STATE OF NEBRASKA, APPELLEE, V. THREE THOUSAND SIXTY SEVEN DOLLARS AND SIXTY-FIVE CENTS ($3,067.65) IN U.S. CURRENCY, APPELLEE, AND DIANA APPLEGATE, INTERVENOR-APPELLANT.

545 N.W.2d 129

Filed March 19, 1996. No. A-94-939.

1. **Criminal Law: Penalties and Forfeitures: Gaming: Controlled Substances.** A Neb. Rev. Stat. § 28-431 (Reissue 1989) forfeiture relates to items which are not contraband per se, as are gambling devices, but which are ordinary, legal items used to facilitate drug transactions. For this reason, Neb. Rev. Stat. § 28-431 (Reissue 1989) forfeitures are considered punitive and criminal in nature.
2. **Criminal Law: Penalties and Forfeitures: Motor Vehicles: Appeal and Error.** Appellate review of the sufficiency of the evidence to support a forfeiture of a motor vehicle under Neb. Rev. Stat. § 28-431(4) (Reissue 1989) is to be treated the same as the review of the sufficiency of the evidence in the appeal of a criminal case.
3. **Statutes: Penalties and Forfeitures: Motor Vehicles: Appeal and Error.** The standard of review for forfeiture of motor vehicles applies to money because the forfeiture procedure for both is set forth under the same statutory subsection.
4. **Criminal Law: Penalties and Forfeitures: Words and Phrases.** "Use" of an object in the commission of a crime, either as a separate crime or as a basis for forfeiture of the object, is generally controlled by statute.
5. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a bench trial of a criminal case, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, all of which are within a fact finder's province for disposition.
6. **Judgments: Appeal and Error.** The trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous.
7. **Penalties and Forfeitures: Evidence: Circumstantial Evidence: Appeal and Error.** In a Neb. Rev. Stat. § 28-431 (Reissue 1989) forfeiture case, when there is both circumstantial and direct evidence, the circumstantial evidence is to be treated the same as direct evidence, and upon review, the State is entitled to have all conflicting evidence, both direct and circumstantial, and all reasonable inferences which can be drawn therefrom, viewed in its favor.
8. **Actions: Penalties and Forfeitures.** Neb. Rev. Stat. § 28-431 (Reissue 1989) provides the terms by which the State may proceed against seized property by filing a petition for forfeiture and additionally sets forth two avenues by which a purported owner or claimant may prevent forfeiture of the property.
9. **Criminal Law: Penalties and Forfeitures: Proof.** To prevent forfeiture of seized money, Neb. Rev. Stat. § 28-431 (Reissue 1989) requires the claimant to prove by a preponderance of the evidence that (1) the money was not used or intended for use to facilitate a violation of chapter 28, article 4, of the Nebraska Revised Statues, (2) he or she was the owner of the money and acquired such money in

good faith, and (3) he or she at no time had any knowledge that the money was being or would be used to facilitate an article 4 violation.

10. **Intent: Circumstantial Evidence.** Knowledge may be inferred from the circumstances surrounding the act.
11. **Intent: Words and Phrases.** "Willful blindness" is when the actor is aware of the probable existence of a material fact but does not determine whether it exists or does not exist.
12. **Criminal Law: Penalties and Forfeitures: Controlled Substances: Intent: Proof.** Neb. Rev. Stat. § 28-431 (Reissue 1989) authorizes forfeiture of money where the State shows beyond a reasonable doubt that the money was used or was intended to be used to facilitate a violation of the controlled substance laws.
13. **Criminal Law: Intent: Circumstantial Evidence: Proof.** Intent in a criminal case can be proven by circumstantial evidence.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

James R. Hancock, of Hancock & Denton, P.C., for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges.

MILLER-LERMAN, Chief Judge.

Diana Applegate appeals the order of the district court for Scotts Bluff County, Nebraska, sustaining the petition of the State of Nebraska under Neb. Rev. Stat. § 28-431(4) (Reissue 1989) to forfeit cash seized from Henry Rein, which money Applegate claims belongs to her. For the reasons recited below, we affirm.

FACTS

At issue in this case is the ownership and forfeiture of certain cash in the amount of $3,067.65 seized from Henry Rein on June 8, 1994, when he was arrested and subsequently charged with possessing with intent to deliver marijuana, in violation of Neb. Rev. Stat. §§ 28-416 (Cum. Supp. 1994) and 28-405 (Cum. Supp. 1992); driving while under the influence of alcohol (DUI), in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1993), and being a habitual criminal under Neb. Rev. Stat. § 29-2221 (Cum. Supp. 1994). For the sake of completeness, we note that pursuant to a plea agreement, on July 28, 1994, Rein pled no contest to the drug charges, and the State dismissed the DUI and habitual criminal charges.

On June 9, 1994, the State initiated forfeiture proceedings in regard to the cash found in Rein's possession. Although the caption on many of the pleadings in this case indicates that the amount in question is $3,068.65, we note that the correct amount is $3,067.65 and that the State amended its petition to make this correction.

The hearing on the forfeiture was held in the district court for Scotts Bluff County on August 24, 1994. At the hearing, the State presented its case, consisting of the testimony of five law enforcement officers and one State Patrol chemist, all of whom were involved in either the arrest of Rein or the analysis of the substances and cash taken from his possession at the time of his arrest. The forfeiture proceeding was opposed by Diana Applegate, Rein's girl friend, on the basis that the cash subject to forfeiture belonged to her. Applegate and Rein testified on behalf of Applegate's opposition to the forfeiture.

The State's case essentially revolved around the circumstances surrounding the June 8, 1994, arrest of Rein and the seizure of the $3,067.65 in his possession at the time of his arrest. The State's witnesses described the events of June 8 as follows: In the early morning hours of June 8, Officer Stanley Lucke of the city of Scottsbluff Police Department observed a car without taillights traveling at a speed which appeared to be in excess of the posted speed limit of 30 miles per hour. Officer Lucke attempted to catch up with and stop the car, but lost track of it in a residential area. Later that morning, at approximately 1:30, Officer Lucke again caught sight of the car and proceeded to pull the driver over. After stopping the car, Officer Lucke made contact with the driver and sole occupant of the car, Rein. Officer Lucke observed that Rein smelled of alcohol and had bloodshot eyes. Officer Lucke arrested Rein for DUI after Rein failed several field sobriety tests.

Officer William Baker, also of the Scottsbluff Police Department, arrived on the scene during the time Officer Lucke was administering the field sobriety tests to Rein. After Officer Lucke arrested Rein, Officer Baker began the impound inventory of Rein's vehicle. Underneath the front passenger seat of the vehicle, Officer Baker found a white Wal-Mart bag which contained a large plastic bag holding 13 smaller plastic bags with "plant material in them." Officer Terry Dishman then directed Hondo, a "drug dog," to sniff the vehicle for the presence of controlled substances. Hondo alerted the officers to a pipe containing a substance later determined to be marijuana residue.

Officer Lucke then transported Rein to the county jail. Officer Lucke testified that on the way to the jail Rein complained that he "was being picked on" and that "he was just trying to make a living [selling] the marijuana." After administering a test of Rein's breath, Officer Lucke transported Rein to the booking area of the jail, where the jailer took Rein's wallet and counted the money twice. Officer Lucke testified that the wallet contained three $1,000 bundles of cash, each bundle composed of both $100 bills and a few $20 bills, and that Rein also had some loose dollars and change in other pockets. Officer Lucke testified that he never discussed with Rein where Rein had acquired all the cash and, specifically, that Rein never told Officer Lucke that the money belonged to Applegate.

Officer Lucke then turned the cash over to Officer Lynn Kemper, who requested that Officer Dishman direct Hondo to sniff the cash taken from Rein. Accordingly, Officer Dishman placed Rein's cash on the floor in a pile and placed $60 of his own money next to Rein's cash. Hondo walked over Officer Dishman's money to Rein's cash, scratched at the bundled cash taken from Rein, and grabbed one of the cash bundles in his mouth, indicating that it smelled of a controlled substance.

In regard to the nature of the substance contained in the plastic bags found in Rein's vehicle, Jon Shay, a chemist with the Nebraska State Patrol, testified that he tested the substance and determined it to be marijuana. Shay also opined that two hand-rolled cigarettes and the pipe found in Rein's vehicle all contained marijuana. Officer Kemper testified that the individual bags of marijuana were packaged in various weights, which indicated that they were intended for resale, as opposed to personal use, and that the street value of the marijuana was $1,400.

After the State rested its case, Applegate took the stand. Applegate testified that the money seized from Rein belonged to her. Applegate explained that she did not work, but that she had recently inherited $5,468 from her father's estate. She testified that when she received the inheritance check she cashed the entire amount at her "mother's bank" because she did not have her own bank account. Applegate could not remember the name of the bank at which she cashed the check or the name of the teller who cashed the check for her. Applegate testified that when she cashed the check, the teller gave her 5 $1,000 bundles, each composed of 10 $100 bills, and $468 in various, unbanded bills. However, in contrast to Applegate's testimony, the record indicates that the banded cash seized from Rein was received from different tellers at different times.

Applegate testified that after she cashed the check she used the money to pay rent and outstanding bills. Specifically, Applegate stated that she "paid out totally a good couple of thousand, probably" for various bills. Applegate said that she did not have or could not produce receipts for the bills she paid with the estate cash. Applegate testified that she gave the remaining cash to Rein to hold for her because she had a tendency to lose money. According to Applegate's testimony, she gave Rein the bank envelope containing the three $1,000 bundles, still in the original bands from the bank, and, possibly, some odd cash.

Applegate testified on direct examination that she did not know that Rein was involved in the sale or use of narcotics. However, on cross-examination, she conceded that she knew Rein had previously been convicted of and was on parole for possession of marijuana with intent to deliver and that at her request, during his parole term, Rein had given her some marijuana, which had previously been found in her home.

Applegate described the events of the night of June 7, 1994, and the early morning hours of June 8, leading up to the time of Rein's arrest. She stated that Rein had picked her up at her house at about 5 or 6 p.m. and that they went "[t]o the bars." Applegate mentioned a few bars they had stopped at that evening, but she could not remember exactly when or how long they were at each, or if they went anywhere else. Applegate testified that she was with Rein the entire evening and that he "might have had a drink," but that she could not remember at which bar this occurred. Applegate acknowledged that she knew that drinking alcohol was a violation of Rein's parole.

Applegate testified that after they went to a few bars, she and Rein stopped at James Zitterkopf's residence. Evidently, Applegate wanted to stay at Zitterkopf's, Rein did not want to stay, an argument between them ensued, and Rein left her at Zitterkopf's with no ride home and with all of her money in his possession. Apparently, Rein was pulled over and arrested after he left Zitterkopf's.

Rein testified on Applegate's behalf, and his explanation of the source and use of the money and his description of the events of the evening of June 7, 1994, and the morning of June 8 were consistent with Applegate's account. In describing his personal financial situation, Rein testified that he worked several jobs and brought home approximately $200 per week. Rein stated that he had held Applegate's money for 7 days before his arrest on June 8. Rein explained that he and Applegate had agreed that Rein would keep the money for Applegate, but that she could draw from the money in any amount at any time. Rein testified that he did not tamper with two of the three $1,000 bundles of $100 bills, which should have still been intact at the time of his arrest.

