, intending to "advise the parties to either pull the vehicle out from the position or just go ahead and pull it over to the side of the roadway so the traffic could flow." As the officers walked past the car, they saw that it was unlocked and that the keys were in the ignition. They testified that that was unusual for such a high crime area, frequented by pedestrians.

The officers caught up with the two men approximately 20 feet away from the car. The officers asked the two to move the car, but they replied that it was not their car and that it belonged to a woman in a nearby bar. The men stated they did not know the woman's name, only her nickname.

This first contact between the police and defendant was proper. The police were addressing an obvious traffic problem and sought to clear the way for traffic by having the car moved. When defendant and his companion said that they did not own the car and that they did not know the name of the owner, the police were then faced with a different problem. Defendant had just left a car that neither he nor his companion owned, and they did not know the name of the owner. The police knew that keys were in the ignition of the car and that the location was a high crime area. At this point, the police knew objective facts constituting reasonable cause for a "stop and frisk." See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The police conducted a pat-down search. Defendant cannot successfully contend the pat-down search was illegal.

The pat-down search of defendant and the other man disclosed no weapons. While one officer was checking the two men's identification, the other went to look for registration

papers in the car. About this time, two more officers joined the officers already at the scene. Two officers looked through the window and immediately saw that the glove compartment was open and that several packages of cellophane and numerous burnt matches were on top of the open glove compartment door. The officers had much training and experience in drug enforcement, and they testified the facts before them made them suspect that someone had been consuming crack cocaine in the car.

After observing the cellophane and the matches, one officer approached defendant and questioned him. At this point, defendant was, in effect, seized. The officer testified that defendant was not "free to go." The stop had developed into an investigation.

We have held:

> The test to determine whether an investigative stop is justified is whether the police officer has a reasonable suspicion based on articulable facts which indicate that a crime has occurred, is occurring, or is about to occur and that the suspect may be involved. . . . In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances must be taken into account. . . . The assessment of the totality of the circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is, has been, or is about to be engaged in criminal behavior.

State v. Pillard, 235 Neb. 642, 646, 456 N.W.2d 755, 758 (1990).

In this case, experienced officers had properly looked inside the car in an effort to determine the ownership of the car and saw physical items in plain view. Those items indicated that illegal drugs had been consumed in the car. The items were positioned directly in front of the seat in the car that the officers knew defendant had just left. The information could be used by the officers because it was obtained pursuant to the "plain view" doctrine. The officers lawfully made their initial intrusion into the car; the incriminating evidence was discovered inadvertently; and it was immediately apparent to

the trained officers that the items they saw could be evidence of a crime. See *State v. Brown*, 232 Neb. 224, 439 N.W.2d 792 (1989). The investigative stop was fully justified and was legally proper.

One of the officers asked defendant if defendant had any drugs on his person and if he had used any drugs that evening. Defendant replied negatively to both questions. The officer then asked defendant if the officer could search him for controlled substances. Defendant told the officer to go ahead. The officer asked defendant to turn around and unbutton his overcoat. Defendant did so and opened the coat.

The officer reached into defendant's overcoat and found a cellophane wrapper in the left inside breast pocket. The wrapper contained a substance that was later determined to be a large rock of crack cocaine. The officer then formally placed defendant under arrest and field tested the substance. Defendant accused the officer of planting the cocaine in his pocket and denied that the cocaine belonged to him.

The officers transported defendant to the police station, where they strip searched and interrogated him. Defendant was advised of his rights under *Miranda*, and an officer recorded defendant's responses stating that he understood his rights. Defendant then made a statement, in which he admitted that he had given consent to the search and had voluntarily opened his coat. The interview concluded about 11:25 p.m.

When reviewing the correctness of a trial court's ruling on a motion to suppress, an appellate court will not reweigh the evidence or resolve conflicts in the evidence, but will uphold the trial court's findings of fact inherent in the court's ruling unless these facts are clearly erroneous. See, *State v. Melton, ante* p. 790, 478 N.W.2d 341 (1992); *State v. Bowen*, 232 Neb. 725, 442 N.W.2d 209 (1989). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh evidence or resolve conflicts therein, but takes into consideration that the trial court has observed the witnesses testifying in regard to the motion to suppress. *State v. Melton, supra.*

Neither a warrant nor probable cause is required for a consensual search, but the State must prove that the consent

was freely and voluntarily given. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). Pursuant to the 4th and 14th amendments to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, a citizen has a right to be free from an unreasonable search and seizure. "[I]f police [have] acted without a search warrant, the State has the burden of proof that the search was conducted under circumstances substantiating the reasonableness of such search or seizure." *State v. Vrtiska*, 225 Neb. 454, 461, 406 N.W.2d 114, 120 (1987).

We discussed the requirements of voluntary consent in *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990), where defendant had been stopped for speeding. Prahin objected to a subsequent search, on the basis that although he gave consent, his consent was not voluntary. Prahin argued that he was in custody at the time he gave his consent to the search, and, therefore, his consent was involuntary. Pope was in custody in this case. In *Prahin*, we held, "Although the fact that an individual is in police custody is an important consideration in determining the voluntariness of the consent to search [citation omitted], such factor, standing alone, does not invalidate the consent to search as long as the consent was otherwise voluntarily given." *State v. Prahin, supra* at 416, 455 N.W.2d at 560.

In this case, defendant was in custody when he gave his consent, because at that point he was not free to leave. There is no evidence, however, that the officer coerced, threatened, or made promises to the defendant. Defendant not only consented, but admitted in his statement that he opened his coat for the officer. Defendant's consent to the search of his person, in this case, was voluntarily given. We hold that the evidence fully supports the trial court's order denying defendant's motions to suppress both his statements and the physical evidence obtained from his person and the trial court's overruling defendant's objections to their admission at trial. Defendant's assignment of error is without merit.

AFFIRMED.