At the conclusion of the evidence, the parties submitted the case to the court for determination. On September 13, 1994, the court issued an order of forfeiture, stating in part:

> The court finds beyond a reasonable doubt that Mr. Rein possessed the $3,000 with the intent of facilitating violations of Article 4, Chapter 28 of the Nebraska Statutes. . . . It is apparent that Mr. Rein was able to make a quantity purchase of marijuana shortly before his arrest. There is also no explanation that he had the means to pay for it, unless he used this resource. The cash has obviously been tampered with because it is no longer clean crisp $100 bills. It is the sort of seed money needed by a drug dealer to make quantity purchases whenever supplies become available, and all reasonable inferences point to

the fact that Mr. Rein intended to continue his enterprise of selling marijuana, financed in part with this money.

The court sustained the State's petition for forfeiture to the extent of the $3,000 in bundled cash and denied the petition as to the remaining cash in the amount of $67.65. The portion of the order denying the forfeiture as to $67.65 is not on appeal to this court. Applegate appeals.

ASSIGNMENTS OF ERROR

Applegate variously assigns five errors, which we distill as follows: The district court erred in ordering a forfeiture of the $3,000 because (1) Applegate proved by a preponderance of the evidence that the $3,000 was hers and was neither used nor intended for use to facilitate a violation of chapter 28, article 4, of the Nebraska Revised Statutes and (2) the State failed to establish beyond a reasonable doubt that the cash in question was used or intended for use to facilitate a violation of article 4.

STANDARD OF REVIEW

Analysis.

[1] In *State v. One 1986 Toyota 4-Runner*, 1 Neb. App. 1138, 510 N.W.2d 556 (1993), this court distinguished the nature of a forfeiture case brought under Neb. Rev. Stat. § 28-1111 (Reissue 1989), which relates to the forfeiture of gambling devices, an action considered civil and remedial in nature, and the nature of a forfeiture case brought under § 28-431 such as the instant case. This court explained in *One 1986 Toyota 4-Runner* that a § 28-431 forfeiture relates to items which are not contraband per se, as are gambling devices, but which are ordinary, legal items used to facilitate drug transactions. For this reason, § 28-431 forfeitures are considered punitive and criminal in nature. Although *One 1986 Toyota 4-Runner* involves the forfeiture of a motor vehicle, as opposed to the forfeiture of money, it refers to the criminal and punitive nature of § 28-431 forfeitures in general.

[2-4] The Nebraska Supreme Court has recently held that appellate review of the sufficiency of the evidence to support a forfeiture of a motor vehicle under § 28-431(4) is to be treated the same as the review of the sufficiency of the evidence in the

appeal of a criminal case. *State v. One 1985 Mercedes 190D Automobile*, 247 Neb. 335, 526 N.W.2d 657 (1995). See, also, *State v. 1987 Jeep Wagoneer*, 241 Neb. 397, 488 N.W.2d 546 (1992); *State v. One 1987 Toyota Pickup*, 233 Neb. 670, 447 N.W.2d 243 (1989). Although the Nebraska Supreme Court has specifically delineated the standard of appellate review for forfeitures of motor vehicles, and not for forfeiture of money, we believe that the standard of review for forfeiture of motor vehicles applies to money because the forfeiture procedure for both is set forth under the same statutory subsection. Specifically, subsection (4) of § 28-431, which authorizes and describes the procedure for forfeiture of both (1) vehicles and vessels used or intended to be used to transport controlled substances and (2) money used or intended to be used to facilitate violations of controlled substance laws, controls the instant case. For the sake of completeness, we note that "use" of an object in the commission of a crime, either as a separate crime or as a basis for forfeiture of the object, is generally controlled by statute. Compare *Bailey v. U.S.*, ____ U.S. ____, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995) (holding that "use" of a firearm under 18 U.S.C. § 924(c)(1) (1994) requires more than mere possession at the time of the commission of the crime).

Pursuant to the foregoing, we will apply the standard of review used in criminal cases.

Application.

[5,6] In determining whether evidence is sufficient to sustain a conviction in a bench trial of a criminal case, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, all of which are within a fact finder's province for disposition. *State v. Kunath*, 248 Neb. 1010, 540 N.W.2d 587 (1995); *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994); *State v. Russell*, 243 Neb. 106, 497 N.W.2d 393 (1993). The trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous. *State v. Simants*, 248 Neb. 581, 537 N.W.2d 346 (1995); *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994).

[7] In this case, the evidence is both direct and circumstantial. In a § 28-431 forfeiture case, when there is both circumstantial and direct evidence, the circumstantial evidence is to be treated the same as direct evidence, and upon review, the State is entitled to have all conflicting evidence, both direct and circumstantial, and all reasonable inferences which can be drawn therefrom, viewed in its favor. *One 1985 Mercedes 190D Automobile, supra*; *1987 Jeep Wagoneer, supra*.

ANALYSIS

Forfeiture Procedure Under § 28-431.

[8] Section 28-431 provides the terms by which the State may proceed against seized property by filing a petition for forfeiture and additionally sets forth two avenues by which a purported owner or claimant may prevent forfeiture of the property. The statutory language of the first method of forfeiture prevention allows the "*owner of record* of such property" to petition the district court to release such property upon "a showing by the owner that he or she had no knowledge that such property was being used in violation of this article." (Emphasis supplied.) § 28-431(4). Cf. *Bennis v. Michigan*, ____ U.S. ____, 116 S. Ct. 994, 134 L. Ed. 2d 168 (1996) (holding that owner's interest in automobile may be forfeited by reason of use to which automobile is put, even though owner did not know that it was to be put to such use). Because money cannot have an "owner of record," the first method of prevention appears to be inapplicable in this case.

The second method of preventing forfeiture under § 28-431(4) provides that any person having an interest in the property proceeded against or any person against whom civil or criminal liability could lie if the property is found to be in violation of this article (the claimant) may within 30 days of the State's petition appear and file an answer or demur to the petition, alleging his or her interest in the property. The court will then hold a hearing to determine whether or not the property shall be forfeited to the State.

Section 28-431(4) further provides:

> If the claimant proves by a preponderance of the evidence that he or she (a) has not used or intended to use the

> property to facilitate an offense in violation of this article, (b) has an interest in such property as owner or lienor or otherwise, acquired by him or her in good faith, and (c) at no time had any knowledge that such property was being or would be used in, or to facilitate, the violation of this article, the court shall order that such property or the value of the claimant's interest in such property be returned to the claimant. If there are no claims, if all claims are denied, or if the value of the property exceeds all claims granted and it is shown beyond a reasonable doubt that such property was used in violation of this article, the court shall order [forfeiture of such property].

References in § 28-431 to "violation[s] of this article [4]" generally refer to violations of laws relating to controlled substances.

Application of Applegate's Burden of Proof.

[9] To prevent forfeiture of the seized money, § 28-431 required Applegate to prove by a preponderance of the evidence that (1) the money was not used or intended for use to facilitate an article 4 violation, (2) she was the owner of the money and acquired such money in good faith, and (3) she at no time had any knowledge that the money was being or would be used to facilitate an article 4 violation.

In her petition for return of the seized money, Applegate alleges that the money belonged to her, being the balance of a distribution from her father's estate and only temporarily in Rein's possession, and that the money was never, to her knowledge, used or intended to be used to facilitate an article 4 violation. Applegate and Rein testified at the hearing in a manner consistent with these contentions. However, we note that their testimony included both internal inconsistencies and statements inconsistent with the testimony of the State's witnesses.

The testimony of Applegate and Rein was the only evidence of Applegate's claims that the money was not, and was never intended to be, used to facilitate a drug transaction and, alternatively, that she had no knowledge of such intent or use. The district court specifically stated that it "disbelieve[d] the story given by Ms. Applegate and Mr. Rein" and, therefore, found that Applegate had not met her burden of proof.

[10,11] The key issue in applying Applegate's burden of proof is whether or not Applegate proved by a preponderance of the evidence that she had no knowledge of Rein's intent, if any, to use the money to facilitate a drug transaction. In this regard, we note that knowledge may be inferred from the circumstances surrounding the act. *State v. LaFreniere*, 240 Neb. 258, 481 N.W.2d 412 (1992); *State v. Mills*, 199 Neb. 295, 258 N.W.2d 628 (1977). Applegate acknowledged during her testimony that she was aware of Rein's history of selling marijuana and that Rein had provided her with marijuana at her request. Applegate's admitted awareness of Rein's previous drug-related activities indicates that any actual lack of knowledge on her part of Rein's intended use of the money could be categorized as "willful blindness." See *State v. LaFreniere*, 240 Neb. at 263, 481 N.W.2d at 415 (citing Model Penal Code's "willful blindness" definition of criminal "knowledge," under which "the actor 'is aware of the probable existence of a material fact but does not determine whether it exists or does not exist'").

Pursuant to the applicable standard of review, we do not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, all of which are within a fact finder's province for disposition. *State v. Kunath*, 248 Neb. 1010, 540 N.W.2d 587 (1995); *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994); *State v. Russell*, 243 Neb. 106, 497 N.W.2d 393 (1993). The district court did not believe Applegate's testimony relating to her lack of knowledge and properly inferred Applegate's knowledge from the surrounding circumstances. Our review of the record indicates that the district court's determination that Applegate failed to prove by a preponderance of the evidence that she was entitled to the return of the money was not clearly erroneous.

Application of State's Burden of Proof.

We now address whether or not the State presented evidence which proved beyond a reasonable doubt that Rein used or intended to use the money to purchase marijuana with intent to deliver, in violation of §§ 28-416 and 28-405.

When Officer Lucke arrested Rein, Rein was in possession of 1,400 dollars' worth of marijuana packaged for resale, two marijuana cigarettes, and a pipe containing marijuana. Rein also possessed the $3,000 in question, which money he claims was not used to purchase and was not related in any way to the marijuana found in his vehicle. The record shows that Hondo, the drug detection dog, indicated by his trained sense of smell that the money in question smelled of marijuana. Rein stated in connection with his arrest that he made a living selling marijuana. Applegate, the claimant, admitted she knew that Rein had a criminal history of dealing marijuana and that he had recently supplied her with marijuana. The district court found that the money in question was "the sort of seed money needed by a drug dealer to make quantity purchases whenever supplies become available" and that Rein had no "means to pay for [the marijuana], unless he used this resource."

[12,13] Section 28-431 authorizes forfeiture of money where the State shows beyond a reasonable doubt that the money was used or was intended to be used to facilitate a violation of the controlled substance laws. The thrust of the State's case was that the $3,000 was intended to be used to facilitate a violation of the controlled substance laws. Intent in a criminal case can be proven by circumstantial evidence. *Kunath, supra*; *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995); *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995). Our review shows that the State established intent beyond a reasonable doubt.

From all the relevant direct and circumstantial evidence in this case and the inferences that can be drawn therefrom in favor of the State, we do not believe the district court's findings are clearly erroneous. See, *State v. Simants*, 248 Neb. 581, 537 N.W.2d 346 (1995); *State v. One 1985 Mercedes 190D Automobile*, 247 Neb. 335, 526 N.W.2d 657 (1995). We find that there was sufficient evidence for the district court to find beyond a reasonable doubt that Rein used or intended to use the money in question to facilitate a transaction involving the purchase or sale of marijuana.

CONCLUSION

Pursuant to the foregoing, we conclude that the district court correctly determined that Applegate failed to prove by a preponderance of the evidence that the money in question belonged to her and that it was not used or intended to be used to facilitate the purchase or sale of marijuana, or that if it was intended to be or was so used, she had no such knowledge. We further find that the district court properly found beyond a reasonable doubt that Rein used or intended to use the money to facilitate the purchase or sale of marijuana. Therefore, we affirm the order of the district court forfeiting to the State $3,000 of the money seized from Rein.