RONALD A. MILLER, APPELLEE, V. GOODYEAR TIRE & RUBBER COMPANY AND THE TRAVELERS INSURANCE COMPANY, APPELLANTS.

480 N.W.2d 162

Filed February 14, 1992. No. 90-1166.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the Nebraska Workers' Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly erroneous.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support findings of fact made by the compensation court after rehearing, the evidence must be considered in the light most favorable to the successful party.
3. **Trial.** Determination of causation is ordinarily a question for the trier of fact.
4. **Workers' Compensation.** A preexisting disease and an accident may combine to produce a compensable disability under the Workers' Compensation Act.
5. _____. A preexisting disease and an aggravation of that disease may combine to produce a compensable injury.
6. **Statutes: Legislature: Intent.** As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
7. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** When a judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court's interpretation.
8. **Workers' Compensation.** Neb. Rev. Stat. § 48-151(3) (Reissue 1988) means that the conditions of the employment must result in a hazard which distinguishes it in character from employment generally.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Richard D. Sievers, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellants.

Rod Rehm, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

This is an appeal from a decision of a three-judge panel (one judge dissenting) of the Workers' Compensation Court

awarding plaintiff-appellee, Ronald A. Miller, 6⁶/₇ weeks' temporary total disability and certain medical expenses. Defendants, Goodyear Tire & Rubber Company, Miller's employer, and The Travelers Insurance Company, Goodyear's insurer, have appealed. Appellants assign five errors, which may be summarized to allege that the compensation court erred (1) in finding that "the Appellee's transient acantholytic dermatosis was an occupational disease where the preexisting disease was not an occupational disease as required [by] Neb. Rev. Stat. §48-151 (4) (Reissue 1988)" and (2) in finding that "the Appellee's transient acantholytic dermatosis was a compensable occupational disease when there was no evidence that the only known aggravating factor, to-wit [sic]: heat or sweat, was unique or peculiar to Appellee's employment with Goodyear." We affirm.

The findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly erroneous. *Phipps v. Milton G. Waldbaum & Co., ante* p. 700, 477 N.W.2d 919 (1991); *Roan Eagle v. State*, 237 Neb. 961, 468 N.W.2d 382 (1991). In testing the sufficiency of the evidence to support findings of fact made by the compensation court after rehearing, the evidence must be considered in the light most favorable to the successful party, *Phipps v. Milton G. Waldbaum & Co., supra*, in this case, the appellee, Miller.

Miller started work for Goodyear in 1976. At that time he had never been treated for a skin disorder. From 1976 to 1989, Miller worked in the hose department at Goodyear making radiator hose. His job, described as "hose pulling," consisted of dipping raw rubber in various chemicals and loading it on mandrels. The rubber was then baked for approximately 15 minutes to a temperature of over 300 degrees. After the rubber was cooked, Miller removed the rubber from the oven and pulled the rubber off the various mandrels, in rotation. Miller testified, "You just keep going from one pot to another, and you just rotate them back and forth. Or if you are on one single pot, you just take that one end . . . so it's just kind of back and forth."

When asked if he got breaks away from the hot environment, Miller testified, "[I]f you can beat the time and get done before that, they do have a picnic table we sit down on, but it's right in the area. There's no cool — I mean, they have a cool room, but that's basically for your lunches."

Miller testified that the job was "a hot physical job." Near the ovens, the temperature reached as high as 125 to 128 degrees, and the ovens and the rubber gave off heat. The workers were dripping wet with sweat at all times of the year. They regularly came into contact with the chemicals. Conditions had been the same since Miller started working for Goodyear in 1976.

While working in this heat, Miller wore protective clothing, including thick cotton sleeves, worn from the wrist to above the elbow, and gloves. He wore a headband to keep the sweat out of his eyes.

Miller was exposed to three different chemicals when he was pulling hose. Goodyear provided information, admitted into evidence, about these chemicals. The information indicated that all three chemicals could cause skin irritation. The first product, cyclohexanone, "is a moderate skin irritant and repeated or prolonged exposure can cause irritation or dermatitis." (Emphasis omitted.) The information on the second chemical, Ucolic, stated that it causes eye and skin irritation. The third product, "hose bloom," "may irritate the skin of some individuals if prolonged and repeated contact is encountered." (Emphasis omitted.)

The expert witnesses, the dermatologists who treated or examined Miller, could not evaluate the contributing effect of the various chemicals on Miller. Dr. Rodney Basler's opinion was that "patch testing" to try to determine the effect of the individual chemicals was "of no diagnostic value whatsoever in dermatologic conditions in which the entire environment is incriminated in aggravating an inflammitory [sic] dermatosis." Dr. Basler reaffirmed, "Again it is the overall work environment which contributed to the aggravation of Mr. Miller's underlying disease."

Dr. Suzanne Braddock, another dermatologist, wrote that "to confirm that *chemicals* are *directly* responsible we would

have to [do a] 'patch test.' " (Emphasis that of Dr. Braddock.)

In 1988, Miller began to develop skin problems. The problems began with a rash in the area of his headband. The rash then spread to his arms, chest, back, and legs. The rash was itchy and bleeding. In November 1988, Miller went to the plant physician, who attempted to treat the problem for about 2 weeks before sending Miller to dermatologists in December 1988. The dermatologists did a biopsy on December 16, 1988, and the results were consistent with transient acantholytic dermatosis (TAD), also known as Grover's disease. The dermatologists prescribed various medications, including Accutane, steroids, and prednisone, to treat the rash through the spring and summer of 1989, but the medications were ineffective.

TAD is a relatively rare disease. Dr. Basler testified that the biochemical background of TAD is unknown in the scientific community, but that it is usually associated with heat and sweating. Basler testified that he believed that Miller's TAD "may have been instigated or originated with a heat-related experience at work," but that "it would be impossible to say that that's definitely what caused the disease."