AFFIRMED.

BONITA GAIL ROOD, APPELLEE, AND STATE OF NEBRASKA, INTERVENOR-APPELLEE, v. HARRY BURRIEL ROOD, APPELLANT.

545 N.W.2d 138

Filed March 26, 1996. No. A-94-960.

1. **Modification of Decree: Appeal and Error.** An appellate court reviews proceedings for modification of a dissolution decree de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion.
2. **Foreign Judgments: Child Support.** In a Revised Uniform Reciprocal Enforcement of Support Act proceeding, to determine the effect of a responding state's support order on an original order of support, courts look to the antisupersession or antinullification clause of the responding state's version of the act.
3. ____: ____. In Revised Uniform Reciprocal Enforcement of Support Act proceedings, a responding court may fix support payments at a different amount than that specified by a decree rendered in the initiating state.
4. ____: ____. An order by a court in the responding state under the Revised Uniform Reciprocal Enforcement of Support Act enforces the duty of support, as distinguished from the amount of support decreed.
5. ____: ____. The remedies provided for in the Revised Uniform Reciprocal Enforcement of Support Act are in addition to and not in substitution for any other remedies.

6. **Modification of Decree: Child Support.** The rule in Nebraska is that a modification of a child support order is allowed prospectively from the time of the modification order itself.
7. ____: ____. When a divorce decree provides for the payment of stipulated sums monthly for the support of minor children, such payments become vested in the payee as they accrue, and courts are generally without authority to reduce the amounts of such accrued payments.
8. ____: ____. The Nebraska Supreme Court has, on occasion, depending on the equities involved, approved modification of a child support order retroactive to the filing date of the application for modification.
9. **Child Support: Emancipation.** The right to demand child support cannot constitute a vested right after emancipation in fact.
10. **Minors: Emancipation.** Whether or not a child has been emancipated is a question of fact, to be determined on the peculiar facts and circumstances of each case.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Affirmed.

David L. Kimble for appellant.

C. Jo Petersen, Seward County Attorney, for intervenor-appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges.

IRWIN, Judge.

I. INTRODUCTION

Harry Burriel Rood appeals from an order of the district court for Seward County overruling his motion for new trial, following an order denying his petition to modify a dissolution decree. Because we find the district court properly refused to retroactively modify the decree and properly determined that there was insufficient evidence of emancipation, we affirm.

II. FACTUAL BACKGROUND

Appellee Bonita Gail Rood and appellant, Harry Burriel Rood, were married in July 1969. There were two children of the marriage, John and Charity. John was born on May 9, 1971, and Charity was born on February 12, 1974. In February 1981, Bonita filed a petition for dissolution of her marriage to Harry. The decree of dissolution was entered in May 1981. The decree awarded custody of the children to Bonita and ordered Harry to pay $150 per month child support for each child. Bonita assigned her interest in the child support payments to the Nebraska Department of Social Services in May 1981.

The record reflects that shortly after the dissolution, Harry moved to Michigan. Harry became delinquent on his child support payments, and contempt proceedings were initiated in Seward County in both October and December 1981.

Sometime in 1983, proceedings were initiated in Nebraska under the Revised Uniform Reciprocal Enforcement of Support Act (RURESA) to enforce the child support obligations of the Nebraska decree in Michigan. In August 1983, a stipulation and an order were entered in the circuit court for Gladwin County, Michigan, pursuant to the RURESA proceedings. The stipulation and order set support at $25 per week. The record indicates that no separate proceedings were initiated in Nebraska to modify the original decree.

Through 1993, Harry appears to have made relatively consistent payments as stipulated to in the Michigan order. The clerk of the district court for Seward County recorded and computed Harry's balance and arrearage in conformity with the Michigan order through November 1993. In November 1993, the records indicate the arrearage was approximately $3,000. In December 1993, the clerk entered a notation in the records which indicated that pursuant to a Nebraska "Supreme Court ruling 'Crow v Crow' arrears recalculated" under the provisions of the original decree, which computation resulted in an arrearage of approximately $36,000, including accrued interest. In January 1994, Harry received a letter from the Seward County District Court indicating that his monthly obligation under the original decree was to be $150 per month per child, regardless of what the Michigan order provided.

On March 4, 1994, Harry filed a petition for modification of the decree. Harry alleged that the Michigan order should govern his monthly support obligation, that he had consistently complied with the Michigan order, and that the Michigan order was never appealed from. Additionally, Harry alleged that one of the children, Charity, had filed an affidavit which demonstrated she was emancipated in July 1992, and Harry sought credit for any arrearages accruing after that time. Harry sought to have the Nebraska decree modified to be in conformity with the Michigan order. At the time the petition for modification was filed, both of the children were above the age of 19 years, and Harry's obligation to support them had terminated. The modification action was brought to decrease the amount of arrearages.

On June 13, 1994, the case was tried to the district court. Harry, Harry's new wife, and a deputy clerk of the Seward County District Court were called to testify on Harry's behalf. Harry and his new wife both testified that they had understood the Michigan order as modifying his support obligation. They further testified that correspondence from the district court for Seward County had consistently reflected that his obligation was as reflected in the Michigan order. Harry also testified that he believed Charity had been emancipated in July 1992 because of an affidavit she had filed with the court. The deputy clerk testified that ledger cards, which reflect Harry's support payments and accrued arrearages, indicated an arrearage of approximately $3,000 in November 1993, but were amended to reflect a Nebraska Supreme Court case and showed an increased arrearage of approximately $36,000, including interest, after November 1993.

Bonita also testified at the hearing. She testified that she was unaware of the Michigan proceedings until 1990, "right after John's [19th] birthday," when Harry sought a reduction in his support obligation. She testified that she was not a party to the Michigan stipulation and order and that she did not receive any notice of the proceedings in Michigan. After hearing the testimony and receiving evidence, the court took the matter under advisement. On August 16, 1994, the court entered an order denying the petition for modification and denying Harry's request that Charity be found to have been emancipated in July 1992. Harry filed a motion for new trial, which was overruled by the court. This appeal followed.

III. ASSIGNMENTS OF ERROR

In this appeal, Harry assigns four errors, which we have consolidated for discussion to three. First, Harry alleges the district court erred in not finding that the Michigan order acted to modify his support obligation. Second, Harry alleges the court erred in failing to retroactively modify his support obligation under the original decree to conform to the Michigan order. Third, Harry alleges the court erred in finding that he failed to show Charity was emancipated in July 1992.

IV. STANDARD OF REVIEW

[1] An appellate court reviews proceedings for modification of a dissolution decree de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion. *Adrian v. Adrian*, 249 Neb. 53, 541 N.W.2d 388 (1995); *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994); *Marr v. Marr*, 245 Neb. 655, 515 N.W.2d 118 (1994); *Muller v. Muller*, 3 Neb. App. 159, 524 N.W.2d 78 (1994).

V. ANALYSIS

1. Effect of Michigan Order

On August 13, 1983, Harry entered into a stipulation with the prosecuting attorney for Gladwin County, Michigan, concerning the RURESA action. The stipulation set Harry's obligation for child support at $25 per week and required Harry to pay an additional $3 per week to be applied toward the arrearages. The circuit court for Gladwin County entered an order dated August 23 adopting the language of the stipulation as an order of the court. After the stipulation and order in Michigan, Harry appears to have made relatively consistent payments of support as set out in the stipulation and order. In his petition for modification of the original dissolution decree which gives rise to the instant appeal, Harry requested that the district court for Seward County modify the original decree to bring it into conformity with the Michigan order.

In 1983, the Nebraska Revised Statutes included a version of RURESA. See Neb. Rev. Stat. § 42-762 et seq. (Reissue 1988). Pursuant to RURESA, in a proceeding brought to enforce the support provisions of a Nebraska decree when the payor spouse lived in another state, Nebraska was defined as the "initiating state," and the other state was defined as the "responding state." See § 42-763. In the 1983 enforcement proceeding, Michigan was the responding state.

[2] In a RURESA proceeding, to determine the effect of a responding state's support order on an original order of support, courts look to the antisupersession or antinullification clause of the responding state's version of RURESA. See *In re Appeal of Crow*, 242 Neb. 54, 493 N.W.2d 169 (1992). See, also, *In re Marriage of Kramer*, 253 Ill. App. 3d 923, 625 N.E.2d 808 (1993). In the present case, the effect of the Michigan order on the original Nebraska decree would be governed by the antisupersession clause of Michigan's version of RURESA. Neither party presented the issue of Michigan law, and neither party has provided us with any guidance on Michigan law. Under such a circumstance, we presume the law of Michigan to be the same as the law of Nebraska on the subject. *Gruenewald v. Waara*, 229 Neb. 619, 428 N.W.2d 210 (1988); *Buckingham v. Wray*, 219 Neb. 807, 366 N.W.2d 753 (1985); *Abramson v. Abramson*, 161 Neb. 782, 74 N.W.2d 919 (1956).

At the relevant time, § 42-792 provided in part:

> A support order made by a court of this state pursuant to sections 42-762 to 42-7,104 shall not nullify and shall not be nullified by a support order made by a court of this state pursuant to any other law or by a support order made by a court of any other state pursuant to a substantially similar act or any other law, regardless of priority of issuance, unless otherwise specifically provided by the court.

Since we presume Michigan law at the relevant time was the same as the above statute, the Michigan order could not have nullified the support provisions of the Nebraska decree unless the Michigan court specifically provided that the order would nullify the previous Nebraska obligation. A review of the stipulation and order from the Michigan court reveals no indication that the court intended to nullify Harry's obligations under the Nebraska decree.

[3-5] In RURESA proceedings, a responding court may fix support payments at a different amount than that specified by a decree rendered in the initiating state. *Dike v. Dike*, 245 Neb. 231, 512 N.W.2d 363 (1994). An order by a court in the responding state under RURESA enforces the *duty* of support, as distinguished from the *amount* of support decreed. *Dike,*

supra. Additionally, the remedies provided for in RURESA are *in addition to* and not *in substitution for* any other remedies. *Dike, supra*.

In the present case, the Michigan court enforced Harry's *duty* of support by ordering him to pay $25 per week in child support. The Michigan order did not in any way nullify, modify, or otherwise supersede the *amount* of support mandated by the original Nebraska decree, but instead provided an additional, supplementary remedy for Harry's delinquency in making his support payments.

The district court did not commit error by refusing to recognize the Michigan order as a modification of Harry's support obligations. Under the original decree, Harry's monthly support obligations continued to accrue at a rate of $150 per month for each child, regardless of the provisions of the Michigan enforcement order. This assigned error is without merit.

2. Retroactive Modification

Harry requested the district court to retroactively modify the decree to bring his support obligation into conformity with the Michigan order. Harry requested the court, in ruling on his 1994 petition for modification, to retroactively modify the decree and reduce his monthly obligation as of 1983.

[6] The rule in Nebraska is that a modification of a child support order is allowed prospectively from the time of the modification order itself. *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993); *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991); *Robbins v. Robbins*, 3 Neb. App. 953, 536 N.W.2d 77 (1995); *Hoover v. Hoover*, 2 Neb. App. 239, 508 N.W.2d 316 (1993).

[7,8] When a divorce decree provides for the payment of stipulated sums monthly for the support of minor children, such payments become vested in the payee as they accrue, and courts are generally without authority to reduce the amounts of such accrued payments. *Id*. The Nebraska Supreme Court has, on occasion, depending on the equities involved, approved modification of a child support order retroactive *to the filing*

date of the application for modification. *Wulff, supra*; *Maddux, supra*.