Basler testified as a witness for defendants and testified that the TAD was aggravated by Miller's work at Goodyear. The following dialogue took place:

> Q Doctor, in your opinion, was there an aggravation of the underlying TAD that occurred when Mr. Miller would return to work at the Goodyear plant?
>
> A I do believe that.
>
> Q Now, when you use the term "aggravation" in responding to my question, what do you mean by "aggravation"?
>
> A During periods of time when he — we had cleared him up, from being away from his job and using the internal medications, particularly the cortisone, the steroid-type preparations, when he would return to work, I would ask him to return to see me within a week, and he would return with the same type of lesions that he had initially that were red, itching, sometimes fluid-filled, weeping, sometimes crusted.

In July 1989, Miller's condition was so bad that Dr. Basler insisted Miller leave the plant for a time. At times his body was covered with blistered, bleeding lesions. Miller said he had trouble sleeping when the rash was bad. He described his legs, arms, and chest as "raw," and he was unable to get haircuts because his head was covered with the rash. "I would just itch. Back then it was really bad. It was to the point where I couldn't stand it." Miller was away from work from July 10 to July 24, 1989. During that time he was taking steroids, and his condition cleared up completely.

The day Miller returned to work, he started in the hose department at his old job. By 11 a.m., his rash returned. Miller only worked in the hose department a few days before Goodyear arranged to temporarily transfer him to another job. His condition cleared slightly.

The doctors wanted to see if Miller's condition would improve without drugs if he were away from the plant. Miller was off work from November 1 to December 13, 1989. During this time, he used only a salve to soothe the itching. His skin condition cleared.

When Miller returned to Goodyear in December 1989, he was assigned to a job packing belts, which was outside the hose department. Miller earned 50 to 60 cents an hour less than he did in the hose department. The conditions were cooler in the packing job, and Miller did not come in contact with any chemicals. He did not sweat much in the packing department. Miller developed a minor rash, but "[it was] nothing like it ha[d] been in hose."

Miller worked packing belts until June or July 1990, when he was moved to another job at Goodyear. The conditions were a little hotter than in the packing job, and the pay was comparable.

Since Miller left the hose department, he has not sought help for his rash other than to obtain a salve that he uses "when [he] need[s] it." He has not suffered a major outbreak since he left the hose department, with the exception of an outbreak on his arm after he momentarily entered a chemical room.

After the rehearing, the compensation court found that there was "ample evidence with respect to the issue of causation" and

that plaintiff was entitled to benefits. In so finding, the court denied defendants' contentions that the heat in Miller's work environment was a condition common to many employments and that Miller's petition should be denied because this case represents only the aggravation of a preexisting dermatosis. Determination of causation is ordinarily a question for the trier of fact. *Kidd v. Winchell's Donut House*, 237 Neb. 176, 465 N.W.2d 442 (1991); *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990).

With respect to appellants' first summarized assignment of error, the compensation court held as follows: "We are persuaded that the employment conditions of the plaintiff at [Goodyear] aggravated his preexisting dermatosis to the point that the plaintiff was required to be off work . . . and to incur the medical expenses ordered to be paid." We agree with the majority of the compensation court panel.

The law is well settled that a preexisting disease and an accident may combine to produce a compensable disability under the Workers' Compensation Act. See, e.g., *Gilcrest Lumber Co. v. Rengler*, 109 Neb. 246, 190 N.W. 578 (1922) (accident combined with existing syphilis resulted in compensable injury); *Chatt v. Massman Construction Co.*, 138 Neb. 288, 293 N.W. 105 (1940) (long-existing rheumatism combined with a slip and fall into the Missouri River resulted in compensable injury); *Engel v. Nebraska Methodist Hospital*, 209 Neb. 878, 312 N.W.2d 281 (1981) (congenital spondylolysis combined with lifting accident resulted in compensable injury); *Kidd v. Winchell's Donut House, supra* (preexisting diabetes combined with a blow to the eye socket resulted in compensable injury).

Similarly, a preexisting disease and an aggravation of that disease may combine to produce a compensable injury, as we held in *Riggs v. Gooch Milling & Elevator Co.*, 173 Neb. 70, 74, 112 N.W.2d 531, 533 (1961), where we stated:

> The law of this state has consistently recognized that the lighting up or acceleration of preexisting conditions by accident is compensable. We see no difference in principle in the situation before us. A disability brought about by employment conditions and a preexisting weakness or

> disease, may be compensable if the conditions bringing it about are characteristic of and peculiar to the employment and do not result in a common disease to which the general public is exposed.

In *Riggs*, the claimant's medical testimony showed that "the inhaling of wheat dust in large quantities over a long period of time produces an irritation of the lungs and bronchial tree and *an aggravation of an existing abnormal condition* which may result in an emphysema reaching a disabling stage." (Emphasis supplied.) *Riggs, supra* at 75, 112 N.W.2d at 534.

We discussed the degree of proof required in a preexisting disability case in *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990). We expressly disapproved a heightened standard of proof when a preexisting disease or condition was involved. We stated:

> [A] workers' compensation claimant may recover when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that in the absence of the preexisting condition no disability would have resulted. Also, we stated in *Spangler* [*v. State*, 233 Neb. 790, 448 N.W.2d 145 (1989)]: "To sustain an award in a workers' compensation case involving a preexisting disease or condition, it is sufficient to show that the injury resulting from an accident arising out of and in the course of employment and the preexisting disease or condition combined to produce disability [citation omitted], or that the employment injury aggravated, accelerated, or inflamed the preexisting condition [citations omitted]." 233 Neb. at 795, 448 N.W.2d at 149.
>
> Although a claimant with a preexisting disability or condition may face various obstacles, both medical and legal, and must satisfy the statutory requirements for an award under the Nebraska Workers' Compensation Act, an enhanced degree of proof, establishing a cause-and-effect relationship between a work-related injury and consequent disability, is not among a claimant's burdens for obtaining an award under the Nebraska Workers' Compensation Act.

Heiliger, supra at 468, 461 N.W.2d at 572.

If the aggravation clause of Neb. Rev. Stat. § 48-151(4) (Reissue 1988) requires that the claimant prove the preexisting disease is occupational, the aggravation clause adds nothing to the statute. Occupational diseases are already compensable according to § 48-151(4), which states, "The terms shall include disablement resulting from occupational disease arising out of and in the course of the employment in which the employee was engaged and which was contracted in such employment." Since disability arising from occupational diseases is already compensable, the aggravation clause adds nothing, with the possible exception of a situation in which the claimant's underlying condition or disease is caused by his work with firm A, the condition is aggravated by his work with firm B, and the claimant wishes to receive benefits from firm B. This set of facts would require the application of Neb. Rev. Stat. § 48-128 (Reissue 1988), which provides, in detail, for a Second Injury Fund.

Appellants' interpretation of the aggravation clause is not compatible with the language of § 48-128, which provides, in part,

> If an employee . . . has a preexisting permanent partial disability whether from compensable injury *or otherwise* . . . the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability.

(Emphasis supplied.) If we allowed compensation only for the aggravation of occupational conditions, then all preexisting permanent partial disabilities would be from "compensable injury" and the "or otherwise" language would be meaningless. Additionally, § 48-128 goes on to define preexisting permanent partial disability as "any preexisting permanent condition, *whether congenital or the result of injury or disease*, of such seriousness as to constitute a hindrance or obstacle to obtaining employment . . . ." (Emphasis supplied.) If we adopt the appellants' interpretation, §§ 48-128 and 48-151(4) of the Workers' Compensation Act are contradictory. Such a result should be avoided, if possible. We stated in *Indian Hills Comm.*

Ch. v. County Bd. of Equal., 226 Neb. 510, 518, 412 N.W.2d 459, 465 (1987), " '[A] series or collection of statutes pertaining to a certain subject matter, statutory components of an act, which are in pari materia, may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.' "

For the past 30 years, since *Riggs v. Gooch Milling & Elevator Co.*, 173 Neb. 70, 112 N.W.2d 531 (1961), we have interpreted the Nebraska Workers' Compensation Act not to require proof that a preexisting condition was occupational before allowing recovery for a work-related aggravation of that condition. When a judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court's interpretation. *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989); *Mayfield v. Allied Mut. Ins. Co.*, 231 Neb. 308, 436 N.W.2d 164 (1989).

Appellants' first summarized assignment of error is without merit.

With regard to appellants' second summarized error, that is, that the panel erred in finding that the only known aggravating factor in Miller's condition was unique or peculiar to Miller's employment with Goodyear, we also agree with the panel's determination in that respect.

Appellants contend: "It is difficult to see how the heat in the plant would distinguish this occupation from a myriad of other occupations. Most work performed in the out-of-doors in a Nebraska summer causes the average worker to sweat, sometimes profusely." Brief for appellants at 19.

In this regard, the majority of the panel found as follows: "We have concluded that the excessive heat to which the plaintiff was exposed, which heat was sufficient to cause the plaintiff to drench his clothing with sweat, is a condition of the plaintiff's employment which distinguishes it in character from employment generally."

In making that finding, the panel majority did not mean "heat" in the abstract. The heat in which Miller worked was not just reflected in a high temperature, but that heat was only a part, albeit a large part, of the work environment. In

responding to a question posed by The Travelers, concerning the possibility of patch testing to determine if specific chemicals were causing Miller's problems, Dr. Basler stated in his March 6, 1990, report:

> In answer to specific questions posed by Mr. Paul A. Harold of the Traveler's, let me first answer that controlled setting exposure to chemicals of any type is of no diagnostic value whatsoever in dermatologic conditions in which the entire environment is incriminated in aggravating an inflammitory [sic] dermatosis. For that reason controlled exposure, specifically patch testing was not used . . . . Again it is the overall work environment which contributed to the aggravation of Mr. Miller's underlying disease.

Dr. Basler is of the opinion which lay common sense affirms, that the entire work environment is "incriminated" in aggravating Miller's condition.

The environment in which Miller worked cannot reasonably be said to be the same as the environment in which "a roofer, construction worker, carpenter, asphalt paver, garbage man, lifeguard, or tour guide at the zoo," brief for appellants at 19, would work. Rather than working in a confined area full of heat and chemicals, the workers referred to by appellants work in fresh outdoor air and at temperatures less than the temperatures to which Miller was continuously exposed.

The statutory requirement in § 48-151(3) is that the disease be "a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment . . . ." Section 48-151(4) includes the aggravation of a preexisting disease within the meaning of disease, so that a disease aggravated by conditions characteristic of and peculiar to a particular employment is likewise compensable.

In *Ritter v. Hawkeye-Security Ins. Co.*, 178 Neb. 792, 795, 135 N.W.2d 470, 472 (1965), we said:

> The requirement of the statute [§ 48-151(3)] is that the cause and conditions of the disease be characteristic of and peculiar to the employment and that the disease be other than an ordinary disease of life. The statute does not

> require that the disease be one which originates exclusively from the employment. The statute means that the conditions of the employment must result in a hazard which distinguishes it in character from employment generally. . . .
>
> . . . The evidence establishes that the cause and conditions of the disease are characteristic of and peculiar to the occupation of dishwashing and that dishwashing involves a hazard which is greater than that which occurs in employment generally.

Ritter was a dishwasher. The lower court had determined that plaintiff's disease was not characteristic of or peculiar to the plaintiff's occupation, but this court reversed that determination and held as set out above.

Similarly in this case, we affirm the panel majority's finding that the causes and conditions in this case are peculiar to Miller's occupation as a "hose puller."

Appellants' second summarized assignment of error is without merit.

Appellee's counsel is awarded a fee of $1,500 on appellee's fee in this appeal.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. DONALD F. GRAY, APPELLANT.

479 N.W.2d 796

Filed February 14, 1992. No. 90-1182.