In the present case, Harry's support obligation had ended over 1 year before he sought modification, because the younger child turned 19, although interest was continuing to accrue on the arrearages at the time of the hearing on his petition for modification. As a result, *any* modification which the district court would have entered would have been a prohibited retroactive modification. As such, the district court was correct in concluding it could not retroactively modify the decree and in denying Harry's petition for modification. This assigned error is without merit.

3. Emancipation of Charity

In February 1993, the younger child, Charity, filed an affidavit with the court indicating that she had been released from being a ward of the state in July 1992 and that she had not been receiving support from Bonita since that time and requesting that her child support payments be sent directly to her. In his petition for modification, Harry alleged that Charity was emancipated as of July 1992, and he sought a credit for arrearages accruing after that time. In ruling on Harry's petition for modification, the district court held that Harry "failed to show by the greater weight of the evidence emancipation of Charity Rood prior to February 12, 1993," which is when Charity turned 19 years of age.

(a) Timeliness of Proceeding

In considering the propriety of the district court's ruling, we first begin by considering whether the court *may* cancel child support which accrued in the period between alleged emancipation and the subsequent application for modification. The initial question therefore is whether Harry, even assuming he could adequately prove emancipation in July 1992, is nevertheless obligated to pay support accruing after that time because the court is without authority to cancel such accrued support.

In *Wolter v. Wolter*, 183 Neb. 160, 158 N.W.2d 616 (1968), the Nebraska Supreme Court addressed this precise question in the context of alimony accruing in a period between the receiving spouse's remarriage and the paying spouse's subsequent filing of a motion to terminate alimony. In *Wolter*, the decree provided for alimony to be payable until further order of the court and did not include a provision which would terminate the obligation upon the receiving spouse's remarriage. The Supreme Court identified the problem as being whether the trial court, if permitted to cancel such accrued alimony payments, would, in fact, be acting retrospectively upon vested rights. The *Wolter* court held that canceling accrued support payments would not amount to a retroactive modification of the alimony award.

The *Wolter* court held that the essential keystone supporting a decree for alimony was the continued unmarried status of the receiving spouse. As such, the receiving spouse's right to receive payments accruing after remarriage was discretionary with the court, and no vested right attached to the installments. *Wolter, supra*. Because the receiving spouse's vested right to receive support terminated upon remarriage, a fact justifying the termination of alimony upon application, the *Wolter* court held there was no justifiable reason to hold that the trial court had no power to relate its order back to the event giving rise to the right to terminate.

The reasoning and holding of *Wolter* were more recently adopted in New Hampshire, in the case *Williams v. Williams*, 129 N.H. 710, 531 A.2d 351 (1987). As the court in *Wolter* had determined, the court in *Williams* determined that cancellation of alimony accruing after the receiving spouse's remarriage was not analogous to a forbidden retroactive order.

[9] The present case is analogous to *Wolter*. In the present case, Harry seeks to have the court cancel child support payments which accrued after an alleged emancipation but before Harry's subsequent petition for modification was filed. In the present case, the decree provided that Harry was to pay child support until, inter alia, the children became emancipated, so that a keystone supporting the accrual of support was the continuing unemancipated status of the children. The right to demand support cannot be said to constitute a vested right after emancipation in fact, and there is no justifiable reason to hold that the court lacks power to relate its order back to the

emancipation which would justify an order terminating the support obligation. See *Wolter, supra.*

(b) Emancipation in Fact

Having determined that the district court had the authority to cancel any support obligations accruing during the period between alleged emancipation and the filing of the petition for modification, we must now determine whether the evidence was sufficient for a finding of emancipation in fact in July 1992, as Harry argues.

[10] Whether or not a child has been emancipated is a question of fact, to be determined on the peculiar facts and circumstances of each case. *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993). The emancipation of a child may be proved by circumstantial evidence, by an express agreement, or by the conduct of the parties. *Accent Service Co., Inc. v. Ebsen*, 209 Neb. 94, 306 N.W.2d 575 (1981).

In the present case, Harry attempted to prove Charity was emancipated in July 1992 through an affidavit Charity had filed with the court. In the affidavit, Charity states that she was released as a ward of the state in July 1992 and that she has received no support from Bonita since then and requests that her child support payments be mailed directly to her. The only testimony at the hearing on Harry's petition for modification concerning the alleged emancipation was by Harry himself and consists merely of his allegation that he understands that she was emancipated in July 1992. The court judicially noticed the affidavit.

Neb. Rev. Stat. § 25-1244 (Reissue 1989) provides:

> An affidavit may be used to verify a pleading, to prove the service of a summons, notice or other process, in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, and in any other case permitted by law.

The Nebraska Supreme Court has held that an affidavit cannot be used to establish facts material to the issue being tried, in the absence of a legislative exception. *Schaneman v. Wright*, 238 Neb. 309, 470 N.W.2d 566 (1991); *Doyle v. Union Ins. Co.*, 209 Neb. 385, 308 N.W.2d 322 (1981). As such, Charity's affidavit should not have been used in the determination of her emancipation, which was clearly a material issue in the modification proceedings. Aside from the affidavit, there was *no* evidence presented to the district court upon which a finding of emancipation could have been based. The district court was correct in finding that Harry failed to establish emancipation, and this assigned error is without merit.

VI. CONCLUSION

Because we find that the Michigan RURESA order did not modify the original decree, that the district court properly declined to retroactively modify the decree, and that the district court correctly concluded that Harry failed to establish emancipation of the child, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, v. TERRY D. LOMACK, APPELLANT.

545 N.W.2d 455

Filed March 26, 1996. No. A-95-291.

1. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous.
2. ____: ____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate 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 it observed the witnesses.
3. **Police Officers and Sheriffs: Arrests: Probable Cause.** Probable cause for a warrantless arrest exists where the facts and circumstances within an officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to warrant one of reasonable caution to believe that there was a fair probability that an offense has been or is being committed.
4. **Constitutional Law: Search and Seizure: Arrests.** A person is seized, or arrested, for Fourth Amendment purposes when, in view of all of the circumstances surrounding the incident, a reasonable person would believe that he or she is not free to leave.

5. **Police Officers and Sheriffs: Arrests: Probable Cause.** Police can have probable cause for a warrantless arrest based on information from an informant if the information from the informant, when taken as a whole in light of underlying circumstances, is reliable.
6. ____: ____: ____. The reliability of an informant may be established in four ways: (1) The informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.
7. **Constitutional Law: Search and Seizure.** Although the determination must be made in light of the fundamental criteria laid down by the Fourth Amendment and in court opinions applying that amendment, the reasonableness of a search is a substantive determination to be made by the trial court from the facts and circumstances of the case.
8. **Trial: Judges: Evidence.** Disclosure of the identity of an informant is a matter of judicial discretion.
9. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the tendered instruction.
10. **Jury Instructions: Appeal and Error.** It is not error for a trial court to refuse to give a defendant's requested instruction where the substance of the requested instruction was covered in the instructions given.
11. ____: ____. All the jury instructions 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 Lancaster County: BERNARD J. McGINN, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Margene M. Timm for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

MUES, Judge.

Terry D. Lomack appeals his conviction for unlawful possession of a controlled substance, cocaine, in violation of Neb. Rev. Stat. § 28-416 (Cum. Supp. 1994). Lomack asserts that the trial court erred by (1) denying his motion to suppress,

(2) granting the State's motion in limine prohibiting Lomack from inquiry and argument as to the identity of the State's confidential informant (CI), (3) refusing to give Lomack's proposed jury instruction on possession of a controlled substance, and (4) finding that Lomack was a habitual criminal.

FACTS

On March 9, 1994, Det. Sgt. Dennis Miller of the Lincoln Police Department received information from a CI that an individual, Terry Lomack, would be coming to Lincoln from Omaha with a quantity of rock cocaine, also known as crack cocaine. The informant did not specify the quantity of cocaine Lomack would be carrying or how he or she knew Lomack. The informant did tell Sergeant Miller that Lomack would be coming to Lincoln shortly, driving a black Ford pickup with the commercial license plate No. 2-29204, and that there would be a passenger in the vehicle with Lomack. Sergeant Miller checked the registration of the vehicle with the license number given and found it to be a blue Ford pickup registered to a Willie Lomack, whose address was determined to be the same as that of the defendant, Terry Lomack.

The CI who provided the information had worked with the Lincoln Police Department on several occasions since 1991. Sergeant Miller testified that past information provided by this CI had resulted in at least 16 felony arrests. On this occasion, the informant was paid for his or her services, but did not receive any benefits in the form of reduced or dismissed charges and was not on parole or probation.

In reliance on the information provided, surveillance was set up to watch for the vehicle described by the informant. The truck was spotted on its way into Lincoln and was eventually stopped at the intersection of 27th and Superior Streets. At the time of the stop, six police officers were present. Officer Clark Wittwer's car was positioned in front of Lomack's pickup, Officer Thomas Ward's vehicle was located behind the pickup, and Sergeant Miller's vehicle was on the left side of the pickup. Also present were Officer William Snoad and an Investigator Gambrell, and an Officer Santacroce soon arrived.

According to the various officers' testimony, the arrest occurred as follows: Officer Ward had followed Lomack once Lomack came into Lincoln, and when the vehicles came to a traffic light and stopped, Officer Ward activated his lights, approached Lomack's vehicle, and was joined by Officer Snoad. Officer Ward asked Lomack for his driver's license, registration, and insurance card. Lomack responded by patting down his pockets and going through a notebook as if looking for identification. When Lomack turned away from the officers and was "messing around" with something on the seat of the pickup, Officer Snoad instructed Officer Ward to order Lomack out of the pickup for safety reasons. Lomack refused to comply with Officer Ward's order, and the officer repeated the order several times. Then Officer Ward, with the assistance of Officer Snoad, pulled Lomack out of the vehicle.

Once Lomack was outside the vehicle, the officers ordered him to place his hands on the "bedrails" of the pickup. Lomack instead leaned over and placed his hands inside the bed of the pickup. Officer Snoad then witnessed Lomack put a small metal pipe inside his mouth. The officers ordered Lomack to spit the item out, which he did after several requests. When Lomack spat the pipe out, Officer Snoad saw a small clear plastic baggie in Lomack's mouth. Officer Snoad ordered Lomack to spit this out also. Lomack did not comply and began struggling with the officers. The officers took Lomack to the ground as he continued to struggle. Officers Snoad, Ward, and Wittwer testified that they each attempted to apply pressure to Lomack's jaw in order to get him to open his mouth, but were unsuccessful. Officer Wittwer then applied a lateral vascular neck restraint. After approximately 5 to 10 seconds, Lomack lost consciousness, and Officer Snoad pulled the plastic baggie out of Lomack's mouth. The baggie was placed into custody and was later determined to contain several rocks of crack cocaine. Lomack regained consciousness 15 to 30 seconds later. There was evidence that there was a small amount of blood around Lomack's mouth following the incident. However, there was no evidence that the bleeding resulted from a serious cut which required medical attention. After regaining consciousness, Lomack was handcuffed and transported to the police department. Although Lomack testified that he vomited as a result of the incident and requested to be taken to the hospital, Lomack admitted that when the police offered to transport him to the hospital, he declined.

According to Lomack's testimony at trial, Willie Rodriguez, the passenger in his vehicle, was Lomack's acquaintance, current coemployee, and former employee. On March 9, 1994, Lomack had received his paycheck 1 day early from GFRC Inc., where both Lomack and Rodriguez were then working. Lomack testified that after work on March 9, Rodriguez asked Lomack for a ride home and then requested a loan of $200 so that Rodriguez could pay it to his brother-in-law. Despite the fact that Lomack had previously loaned Rodriguez $325 which he had failed to pay back, Lomack testified that he agreed to loan Rodriguez the additional $200 upon the promise that Rodriguez would pay Lomack back all of the money owed the following day when Rodriguez received his paycheck, even though Lomack knew that Rodriguez' check would only be approximately $350.

In addition to loaning Rodriguez the additional $200, Lomack gave Rodriguez a ride to Omaha so that Rodriguez could give the money to his brother-in-law. Lomack testified that Rodriguez appeared excited and talkative on the way to Omaha, but was quiet on the way back, saying that he felt sick. When Lomack stopped to get gas on the way to Omaha, Rodriguez made a phone call. Again on the way back from Omaha, Lomack saw Rodriguez place a call. Lomack also testified that he did not see any drugs or talk about drugs on the way to Omaha.

As Lomack and Rodriguez returned to Lincoln, Lomack saw a police car following him and stopped when it activated its lights. Lomack testified that an officer had a gun drawn and pointed at him and that an officer requested identification from him. According to Lomack, he looked for his identification, which he thought was inside of a notebook lying in the middle of the seat. As he looked on the seat next to him for the identification, Lomack noticed a pack of cigarettes which he had bought for Rodriguez as well as what he referred to as "something plastic — little plastic deal and a silver deal."

Lomack testified that he did not recognize the two items and that they did not belong to him, but he knew that they were something illegal. Lomack then picked up the two items just before being removed from the pickup. It was Lomack's contention that he took the items so that he could present them to the officers and tell them that the items belonged to Rodriguez because he did not want them found in his father's truck. Lomack stated that as he was being removed from the truck, he placed the "tubular, silver deal" in his mouth to show the officers that it was not a knife. Lomack also stated that he put the plastic baggie in his mouth so that the officers could see it. According to Lomack, when the officers grabbed him, the plastic baggie got wedged in his throat, and he was unable to spit it out at the officers' requests.

PROCEDURAL HISTORY

An information was filed in the district court for Lancaster County on April 25, 1994, charging Lomack with the possession of a controlled substance and with being a habitual criminal. In a motion to suppress filed on August 15, Lomack challenged the stop of his vehicle, his arrest, the evidence seized from his body, and any visual or auditory observations made by the police officers because the police lacked probable cause as well as articulable suspicion for stopping his truck.

A hearing on Lomack's motion to suppress was held on November 10, 1994. In an order dated December 2, the court overruled the motion to suppress, finding that the police had reasonable suspicion supported by articulable facts to stop Lomack and detain him for investigative purposes and that this suspicion was elevated to probable cause when Lomack failed to obey the lawful orders of the officers.

Trial commenced on January 17, 1995. After opening statements, the State orally presented a motion in limine, seeking an order that Lomack be prohibited from attempting "to gain the [confidential] informant's name." The basis for the State's motion in limine was Neb. Evid. R. 510, Neb. Rev. Stat. § 27-510 (Reissue 1989), which, subject to certain conditions and exceptions, grants to the government a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law. Lomack's counsel resisted such prohibition, arguing that she had intended to question Sergeant Miller as to whether the CI was Rodriguez because it was crucial to Lomack's defense that Rodriguez had set him up and Rodriguez' status as the CI provided a motive for such action. The trial court sustained the State's motion and ordered Lomack to refrain from asking the police officers at trial to identify the CI.

At the conclusion of the evidence, the State asked the court to clarify the order in limine as to what could be argued by Lomack in closing arguments. The court ordered that there was to be no reference made to Rodriguez as the CI by defense counsel, although it was acceptable to argue the reasonable inferences to be drawn from the fact that Rodriguez, on the trip to and from Omaha, had made phone calls and to argue that he might have been the one who tipped off the police as to Lomack's possession of the contraband, without specifically calling him the CI.

Following the presentation of evidence, a jury instruction conference was held at which Lomack's attorney objected to the court's proposed instructions Nos. 4, 6, and 8, arguing that the court's instructions allowed Lomack to be convicted of possession without knowing the character of what he possessed. Instead, Lomack's counsel orally offered proposed instruction No. 2, which defined possession of a controlled substance. The court both overruled Lomack's objections and denied his request for the proposed instruction.

The jury returned a verdict on January 20, 1995, finding Lomack guilty as charged in the information. The court then ordered a presentence investigation. Lomack filed a motion for a new trial on January 30, and the matter came on for hearing on February 16. At the hearing, the court denied the motion for a new trial and proceeded with the enhancement and sentencing. The court found the habitual criminal charges as alleged in the information to be true and sentenced Lomack to not less than 10 nor more than 14 years' imprisonment. This appeal follows.

ASSIGNMENTS OF ERROR

In his appeal, Lomack alleges that the district court erred by (1) overruling his motion to suppress, (2) granting the State's motion in limine which prohibited the inquiry and argument as to the identity of the State's CI, (3) refusing to give Lomack's proposed jury instruction on the word "knowingly" and on "possession" of a controlled substance, and (4) finding that Lomack was a habitual criminal.

ANALYSIS

Motion to Suppress.

[1,2] A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate 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 it observed the witnesses. *Grimes, supra*; *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994).

Probable Cause.

[3] Lomack argues that the trial court should have sustained his motion to suppress evidence, since the police lacked probable cause when they arrested him without a warrant and because the evidence was seized by unreasonable means. Probable cause for a warrantless arrest exists where the facts and circumstances within an officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to warrant one of reasonable caution to believe that there was a fair probability that an offense has been or is being committed. See, *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); *State v. Roach*, 234 Neb. 620, 452 N.W.2d 262 (1990). Thus, the key to a lawful arrest without a warrant is reasonable or probable cause to believe that a person has committed a crime. *Roach, supra*; *State v. Moore*, 226 Neb. 347, 411 N.W.2d 345 (1987).

[4] To determine whether probable cause existed to arrest Lomack without a warrant, it must first be determined at what point Lomack was arrested. It is the State's contention that when Lomack was first stopped, the police were simply conducting an investigatory stop based upon the reasonable suspicion that Lomack was, had been, or was about to be

engaged in criminal behavior. However, a person is seized, or arrested, for Fourth Amendment purposes when, in view of all of the circumstances surrounding the incident, a reasonable person would believe that he or she is not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980); *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993). The record indicates that when Lomack was first stopped, there were officers parked in front, behind, and to the left of his vehicle. Even though there was some dispute as to whether or not the officers had their guns drawn, the State concedes that there were six officers present surrounding Lomack's vehicle. It is clear, in light of these circumstances, that a reasonable person would not believe he or she was free to leave. Therefore, Lomack was seized for Fourth Amendment purposes at the time he was initially stopped.

[5,6] The record shows that Lomack was stopped solely based upon the information provided by the CI along with the verification and observations made by the police officers. Police can have probable cause for a warrantless arrest based on information from an informant if the information from the informant, when taken as a whole in light of underlying circumstances, is reliable. See, *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988); *State v. Butler*, 207 Neb. 760, 301 N.W.2d 332 (1981). The reliability of an informant may be established in four ways: (1) The informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. See, *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992).

Sergeant Miller testified that the informant who provided the information regarding Lomack had been working with the police since 1991. The information provided by this particular informant had resulted in at least 16 felony arrests, many of which had led to convictions. The informant had also been used by the police to buy drugs and had, in the past, been wired for sound. According to Sergeant Miller, there had never been a time when this informant's information "did not pan out." The necessary reliability of the information was established by several instances of past reliability. We therefore find that the district court was not clearly wrong in denying Lomack's motion to suppress his arrest because probable cause existed for the arrest.

Intrusive Search.

Lomack also argues that the court should have granted his motion to suppress because unreasonable means were employed in retrieving the cocaine from his mouth, in violation of the Fourth Amendment. The Nebraska Supreme Court addressed the issue of intrusive body searches in *State v. Thompson*, 244 Neb. 189, 505 N.W.2d 673 (1993), and *State v. Harris*, 244 Neb. 289, 505 N.W.2d 724 (1993).

In *Thompson*, the police witnessed the defendant making a motion to his mouth with his hand, noticed white crumbs around the defendant's mouth, and ordered the defendant to open his mouth. When the defendant refused to comply with the order and began to struggle, the police employed a lateral vascular neck restraint on the defendant which resulted in the defendant's becoming unconscious for approximately 10 seconds. While the defendant was unconscious, the police removed crack-cocaine-like substances off the defendant's lips and from around his teeth. In determining whether the intrusive search was constitutional under the Fourth Amendment, the court looked to the following factors set out in *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966): (1) whether the government had a clear indication that incriminating evidence would be found; (2) whether the police had a warrant or there existed exigent circumstances, such as the imminent destruction of evidence, to excuse the warrant requirement; and (3) whether the method used to extract the evidence was reasonable and performed in a reasonable manner.

The court in *Thompson* determined that because of the defendant's behavior there were strong indications that evidence would be found in and around his mouth. Further, the court found that exigent circumstances existed, since the defendant appeared to be destroying evidence which could have been metabolized before a blood test could be performed. The court also concluded that the substance in and around the defendant's mouth was easily removed and that the method used to seize it was reasonable, finding that the defendant suffered only momentary discomfort and minimal intrusion. In so deciding, the court noted that "[i]n reviewing the amount of force used, a court must make allowance for the fact that police officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving, about the force that is necessary in a particular situation." *Id.* at 200, 505 N.W.2d at 680.

Similarly, in *Harris, supra*, the police noticed the defendant chewing something and requested that he open his mouth. When the defendant refused and continued chewing, an officer grabbed the defendant's throat and ordered him to spit the object out. The defendant again refused to comply and began to struggle with the officers. The officers used a lateral vascular neck restraint and a Heimlich-type maneuver on the defendant in order to get him to eject what was in his mouth and throat. As a result, the defendant received a small cut to the mouth and stated that his throat hurt for 3 or 4 days after the struggle. Immediately following an ejection from the defendant's mouth and throat, the officers found in the defendant's right hand a saliva-covered baggie which appeared to contain cocaine.

The court in *Harris*, as it had done in *Thompson*, examined the constitutionality of the intrusive search in terms of the criteria set out in *Schmerber*. The court found that the police had a clear indication that the defendant was attempting to swallow narcotics and that exigent circumstances existed, since the police had no way of knowing whether or not the drugs could be retrieved later and because of the possible health risks involved had the defendant swallowed the narcotics. In analyzing the reasonableness of the search, the court balanced the " 'extent to which the procedure may threaten the safety or health of the individual' and the extent to which the procedure intrudes on 'the individual's dignitary interests in personal privacy and bodily integrity' " with the community's interests in " 'fairly and accurately determining guilt or innocence.' " *Harris*, 244 Neb. at 296, 505 N.W.2d at 729, quoting *Winston* *v. Lee*, 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985). The court determined that the trial court was not clearly wrong in finding that the police had used reasonable force in extracting the narcotics, since the intrusion upon the defendant was minimal when compared with the community's interests.