Motions to Dismiss: Directed Verdict: Waiver: Convictions: Appeal and Error. A defendant who moves for dismissal or a directed verdict at the close of evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict, but may challenge sufficiency of the evidence for the defendant's conviction.

Appeal from the District Court for Sarpy County, RONALD E. REAGAN, Judge, on appeal thereto from the County Court for Sarpy County, JEFFREY L. CAMPBELL, Judge. Judgment of District Court affirmed.

Thomas J. Garvey, Sarpy County Public Defender, and Robert C. Wester for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

Donald F. Gray appeals his conviction during a bench trial in the county court for Sarpy County and sentence for third degree assault, see Neb. Rev. Stat. § 28-310(1)(b) (Reissue 1989), a Class I misdemeanor punishable by a maximum of 1 year's imprisonment, a $1,000 fine, or both, pursuant to Neb. Rev. Stat. § 28-106 (Reissue 1989), which prescribes no minimum sentence of imprisonment or fine for a Class I misdemeanor.

Section 28-310(1)(b) states in pertinent part: "A person commits the offense of assault in the third degree if he . . . [t]hreatens another in a menacing manner."

In the late hours of a July evening in 1989, the victim, a 9-year-old boy who was 4 feet tall and weighed around 120 pounds, was involved in playing darts at the River City Softball Complex with 28-year-old Gray, who was 5 feet 7 inches tall and weighed 184 pounds, a bodybuilder who had won the title of "Mr. Nebraska . . . collegiate." Also involved in the dart matches was Gray's friend, Tim Pool. While the trio played their dart games in the upper level of the complex, the victim's parents were downstairs with other family members. During one of the dart games, an apparent dispute occurred concerning the victim's contribution toward payment for the game. When Gray and Pool began to chase the victim around the upper level, the frightened victim ran to the men's room, went inside, and hid himself in a toilet stall, which he locked. Gray and Pool entered the men's room and beat on the door of the stall

containing the victim, but soon left. When the victim believed it was safe, he left the stall. At that point, Gray and Pool reentered the men's room. Gray picked up the victim and held the victim's legs as Pool grasped the victim around the waist. While the victim was "afraid," head down, and nearly vertical, Gray and Pool lowered the victim's head into a urinal to the point that the boy's head became wet from water in the urinal. Afterward, Gray and Pool left the victim sitting on the floor of the men's room and crying, and returned to the area where the dart games had been played. Thereafter, when the victim informed his parents about the incident, the victim's father and uncle confronted Gray, who admitted the events in the men's room. Officers from the Sarpy County Sheriff's Department appeared at the scene in response to a call from the manager of the complex.

The preceding account of the incident was, by and large, established through evidence presented by the State. At the conclusion of the State's case in chief, Gray moved for dismissal, contending that the State had failed to prove a prima facie case of assault. When the dismissal motion was overruled, Gray proceeded to testify, expressly and specifically contradicting the State's evidence that he held the victim aloft and then lowered the victim's head into the urinal. For the most part, Gray testified that it was Pool, not Gray, who lowered the victim into the urinal. At the conclusion of Gray's evidence and without Gray's renewal of a motion for dismissal, the State declined to offer rebuttal evidence. After summations by the lawyers, the court found Gray guilty of third degree assault, the charge and conviction involved in Gray's appeal. Later, after a presentence report, the county court, on September 21, 1990, sentenced Gray on the assault conviction—15 days' imprisonment and a $75 fine.

In Gray's appeal to the district court for Sarpy County, Gray's conviction and sentence were affirmed. In his appeal to this court, Gray claims: "1. The trial court erred as a matter of law by not dismissing at the close of Appellee's case. 2. The trial court erred and abused its discretion by imposing an excessive sentence which was disproportionate to the crime."

Although Gray contends that the State failed to prove a

prima facie case of assault and, hence, the court should have sustained Gray's dismissal motion at the end of the State's case in chief, both Gray and the State, in a knee jerk response to Gray's assignments of error without a careful examination of the record, overlook a fundamental and longstanding principle for appellate review: A defendant who moves for dismissal or a directed verdict at the close of evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict, but may challenge sufficiency of the evidence for the defendant's conviction. See, *State v. Tingle, ante* p. 558, 477 N.W.2d 544 (1991); *State v. Coburn*, 218 Neb. 144, 352 N.W.2d 605 (1984); *State v. Hellbusch*, 213 Neb. 894, 331 N.W.2d 815 (1983); *Henggler v. State*, 173 Neb. 171, 112 N.W.2d 762 (1962).

By introduction of evidence after the court's ruling on the dismissal motion, Gray has waived any appellate challenge to the correctness of the trial court's ruling on Gray's dismissal motion at the end of the State's case in chief. We have recounted some of the evidence to show that there was not a complete failure of proof on an essential element of the crime charged and thereby dispel any notion about availability of the plain error doctrine concerning sufficiency of evidence to support Gray's conviction. Also, the factual background for Gray's conviction supplies the setting for our considering Gray's claim that an excessive sentence was imposed on him.

In conjunction with Gray's claim that the county court imposed an excessive sentence, we have examined the presentence report on Gray, which discloses that he has had several encounters in the criminal justice system, including the following convictions: theft (1982); reckless driving (1984); drunk driving (1986); disturbing the peace (1987); drunk driving, which was Gray's second offense (arrest: August 19, 1989; conviction: May 10, 1990); and drunk driving, which was treated as Gray's second offense (arrest: January 3, 1990; conviction: May 10, 1990).

" ' "A sentence imposed within the statutory limits will not

be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed." ' " *State v. Witt, ante* p. 400, 402-03, 476 N.W.2d 556, 558-59 (1991). Accord, *State v. Jameson, ante* p. 109, 474 N.W.2d 475 (1991); *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991). We have also stated:

> [I]n considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment and includes the observations of the sentencing judge as to the demeanor, attitude, and all facts and circumstances surrounding the life of the defendant.

State v. Stranghoener, 208 Neb. 598, 603, 304 N.W.2d 679, 682 (1981). Accord *State v. Witt, supra*.