In applying the *Schmerber* criteria to the circumstances presented here, Lomack concedes that "there is no dispute as to the first factor, that the police had a clear indication that incriminating evidence would be found." Brief for appellant at 21. Lomack, however, asserts that the second factor, exigent circumstances, did not exist. Lomack attempts to distinguish his situation from *Thompson* and *Harris* by arguing that there were no exigent circumstances, since the cocaine in his mouth was packaged and therefore could not have been digested. However, there is nothing to show that the officers could have determined, when making their split-second decision, how effectively the substance was packaged or whether Lomack could have bitten through the packaging. As stated in *Harris*,

> If the crack cocaine was unpackaged, the narcotic could have been metabolized before the police could obtain a blood sample or induce vomiting. The possibility existed that the evidence would be destroyed if the officers did not act immediately to prevent [the defendant] from swallowing it. Moreover, as the district court found, [the defendant] could have been endangered had the police officers allowed [the defendant] to swallow the suspected narcotic.

244 Neb. at 301, 505 N.W.2d at 732.

Because of the possibility that the evidence in Lomack's mouth could have been destroyed or that Lomack could have injured himself by ingesting the cocaine, we find that the district court did not err in finding that exigent circumstances existed.

[7] Although the determination must be made in light of the fundamental criteria laid down by the Fourth Amendment and in court opinions applying that amendment, the reasonableness of a search is a substantive determination to be made by the trial court from the facts and circumstances of the case. See, *State v. Sharp*, 184 Neb. 411, 168 N.W.2d 267 (1969); *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). While the district court here made no specific factual findings as to the reasonableness of the search, it did determine that the "force used by the officers to extract the evidence from [Lomack's] mouth was reasonable under all of the circumstances shown by the evidence." The evidence is clear that Lomack was not permanently injured and that he, at most, suffered a small cut to the mouth. Also, the intrusion into Lomack's body, that of removing the baggie from his mouth, was minimal. Therefore, we find that the trial court was not clearly wrong in finding that the search was reasonable or in denying the motion to suppress.

Motion in Limine.

Lomack's second assignment of error is that the court erred in prohibiting him from asking of the State's witnesses the identity of the State's CI and in precluding him from arguing that Rodriguez was the CI. Lomack, presuming that proper questioning would reveal the CI to be Rodriguez, argues that such disclosure was crucial to his defense. This defense was that the cocaine belonged to Rodriguez, who set him up by planting the cocaine in the pickup and then calling Sergeant Miller. The State asserts that the order excluding this line of questioning was proper under § 27-510. Lomack also maintains that any privilege the State held regarding the identity of the CI was waived when the State disclosed Rodriguez as a CI in another case pending against Lomack. In the present case, neither the State nor Lomack called Rodriguez as a witness.

Section 27-510 provides that the State has "a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law." However, § 27-510 also places certain limitations on this privilege. Specifically, § 27-510 provides in pertinent part:

> (3)(a) No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness.

> (b) If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case . . . and the government invokes the privilege, the judge shall give the government an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony.

The State, relying on § 27-510, orally moved for an order that "[Lomack's counsel] not attempt to gain the informant's name." Lomack's counsel argued that she had intended to ask Sergeant Miller whether Rodriguez was the CI and that this information was necessary to Lomack's defense that Rodriguez had "set up" Lomack. The court nevertheless sustained the State's motion, reasoning that prohibiting Lomack from asking whether Rodriguez was the CI did not prohibit Lomack from utilizing the setup defense.

Lomack's attorney then made a record consisting of Lomack's testimony that Rodriguez was the only person who knew Lomack was going to Omaha or knew the time he would be returning, and that Rodriguez was the only person who could have placed the contraband in the vehicle, since he was the only person with Lomack in the vehicle that day. Lomack's attorney also offered into evidence portions of a transcript from a preliminary hearing in a separate criminal proceeding which had been held June 7, 1994, wherein Lomack was charged with another drug offense. The transcript disclosed that one Willie Rodriguez was the CI in that case. Lomack then asked the court to reconsider its ruling on the State's motion in limine, again arguing that Rodriguez' status as the CI was additional motivation to set up Lomack and also arguing that the State had waived the privilege by disclosing Rodriguez as a CI in the previous proceeding. The court, still with no evidence of who the CI was, refused to reconsider its ruling on the motion and directed Lomack's counsel to not ask the State's police officers in front of the jury to identify the CI.

Prior to closing arguments, the State asked the court to clarify what could be argued by the defense to the jury. The court ordered that defense counsel was not to refer to Rodriguez as the CI, but could argue the reasonable inferences to be drawn from the fact that Rodriguez, on the trip from Omaha to Lincoln, had made phone calls. Specifically, the court stated:

> My anticipation was that the defense would argue that this was set up and that the inference is that Mr. Rodriguez made the call and tipped off the police; without alleging or contending that Mr. Rodriguez was a confidential informant. . . .
>
> . . . .
>
> . . . [Y]ou can argue the facts as shown by the evidence — you know — which include your client's testimony that Mr. Rodriguez was the only person that knew where they were going and when they were coming back and what vehicle they would be in; and that he made phone calls along the way, and that your client testified that the controlled substance was Mr. Rodriguez' and not his.
>
> And you can argue your — your set-up theory; that your client was set up by this Willie Rodriguez and that Rodriguez had a motive due to the loan that was out standing, and that you can do all of that without saying that Mr. Rodriguez must be the confidential informant.

Lomack now asserts on appeal that the court erred in making this ruling, again arguing that (1) the State had waived the privilege by prior disclosure and, if not, (2) the disclosure of the CI's identity was necessary to a fair determination of Lomack's guilt or innocence.

Prior Disclosure.

Lomack first asserts that the State waived its informant privilege by disclosing that one Willie Rodriguez was the informant in a prosecution of Lomack for the sale of marijuana that occurred in January 1994. Lomack relies upon § 27-510(3)(a).

It has been said that the main purpose of the informant privilege is to encourage and ensure the free flow of information to the government. Of course, by maintaining the secrecy of the informant's identity, the informant may continue to serve in that role. Thus, the privilege necessarily has the ancillary effect of protecting the informant from retaliation. See, e.g., *Westinghouse Electric Corp. v. City of Burlington, Vermont*, 351 F.2d 762 (D.C. Cir. 1965).

Naturally, if the fact of informing and the identification of the informant have already been disclosed "to those who would have cause to resent the communication," the likelihood of information flowing to the government from that informant is severely reduced, if not eliminated. Section 27-510(3)(a) recognizes that such prior disclosure operates to destroy, not waive, the privilege.

The State is the holder of the privilege. § 27-510(1). In a related proceeding against Lomack, a State's witness disclosed the identity of one Willie Rodriguez as the CI. *If* Rodriguez is the informant in this case, his prior disclosure by the State strongly suggests that the State's privilege no longer exists in this case.

For Lomack to successfully assert the nonexistence of the privilege under § 27-510(3)(a), two threshold showings were necessary: first, that Rodriguez was actually the informant *in this case* and, second, that he was the same Willie Rodriguez disclosed in the separate proceeding. The record expressly discloses neither, although it may be reasonably inferred from the record that all parties, as well as the court, were proceeding on the assumption that Rodriguez was the informant in both cases. In any event, the blame for these omissions in the record cannot be laid at Lomack's feet.

As we discuss later, § 27-510(3)(b) requires a judge, if it appears that an informant may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case, to give the government an opportunity to make an in camera showing so that the judge can determine whether the informant can in fact give such testimony. While § 27-510(3)(b) expressly addresses the determination of whether an *existing* privilege must give way to the interest of the criminally accused, the procedure identified therein seems equally appropriate when the very existence of the privilege is challenged, as is the case here.

In this case, sufficient showing was made to mandate an in camera showing by the government as to whether the Willie Rodriguez from the separate matter was the CI in this case.

Without requiring this minimal showing, available only from the State at the court's insistence, the judge could not properly assess Lomack's "waiver" argument. This was error.

Because the record fails to disclose that Willie Rodriguez was the informant in this case and that he was the same Willie Rodriguez who had been disclosed as a CI in the separate proceeding, we cannot say that the district court erred in rejecting Lomack's "waiver" argument. However, the district court erred in not requiring the State to make an in camera showing of the identity of the CI in this case once Lomack had raised the issue and supported it with sufficient evidence that prior disclosure had likely occurred.

Disclosure of Informant.

[8] Lomack next argues that if the privilege existed, the trial court erred in prohibiting him from asking about the identity of the informant, since he had adequately demonstrated that the identity of the informant was necessary to a fair determination of the issue of his guilt or innocence as required by § 27-510(3)(b). Disclosure of the identity of an informant is a matter of judicial discretion. See *State v. Wenzel*, 196 Neb. 255, 242 N.W.2d 120 (1976). In *Wenzel*, the Nebraska Supreme Court adopted the following position on the issue:

> "At the outset, we must recognize that no hard and fast rule can be patterned with reference to disclosure of the name of an informer. The trial judge must balance the public interest in protecting the flow of information against the individual's right to prepare his defense. The answer depends upon the particular facts in each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. Roviaro v. United States, 353 U. S. 53, 62, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957). . . . [I]n balancing the interest of the government against that of the accused, the burden of proof is on the defendant to show need for the disclosure."

196 Neb. at 260, 242 N.W.2d at 123, quoting *United States v. Alvarez*, 472 F.2d 111 (9th Cir. 1973), *cert. denied* 412 U.S. 921, 93 S. Ct. 2742, 37 L. Ed. 2d 148 (1973).

We must, therefore, balance Lomack's right to make his defense against the public's interest in protecting the flow of information.

Lomack asserts that with evidence that Rodriguez was the CI, his defense that Rodriguez planted the cocaine was strengthened in that he could then argue that Rodriguez was motivated by the money received as an informant, as well as by avoidance of the $525 debt Rodriguez owed to Lomack. Indeed, if Rodriguez was the CI, disclosure to the jury of that fact would have bolstered Lomack's story and credibility. While Lomack's defense, when considered in connection with the overall facts and circumstances of the case, is weak, if not fanciful, it appears to be one of the only defenses he had. Furthermore, if Rodriguez was the CI in both cases, any public interest in protecting the free flow of information from Rodriguez as an informant was slight in light of the State's prior disclosure.

As stated above, following Lomack's offer of evidence supporting the reasons why disclosure of the CI was critical to his defense, the court refused to reconsider its previous ruling. Under § 27-510(3)(b), the court implicitly concluded that even *assuming* Rodriguez was the informant in this case, his identity or his testimony was not necessary to a fair determination of Lomack's guilt or innocence. Having so concluded, the trial court did not order an in camera showing of any kind to be made by the government. As a result, the identification of the informant and whatever testimony he held remained a secret, not only from Lomack, but also from the court.

Under the rationale of *Wenzel, supra*; *Roviaro v. United States*, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957); and § 27-510(3)(b), the court erred in not holding an in camera hearing and in not forcing the government to disclose, at least to the court, who the CI was in this case. Had the in camera showing disclosed that Willie Rodriguez was the CI, and the same Willie Rodriguez who had previously been disclosed as a CI against Lomack, it was error to deny Lomack the right to bring this fact before the jury. However, not all trial errors, even of a constitutional magnitude, entitle an accused to reversal of an adverse trial result; it is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires that a conviction be set aside. *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994). In light of the overall facts and circumstances of this particular case, we find that the trial court's error was harmless beyond a reasonable doubt.

While undisputed evidence that Rodriguez was a paid informant would have bolstered Lomack's setup defense, Lomack was still allowed to adduce evidence that Rodriguez owed him money and made several unexplained telephone calls and to argue that Rodriguez tipped off the police so long as he did not place the "CI" label on Rodriguez. Sergeant Miller testified that the person who called him was a *paid* informant. Thus, if the jury accepted Lomack's argument that Rodriguez was the "snitch," it necessarily concluded that he was paid.

More importantly, Lomack was charged with possession of a controlled substance. The ownership of the substance is not an element of the crime. While accidentally and innocently finding oneself in the presence of an illegal substance might be sufficient, under some circumstances, to avoid a finding of guilt, this case does not present such circumstances. It is undisputed that Lomack, realizing a substance was illegal, placed it in his mouth. He then tenaciously resisted all efforts to remove it. These are not reasonable reactions of one innocently surprised by the accidental discovery of planted contraband.

Although pinpointing Rodriguez as the CI would have provided an additional fact for defense counsel to use in asserting the setup defense, the fact remains that the setup defense, by Lomack's own description of the events of that day, is preposterous. Therefore, the inability to conclusively label Rodriguez as the CI, remembering that Lomack was still able to argue his setup defense, is harmless beyond a reasonable doubt.

Jury Instructions.

Lomack next contends that the trial court erred by refusing to give his proposed jury instruction on possession of a controlled substance. The trial court instructed the jury in pertinent part as follows:

INSTRUCTION NUMBER 4

The material elements which the state must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime charged are:

1. That on or about March 9, 1994, the defendant, Terry D. Lomack, did knowingly or intentionally possess a controlled substance, to-wit: Cocaine.

2. That said alleged possession of a controlled substance occurred within Lancaster County, Nebraska.

. . . .

INSTRUCTION NO. 8

You are instructed that to do an act knowingly or intentionally means to do it with the intent to violate the law and to commit the act charged.

"Possession" of a controlled substance is defined as either knowingly having it on one's person or knowing of its presence and having the right to exercise control over it.

"Intentionally" means willfully or purposely.

Lomack orally requested that the following instruction be given to the jury: "[P]ossession of a controlled substance is defined as physical or constructive possession, with knowledge of the presence of the drug and of it's [sic] character as narcotic." This request was denied.

It is Lomack's contention that the instruction requested was proper under *State v. Lonnecker*, 237 Neb. 207, 213, 465 N.W.2d 737, 742 (1991), which states: "A defendant possesses a controlled substance when the defendant knows of the nature or character of the substance and its presence and has dominion or control over the substance." Lomack argues that there was evidence to support this proposed instruction because he testified that when he picked up the bag "he did not have the requisite intent to break the law, i.e. to knowingly possess a controlled substance," and that he did not know what was in the baggie and, "at most, believed it was something illegal because it came from Willie Rodriguez." Brief for appellant at 28. Lomack concludes that based upon the instructions given, without his proposed instruction, he could have been found guilty for a mere possession of the baggie, "without knowing that the baggie contained crack cocaine or without intending to possess crack cocaine." *Id.* at 29.

[9] To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the tendered instruction. *State v. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995); *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994); *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994).

Section 28-416(3) provides in relevant part, "A person knowingly or intentionally possessing a controlled substance . . . shall be guilty of a Class IV felony." Recently, in *State v. Neujahr*, 248 Neb. 965, 972, 540 N.W.2d 566, 572 (1995), the Nebraska Supreme Court reiterated its position that " '[o]ne possesses a controlled substance when one knows of the nature or character of the substance and of its presence and has dominion or control over it.' " Quoting *State v. DeGroat*, 244 Neb. 764, 508 N.W.2d 861 (1993). Lomack's proposed instruction, with the exception of substituting the word "narcotic" for the phrase "controlled substance," appears to be a reasonably accurate restatement of the rule enunciated in *Lonnecker* and *Neujahr*. Moreover, the evidence certainly warranted an instruction on what constituted "possession" for purposes of a finding of guilt. Nevertheless, that does not end our analysis.

[10,11] It is not error for a trial court to refuse to give a defendant's requested instruction where the substance of the requested instruction was covered in the instructions given. *Neujahr, supra*; *State v. Hernandez*, 242 Neb. 78, 493 N.W.2d 181 (1992). All the jury instructions 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. Lowe*, 248 Neb. 215, 533 N.W.2d 99 (1995); *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995); *Myers, supra*.

That Lomack had possession of the baggie which contained the controlled substance is undisputed. While testifying that he did not know exactly what was in the baggie, Lomack did admit that he believed it was "something illegal." He seems to argue that it was necessary for the State to prove that he was aware the baggie contained cocaine in order to be convicted. With this, we disagree. A similar argument was made in *Neujahr, supra*, and was soundly rejected. In *Neujahr*, the defendant requested an instruction which, in substance, required that the jury find that Neujahr knew that the pills in his possession were clorazepate. The Supreme Court held that the State need only prove that the defendant knowingly possessed a substance and that he knew of the nature or character of the substance, i.e., he knew it was a controlled substance. It specifically rejected the notion that the State must prove that the defendant knew of the precise type of controlled substance in order to sustain a conviction. Similarly, in this case, it was unnecessary for the State to prove that Lomack knew the substance in the baggie was cocaine. It was sufficient for the State to prove that Lomack knowingly possessed the substance and that he knew of the nature or character of the substance as being a controlled substance.

In order to prove that Lomack knowingly or intentionally possessed a controlled substance, the State was required, by jury instruction No. 8, to prove that Lomack's possession was with the intent to violate the law and to commit the act charged. His act of possessing the substance could not, thus, be inadvertent or by mistake or accident. Moreover, jury instruction No. 8, in defining "possession," required the State to prove that Lomack knowingly had "it" on his person or knew of "its" presence and had the right to exercise control over "it." The "it" in jury instruction No. 8 obviously refers to a controlled substance. Thus, the State was required to prove that Lomack knowingly possessed the substance and that he knew of the nature or character of the substance as being a controlled substance.

Lomack was not prejudiced by the trial court's refusal to give the requested jury instruction. The instructions which were given, when taken as a whole, correctly stated the law, were not misleading, and adequately covered the issues presented by the evidence. The instructions as given properly advised the jury that in order to convict Lomack, they had to find that he knew the substance he possessed was a controlled substance, not that he knew that he possessed crack cocaine. We therefore find that the trial court did not err in refusing to give Lomack's requested instruction.

Habitual Criminal.

Finally, Lomack claims that the trial court erred in finding that he was a habitual criminal under Neb. Rev. Stat. § 29-2221 (Cum. Supp. 1994). Section 29-2221 provides in relevant part: "Whoever has been twice convicted of crime, sentenced, and committed to prison . . . for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal . . . ." Lomack argues that exhibit 2 offered by the State in support of the habitual criminal allegation was not competent evidence of his prior conviction under Neb. Rev. Stat. § 29-2222 (Reissue 1989). Section 29-2222 provides:

> At the hearing of any person charged with being an habitual criminal, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for any of such crimes formerly committed by the party so charged, shall be competent and prima facie evidence of such former judgment and commitment.

It is Lomack's specific contention that exhibit 2 is flawed because it does not show a commitment, but only a sheriff's return. Exhibit 2 contains a certified judgment from the district court for Canadian County, Oklahoma, showing that Lomack was convicted of first degree burglary and sentenced to 10 years' imprisonment. It also contains a certified copy of a sheriff's return which reads:

> Received this Judgment & Sentence on the 22nd day of August,1984, [sic] and executed the same as ordered there herein by transporting Terry Dale Lomack from the Canadian County Jail in El Reno, Okla. to the Lexington Assessment & Receiving Center in Lexington, Okla. on the 27th day of August, 1984.

In *State v. Bundy*, 181 Neb. 160, 147 N.W.2d 500 (1966), *cert. denied* 389 U.S. 871, 88 S. Ct. 152, 19 L. Ed. 2d 150 (1967), the court held that § 29-2222 does not confine the proof on the issue of the defendant's prior convictions to the documents therein mentioned. Moreover, in *State v. Coffman*, 227 Neb. 149, 416 N.W.2d 243 (1987), the court found that certified copies of the sheriff's return and warden's receipt showing the defendant's actual commitments were in substantial compliance with the requirement of proof of commitment. We therefore find that the trial court did not err in finding that Lomack was a habitual criminal.

CONCLUSION

Because probable cause existed to arrest Lomack without a warrant and since the intrusive search of Lomack was reasonable under the circumstances, the trial court did not err in denying Lomack's motion to suppress. Also, even though the trial court erred in not granting an in camera review pursuant to § 27-510(3)(b), under the facts and circumstances of this case, the error was harmless beyond a reasonable doubt. Furthermore, the trial court did not err by refusing to give Lomack's proposed jury instruction, since Lomack failed to show that he was prejudiced by the refusal and the instructions as given properly advised the jury of the law. Finally, because the State substantially complied with the habitual criminal statutes in showing his commitment on a prior conviction, the trial court did not err in finding that Lomack was a habitual criminal. We therefore affirm the decision of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HAROLD L. WILSON, APPELLANT.

546 N.W.2d 323

Filed April 2, 1996. No. A-95-288.

1. **Rules of Evidence: Other Acts: Proof.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27–404(2) (Cum. Supp. 1994), 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. However, such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
2. **Trial: Evidence: Other Acts: Appeal and Error.** It is within the trial court's discretion to determine the admissibility of evidence of a defendant's other wrongs or acts, and the trial court's decision will not be reversed on appeal absent an abuse of discretion.
3. **Trial: Words and Phrases.** Judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
4. **Rules of Evidence: Other Acts: Appeal and Error.** When reviewing the admission of evidence of other acts, an appellate court considers (1) whether the evidence was relevant; (2) whether the evidence had a proper purpose; (3) whether the probative value of the evidence outweighed its potential for unfair prejudice as required by Neb. Evid. R. 403, Neb. Rev. Stat. § 27–403 (Reissue 1989); and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.
5. **Rules of Evidence.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
6. **Evidence: Words and Phrases.** To be relevant, evidence must be rationally related to the issue by a likelihood, not a mere possibility, of proving or disproving the issue to be decided.
7. **Rules of Evidence: Other Acts.** Even when "other acts" evidence is relevant and has a proper purpose, it is still subject to overriding protection under Neb. Evid. R. 403, Neb. Rev. Stat. § 27–403 (Reissue 1989), which permits relevant evidence to 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.
8. **Trial: Evidence: Other Acts.** Evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and circumstances to the offense or offenses charged as to have substantial probative value in determining the guilt of the accused.
9. ____: ____: ____. A separate act or acts with distinctive patterns or procedures may have probative value in determining a defendant's guilt and need not be identical to the act charged in order to be admissible.

10. **Evidence: Words and Phrases.** Probative value is a relative concept; the probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issues of the case.
11. **Convictions: Appeal and Error.** A defendant's conviction must be sustained if, taking the view of the evidence which is most favorable to the State, there is sufficient evidence to support it.
12. ____: ____. A conviction will not be reversed on appeal unless, after the court views the evidence most favorably for the State, the evidence is so lacking in probative value that it is insufficient as a matter of law to support the verdict.
13. ____: ____. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence.
14. **Sentences.** The Nebraska indeterminate sentencing statute provides, in relevant part, that a court imposing an indeterminate sentence must fix the minimum and maximum limits of the sentence to be served within the limits provided by law.
15. ____. In setting an indeterminate sentence, there must be a difference between the periods, and a sentence fixing identical minimum and maximum terms of imprisonment is not an indeterminate sentence.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed in part, and in part reversed and remanded for resentencing.

Thomas L. Spinar, Saline County Public Defender, for appellant.

Don Stenberg, Attorney General, and David K. Arterburn for appellee.

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

INBODY, Judge.