In view of the foregoing, there is no abuse of discretion in the sentence imposed on Gray.

Therefore, the judgment of the district court, affirming Gray's county court conviction and sentence, is affirmed.

AFFIRMED.

IN RE INTEREST OF M.B. AND A.B., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. A.B., APPELLANT, AND N.F., APPELLEE AND CROSS-APPELLANT.

480 N.W.2d 160

Filed February 14, 1992. No. 91-443.

1. **Juvenile Courts: Jurisdiction.** The jurisdiction of the State in juvenile adjudication cases arises out of the power every sovereignty possesses as parens patriae to every child within its borders to determine the status and custody that will best meet the child's needs and wants.
2. **Juvenile Courts: Evidence: Jurisdiction.** If evidence of the fault or habits of a parent or custodian indicates a risk of harm to a child, the juvenile court may properly take jurisdiction of that child, even though the child has not yet been harmed or abused.
3. **Juvenile Courts: Jurisdiction: Intent.** It is not the intent or the purpose of the Nebraska Juvenile Code to require the separate juvenile court to wait until disaster has befallen a minor child before the court may acquire jurisdiction.

Appeal from the Separate Juvenile Court of Lancaster County: TONI G. THORSON, Judge. Affirmed.

Roger C. Lott for appellant.

Thomas R. Lamb, of Berry, Anderson, Creager & Wittstruck, for appellee N.F.

Linda S. Porter, Deputy Lancaster County Attorney, for appellee State.

Roberta S. Stick, guardian ad litem.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

A.B. appeals and N.F. cross-appeals the adjudication of their daughter, A.B., and N.F.'s daughter from a previous relationship, M.B., as children in need of supervision by reason of the fault or habits of A.B. and N.F., hence bringing the children within the jurisdiction of the separate juvenile court of Lancaster County in accordance with Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988).

The State introduced evidence that appellant A.B. had twice been convicted of committing sex crimes against children. One of the crimes occurred in Iowa and involved another daughter of A.B.'s. One conviction was the result of a guilty plea; the other was pursuant to a guilty verdict following a jury trial. Although A.B. was incarcerated as a result of these actions, he did not receive treatment for his impulses to sexually abuse children. A.B. had confided in N.F., the children's mother, regarding the existence of these two convictions, but denied the factual bases of the convictions. N.F. testified she did not think that A.B. posed a threat to either her own daughter or the daughter they had had together. She continued to leave the children with A.B. unsupervised, despite the demands of the Department of Social Services that she not do so.

The State has intervened due to the allegedly high risk A.B. poses to the children, as a repeat sex offender who has not received treatment for his disorder. Although no evidence exists that A.B. has made inappropriate contact with the girls, he

testified he avoided diapering and bathing them, to prevent any further accusations like those in his past that resulted in the above-mentioned convictions.

The appellant alleges that the separate juvenile court erred in (1) finding that the State's amended petition stated a cause of action and overruling A.B.'s demurrer and (2) allowing N.F. to be questioned regarding incidents and conflicts between A.B. and N.F. Both the appellant and cross-appellant allege that the separate juvenile court erred in (1) failing to sustain their motions to dismiss at the close of the State's evidence and (2) finding that the children lacked proper parental care by reason of the fault and habits of A.B. and N.F.

We decide this case de novo on the record. See *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990).

We have stated that the jurisdiction of the State in juvenile adjudication cases arises out of the power every sovereignty possesses as parens patriae to every child within its borders to determine the status and custody that will best meet the child's needs and wants. See *Stewart v. McCauley*, 178 Neb. 412, 133 N.W.2d 921 (1965). In that case, we elaborated on the role of the juvenile court:

> The juvenile court is a product of the solicitude of the law for the welfare of infants. Its powers and duties are described more or less in detail in our statutes, and because of their humanitarian and beneficient [sic] purpose, they should be liberally construed to the end that their manifest purpose may be effectuated to the fullest extent compatible with their terms.

Id. at 418, 133 N.W.2d at 925.

If evidence of the fault or habits of a parent or custodian indicates a risk of harm to a child, the juvenile court may properly take jurisdiction of that child, even though the child has not yet been harmed or abused. See, *In re Interest of S.R., D.R., and B.R., ante* p. 871, 479 N.W.2d 126 (1992); *In re Interest of S.L.P.,* 230 Neb. 635, 432 N.W.2d 826 (1988); *In re Interest of J.D.M.,* 230 Neb. 273, 430 N.W.2d 689 (1988); *In re Interest of E.R., J.R., and A.R.*, 230 Neb. 646, 432 N.W.2d 834 (1988).

As we found in *In re Interest of W.C.O.*, 220 Neb. 417, 419,

370 N.W.2d 151, 153 (1985),

> [t]he question that we must therefore address is whether a child lacks proper parental care by reason of the fault or habits of his parent if his parent has committed a sexually abusive act upon another minor child. The danger of permitting such a father to remain in a position where he may be alone with his own minor child should be obvious. It is not the intent or purpose of the juvenile code to require the separate juvenile court to wait until disaster has befallen a minor child before the court may acquire jurisdiction. If it is reasonable to assume that injury will occur absent action by the court, then the court may assume jurisdiction and act accordingly.

This court's position discouraging juvenile courts from waiting until tragedy has befallen a child before intervention occurs is clearly not a novel one. In light of our consistent position in cases concerning juvenile adjudications under § 43-247(3)(a), we find that the amended petition sufficiently stated a cause of action and that the State was not required to allege these children had been subjected to sexual abuse by A.B. The petition set out the crimes of which A.B. had been convicted and the corresponding risk to these children due to A.B.'s failure to seek treatment for his propensity toward sexual contact with minors. The assignment is without merit.

As to A.B.'s contention that the court improperly considered N.F.'s testimony regarding her domestic altercations with A.B., we affirm.

The record reflects that this testimony was not solicited as evidence against A.B., but was offered for the limited purpose of establishing N.F.'s inability to protect the children from the risk posed by A.B. and to impeach her testimony that she was not afraid of him. The assignment is without merit.

N.F. admitted that she had left her children alone with A.B. approximately 15 times since learning of his history of sexual contact with children. Despite her in-court testimony to the contrary, N.F., to date, has not proven her reliability in keeping her daughters away from unsupervised contact with A.B.

We find that the separate juvenile court of Lancaster County did not abuse its discretion in overruling appellant's and

cross-appellant's motions to dismiss or in its finding that the children fell within § 43-247(3)(a), lacking proper supervision by reason of the fault or habits of A.B. and N.F., and that the children were within the court's jurisdiction.

We affirm the adjudication decision in its entirety.

AFFIRMED.

JOSEPH J. POLICKY, APPELLANT, V. RHONDA L. POLICKY, APPELLEE.

479 N.W.2d 795

Filed February 14, 1992. No. 91-491.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Affirmed.

David L. Kimble, of Souchek & Kimble, for appellant.

Thomas M. Wakeley, of Legal Services of Southeast Nebraska, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Joseph J. Policky appeals from the judgment of the district court for Seward County in a proceeding to dissolve his marriage to Rhonda L. Policky. The court found that Joseph and Rhonda Policky were fit parents of their minor son. Joseph Policky contends that the district court abused its discretion in awarding custody of the parties' minor child to the mother, Rhonda Policky, with reasonable visitation to Joseph Policky, and by failing to equitably divide the Policky marital estate.

> "In an appeal involving an action for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse

> of discretion. In such de novo review, when the evidence is in conflict, the Supreme 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."

Moser v. Moser, ante p. 617, 617-18, 476 N.W.2d 922 (1991). Accord, *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991); *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990). "Child custody in a proceeding to dissolve a marriage is a matter within the trial court's discretion." *Ritter v. Ritter*, 234 Neb. 203, 208, 450 N.W.2d 204, 209 (1990). Accord *Peterson v. Peterson*, 224 Neb. 557, 399 N.W.2d 792 (1987). The division of property in marriage dissolution cases is a matter initially entrusted to the discretion of the trial judge. *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984). See, *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986); *Sullivan v. Sullivan*, 223 Neb. 273, 388 N.W.2d 516 (1986).

From our de novo examination and review of the record, we have determined that the district court did not abuse its discretion regarding child custody or property division in this proceeding. See *Moser v. Moser, supra*.

AFFIRMED.

KIM M. WIESE, APPELLANT, V. BECTON-DICKINSON CO., APPELLEE.

480 N.W.2d 156

Filed February 14, 1992. No. 91-587.

1. **Workers' Compensation: Evidence: Appeal and Error.** Findings of fact by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong. In testing the sufficiency of the evidence to support findings of fact made by the court after rehearing, the evidence must be considered in the light most favorable to the successful party. In an appeal, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.
2. **Appeal and Error: Words and Phrases.** Plain error is error which was unasserted

or uncomplained of at trial or on appeal, but is plainly evident from the record, which prejudicially affects a litigant's substantial right and which is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

3. **Workers' Compensation: Evidence: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside if there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award.
4. **Workers' Compensation: Appeal and Error.** Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous.
5. **Trial: Expert Witnesses.** A fact finder or trier of fact may accept or reject an opinion from an expert witness.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded for further proceedings.

Clark J. Grant, of Grant, Rogers, Maul & Grant, for appellant.

John R. Hoffert, of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Kim M. Wiese appeals the Workers' Compensation Court's dismissal of her petition requesting compensation for the injuries which she claims she received arising out of and in the course of her employment with Becton-Dickinson Co. (B-D).

Wiese's two assignments of error combine to claim that the compensation court erred in determining that she failed to sustain her burden of proof on causation of the injury to her left arm and shoulder. Because we find that there was plain error committed by the Workers' Compensation Court in regard to its finding concerning the injuries to Wiese's arm and shoulder, it is not necessary to discuss the appellant's assignments of error.

We reverse the decision of the Workers' Compensation Court and remand the cause for a new trial.

On appeal,

> "[f]indings of fact by the Nebraska Workers'

> Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong. . . . In testing the sufficiency of the evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. . . . Every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence."

Schlup v. Auburn Needleworks, *ante* p. 854, 857, 479 N.W.2d 440, 443-44 (1992).

In 1986, the appellant, who had been employed 10 years in various departments of B-D, a pharmaceutical supplies manufacturer, began experiencing pain in her left arm and shoulder, in both her hands, and in her neck. In 1985, Wiese began working in the wash-and-dry department, where she processed approximately 200 metal trays per day. Each tray weighed between 30 and 35 pounds and was lifted by Wiese four or five times during processing.

Wiese testified that the onset of her symptoms occurred gradually and coincided with her pregnancy in 1986. She sought medical advice from several doctors in 1987 and 1988 and was diagnosed as having bilateral carpal tunnel syndrome. Surgery was performed in May 1988 which proved unsuccessful in relieving the pain in her left hand, shoulder, and arm. Wiese has been compensated by B-D for the expenses of that surgery and for the resulting temporary total disability.

In April 1989, Wiese consulted Dr. Kip Burkman, a physician specializing in physical medicine and rehabilitation. She complained of numbness and tingling in the posterior left upper shoulder girdle. She complained to a lesser degree of numbness and tingling in her arm. She stated that these symptoms were worsening with time. Dr. Burkman diagnosed Wiese as suffering, in part, from myofascial pain syndrome of the left arm due to repetitive motion. In hopes of alleviating her pain, Dr. Burkman and Wiese experimented with numerous courses of pain therapy and treatments, none of which

provided more than short-term relief. Following more than a year of such attempts, it was Dr. Burkman's opinion, based on a reasonable degree of medical certainty, that Wiese suffered a 23-percent permanent partial impairment to the body as a whole. In Dr. Burkman's opinion, the appellant suffered a left posterior shoulder girdle myofascial pain syndrome secondary to repetitive work injuries sustained at B-D. Dr. Burkman stated that at the time he made the rating, Wiese had reached maximum medical improvement.

Although Wiese was able to obtain a position at B-D involving less lifting, her condition failed to improve. In November 1990, Dr. Burkman restricted her from work. At the request of B-D, Wiese was examined by Dr. Michael O'Neil in February 1991. Dr. O'Neil concluded that Wiese has a maximum 5-percent permanent impairment of the hand as a result of the carpal tunnel surgery. He was unable to form an opinion as to whether her left shoulder and arm pain were work related.

Wiese filed a petition with the Workers' Compensation Court on July 11, 1990, alleging that she sustained the following injuries as a result of repeated and continuous motion arising out of and in the course of her employment with B-D: (1) left carpal tunnel syndrome, (2) left posterior shoulder girdle and trapezius myofascial pain syndrome, and (3) left ulnar neuropathy. The appellant alleged that as a result of these injuries, she suffers from a permanent disability and is unable to continue her present employment. B-D denied her allegations.

A three-judge panel of the Workers' Compensation Court found that the carpal tunnel surgery was compensable but that all benefits for that injury had already been paid. The court found that the injuries to Wiese's arm and shoulder were not compensable. The court stated:

> The principal issue herein is one of causation. The Court finds that the plaintiff has failed to sustain her burden of proof on this issue. There is evidence to show that the plaintiff's problems with her left shoulder and arm started in 1986 with a pregnancy *and that Dr. Burkman was not informed of this history.* . . . [T]he value of the opinion of

> an [expert] is no stronger than the facts upon which it is based.

(Emphasis supplied.) The court noted that Dr. O'Neil was unable to state with any certainty that Wiese's shoulder and arm injuries were work related, and noted that her symptoms had not changed since she stopped work in November 1990.

It is the court's statement regarding Dr. Burkman's lack of knowledge of the onset of Wiese's symptoms with her 1986 pregnancy that forms the basis for this appeal. The compensation court's finding is unsupported by the evidence. Its ruling based upon this erroneous finding constitutes plain error. Plain error is error which was unasserted or uncomplained of at trial or on appeal, but is plainly evident from the record, which prejudicially affects a litigant's substantial right and which is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Phelps v. Phelps, ante* p. 618, 477 N.W.2d 552 (1991).

The record reflects that at the time of the onset of the pain and in the early phase of her medical treatment, Wiese stated that her symptoms arose with her pregnancy. She was unable to isolate any particular incident or exacerbating factors in the development of the pain. She did not associate her symptoms with her work until she was informed of the connection by Dr. Louis Sojka, the surgeon who performed the carpal tunnel surgery. Subsequently, Wiese informed Dr. Burkman on her initial visit with him that her symptoms were work related. In his deposition, Dr. Burkman stated that Wiese never gave him a history of the onset of her symptoms with her pregnancy. He was, however, provided with a report from Dr. Kathleen Wilken, whom Wiese had seen previously. In that report, the history recounted that the onset of Wiese's symptoms occurred with her pregnancy.

Dr. Wilken's report is quoted in B-D's letter brief to the Workers' Compensation Court which was submitted in lieu of a closing argument. In that brief, B-D states that this "detailed history was never provided by the plaintiff [Wiese] to the plaintiff's principal expert, Dr. Kip Burkman." The record reflects that not only did Dr. Burkman have Dr. Wilken's

report, but after Dr. Burkman discussed its contents with B-D's counsel at the deposition, counsel requested a copy of it from the doctor.

It is also clear from the record that when forming his opinion on causation, Dr. Burkman was aware of Wiese's medical history, including the pregnancy. The deposition of Dr. Burkman includes a discussion of the content of Dr. Wilken's report, after which the following exchange on cross-examination occurred:

> Q. . . . I take it a history is important to you in reaching an opinion as to the cause of the injury you diagnose?
>
> A. Correct.
>
> Q. And in the present case, I take it it's particularly true because the plaintiff was largely your sole source for your opinion on causation; is that accurate?
>
> A. *Again, I have the records, as previously stated, to help that point.*

(Emphasis supplied.)

A judgment, order, or award of the compensation court may be modified, reversed, or set aside if there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award. Neb. Rev. Stat. § 48-185(3) (Supp. 1991). Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous. *Phipps v. Milton G. Waldbaum & Co., ante* p. 700, 477 N.W.2d 919 (1991). The finding of the court that Dr. Burkman was not informed of the history of Wiese's pregnancy was clearly erroneous and is set aside.

In addition, the significance of Dr. Burkman's supposed lack of knowledge of the pregnancy is not clear from the record or from the court's order. No evidence linking Wiese's symptoms with her pregnancy was adduced other than her own statements that the two coincided in time. These statements could be regarded as Wiese's attempt to pinpoint the time that the symptoms arose, rather than an attempt to attribute her shoulder and arm pain to the fact that she was then pregnant. There is no expert testimony or other medical evidence in the record to show that her symptoms were in fact caused by the pregnancy.

B-D characterizes the Workers' Compensation Court decision as the result of a choice between conflicting medical testimony. This court has repeatedly held that a fact finder or trier of fact may accept or reject an opinion from an expert witness. *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990). However, here the court has misconstrued the testimony of an expert. The factual determination being erroneous, the order of the Workers' Compensation Court will be set aside. *Phipps, supra.* Wiese's petition on rehearing should not have been dismissed on the ground that Dr. Burkman was not fully informed of her history.

No attorney fees for this appeal are awarded to Wiese because she has failed to increase her award in this court. See, Neb. Rev. Stat. § 48-125 (Supp. 1991); *Mata v. Western Valley Packing*, 236 Neb. 584, 462 N.W.2d 869 (1990).

The order of the Workers' Compensation Court dismissing Wiese's petition for benefits is reversed, and the cause is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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