I. INTRODUCTION

This appeal arises from Harold L. Wilson's convictions of attempted second degree murder, robbery, and use of a weapon to commit a felony. On appeal, Wilson contends that the district court erred in admitting evidence of a subsequent crime under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 1994); that there was insufficient evidence to support his conviction for attempted second degree murder; and that the sentences imposed upon him are excessive. For the reasons set forth herein, we affirm.

II. STATEMENT OF FACTS

On September 6, 1994, an information was filed charging Wilson with attempted second degree murder, robbery, first degree assault, and use of a weapon to commit a felony resulting from an attack on a convenience store worker on May 8, 1994, in Crete, Nebraska. At his arraignment, Wilson pled not guilty to all counts. Prior to trial, the State filed a notice of intent to offer evidence of other wrongs or acts during Wilson's trial, and a § 27-404 hearing was held to determine the admissibility of the evidence sought to be introduced by the State.

1. § 27-404 Hearing

On November 3, 1994, a § 27-404 hearing was held to determine, among other things, the admissibility of testimony from Kimberly Paulsen regarding an incident similar to the charged incident which had occurred in Lincoln, Nebraska, on May 9, 1994. Evidence was received including a transcript of testimony by Paulsen, while under oath, as to the circumstances surrounding an attack upon her by Wilson while she was working at a Little King fast-food restaurant in Lincoln. The court determined that the testimony of Paulsen could be introduced by the State on direct examination to show proof of intent, plan or method of attack, identity, and absence of mistake or accident, and further details concerning the Lincoln incident will be set forth later in this opinion. The court denied the remainder of the State's motion concerning admission of other evidence.

2. Trial

A jury trial was held on November 28 and 29, 1994. At trial, the victim, Peggy Kenney, testified that on May 8, 1994, she was employed at a Crete convenience store named "First & Last Stop." Kenney worked the morning shift, opening the store at 6 o'clock. On May 8, Kenney arrived at the store at approximately 5:50 a.m. and was working alone when Wilson, who was the store's first customer, entered the store at approximately 6:15. Kenney recognized Wilson because she had seen him in the store before and had noticed Wilson's eyes as a distinguishing feature.

Kenney testified that after Wilson entered the store, he walked around the store for a few minutes looking at various items. During this time, Kenney continued working behind the counter, performing various tasks, including placing money in the cash register drawer. Shortly thereafter, Kenney asked if she could help Wilson, to which Wilson responded that he did not know what he wanted. During this brief conversation, Kenney testified, Wilson acted friendly toward her and showed no sign of anger, of abnormal behavior, or that he was upset.

Shortly thereafter, Wilson walked up to a snack food display, picked up a bag of Doritos chips, and placed the bag on the counter. At this point, Wilson was only 2 feet away from Kenney. Kenney informed Wilson how much the chips would cost, and Wilson said that he had to go out to his car to get his wallet. When Wilson returned 20 to 30 seconds later, he was walking very quickly. Wilson approached Kenney, grabbed her hair with his right hand, pulled her head down behind the counter, and stabbed her neck 6 to 10 times with an object that he was holding in his left hand. Kenney testified that Wilson stabbed her with a long, cylindrical, metallic object which she thought might be an ice pick or a screwdriver.

During the attack, Wilson did not say anything to Kenney and did not demand money. After Kenney attempted to pull away from the attack, but was unable to do so, she told Wilson to take the money in the cash register. At this time, Wilson let go of Kenney's hair; grabbed $175 in bills out of the open cash register drawer, which was within easy reach; and ran out of the store.

Kenney then ran to a house across the street, where a call was made to police, and Kenney was taken to the emergency room at the Crete hospital. David Marvin, a physician's assistant, testified that there were several stab wounds to Kenney's neck. This caused Marvin concern because one particular stab wound was in the area of the carotid artery and the internal jugular vein. Both Marvin and Dr. Leon Jons, who saw the victim for followup care, testified that given the nature of Kenney's injuries, she had been placed in a situation involving a substantial risk of death, permanent disfigurement, or injury.

The State then adduced evidence from Paulsen, regarding a similar incident that occurred to her while she was working at a restaurant in Lincoln, over Wilson's continuing objection as to relevance and on the basis of the § 27-404 hearing. Paulsen testified that on May 9, 1994, she was working a 5 to 10:30 p.m. shift at a Little King restaurant, located at 27th and Dudley Streets. At approximately 8:15 p.m., Wilson entered the Little King store where she was working and asked to use a telephone book. After exiting and reentering the store several times over a half-hour period, Wilson ordered a sandwich from Paulsen. Paulsen testified that she did not notice anything unusual about Wilson's behavior and that he was friendly to her and did not appear to be angry or upset.

However, as Paulsen reached down to get some Parmesan cheese for Wilson's sandwich out of a refrigerator that was located underneath the counter, Wilson grabbed her from behind and started cutting her neck with a knife. Paulsen could tell that Wilson was holding the knife in his left hand and estimated that she felt the cutting motion on her neck approximately 10 to 15 times. After Wilson cut her neck, he stabbed her in the back with the knife three or four times, then started to stab her in her front chest area. After stabbing Paulsen approximately four times in her front chest area, Wilson stopped abruptly and ran out the door. Wilson did not say anything while he was attacking her, did not demand money, and made no attempt to steal any money or items from the store.

Corroborating testimony was adduced from Wilson's fiance, Laura Leigh, who testified that Wilson is left handed. Leigh also testified that Wilson was driving a red four-door Ford Tempo when she last saw him early in May 1994 and that Wilson took a screwdriver with him when he left. Additionally, Leigh testified that on more than one occasion, the most recent being in early May, Wilson told her that "you know, Laura, I told you time before and time again and I always wanted to know how it was like to kill someone."

On May 10, 1994, during an execution of a search warrant on Wilson's room at a Lincoln Holiday Inn, Lincoln police officers found a Phillips-head screwdriver. However, the screwdriver recovered was a different one than the screwdriver that was given to Wilson by Leigh. Additionally, no blood was detected on the seized screwdriver.

Wilson took the stand in his own defense, testifying that he was not involved in either the Crete or the Lincoln incident. Wilson testified that on May 8, 1994, at the time of the attack and robbery in Crete, he was in Lincoln. He stated that on May 8, he had stayed at a Lincoln Holiday Inn located on Cornhusker Highway and that he woke up at approximately 6 a.m. Wilson stated that he left the Holiday Inn at approximately 6:30 a.m. and drove to the Highway Diner, located on Highway 2 in Lincoln, to eat breakfast. Wilson testified that he remained at the Highway Diner until approximately 7:30 a.m. However, the State presented rebuttal evidence by Gary Walker, owner of the Highway Diner, and Tami Hill, a waitress at the diner, that they were present at the Highway Diner on the morning of May 8 between 6 and 7:30 a.m. and that they did not observe Wilson to be present and had never seen Wilson prior to the trial.

Wilson further testified regarding the May 9, 1994, Lincoln incident. Wilson admitted that he went to the Little King restaurant at 27th and Dudley Streets on May 9 at approximately 8 p.m., but claimed that he left the restaurant between 8:50 and 9 p.m. and was not in the restaurant during the attack on Paulsen. Wilson testified that after ordering a second sandwich, he left to make a telephone call, and that upon returning, he ran into an individual leaving the store carrying a knife. At that point, Wilson claims, he also decided to run off.

Finally, Wilson testified that he was driving a maroon, not a red, vehicle; that he uses his left hand only for writing; and that his statements to Leigh about what it would be like to kill someone referred simply to fighting.

To corroborate Wilson's alibi defense, Wilson called Emma Yost, who testified that on May 8, 1994, at shortly after 6 a.m. she and her husband left for work from their home, which is only about one-half block away from First & Last Stop. On the drive to work, they met a blue or dark-gray car being driven by a clean-cut black man.

On November 29, 1994, the jury found Wilson guilty of attempted second degree murder, robbery, and use of a weapon to commit a felony. On March 6, 1995, Wilson was sentenced to a term of imprisonment of not less than 40 nor more than 40 years for the attempted second degree murder conviction, not less than 2 nor more than 2 years on the robbery conviction, and not less than 20 nor more than 20 years on the use of a weapon to commit a felony conviction. Wilson then filed a timely appeal to this court.

III. ASSIGNMENTS OF ERROR

On appeal, Wilson contends that (1) the district court erred in admitting evidence of a subsequent crime under § 27-404(2), (2) the evidence was insufficient to support his conviction for attempted second degree murder, and (3) the sentences imposed upon him were excessive.

IV. ANALYSIS

Before beginning our analysis of Wilson's assignments of error, we note that one of Wilson's convictions was for attempted second degree murder. We are cognizant of the recent Nebraska Supreme Court rulings holding that malice is an element of second degree murder and have examined the record to determine whether the jury instructions and the information charging Wilson contained malice as an element of the attempted second degree murder charge. Our review of the record reveals that malice was included in both the information charging Wilson, as required by *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994), and the jury instructions, as required by *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994). Therefore, we need not address this issue further, and proceed to consider Wilson's assignments of error.

1. Admission of Evidence

Wilson's first assignment of error is that the district court abused its discretion in permitting the State to adduce evidence of a similar act, i.e., the May 9, 1994, attack on Paulsen at a Little King restaurant in Lincoln. Wilson contends that the evidence was not admissible under § 27-404(2).

[1] Section 27-404(2) 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. However, such evidence may be admissible for other

purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.*

[2,3] It is within the trial court's discretion to determine the admissibility of evidence of a defendant's other wrongs or acts, and the trial court's decision will not be reversed on appeal absent an abuse of discretion. *State v. Wood*, 245 Neb. 63, 511 N.W.2d 90 (1994); *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993); *State v. Rosales*, 3 Neb. App. 26, 521 N.W.2d 385 (1994). "Judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition." *State v. Williams*, 247 Neb. 878, 884, 530 N.W.2d 904, 909 (1995). Accord *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994).

[4] When reviewing the admission of evidence of other acts, an appellate court considers (1) whether the evidence was relevant; (2) whether the evidence had a proper purpose; (3) whether the probative value of the evidence outweighed its potential for unfair prejudice as required by Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989); and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted. *Wood, supra*; *State v. Martin*, 242 Neb. 116, 493 N.W.2d 191 (1992); *Rosales, supra*.

(a) Relevance

[5,6] With regard to the relevance of "other acts" evidence, Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1989), states that "[r]elevant 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." " 'To be relevant, evidence must be rationally related to the issue by a likelihood, not a mere possibility, of proving or disproving the issue to be decided.' " *Rosales*, 3 Neb. App. at 38, 521 N.W.2d at 393 (quoting *Wood, supra*).

In the instant case, the "other acts" evidence consisted of a similar act of cutting a Lincoln restaurant worker's neck and occurred only 1 day after the date of the offense for which Wilson was on trial. Further, the similarities between the Lincoln incident and the Crete incident are numerous. The sites of both attacks were fast-service establishments. The victims in both attacks were women. The attacks on both victims were unprovoked and occurred when the women were alone with Wilson inside the stores. Both victims individually and unconditionally identified Wilson as their attacker. In both incidents, Wilson spent time in the stores prior to the attacks and talked to the victims normally, pleasantly, and without anger or other unusual behavior being noted by the victims. Also, in both incidents Wilson briefly left the stores before returning to attack the victims. Wilson grabbed both victims with his right hand and stabbed and cut the victims' necks with an object held in his left hand. Further, Wilson did not speak during either of the attacks. Because of the similarities in circumstances and the closeness in time between the two incidents, the Lincoln incident was clearly relevant to the charged offense, which had occurred in Crete.

(b) Proper Purpose

The "other acts" evidence was also admitted for a proper purpose, that is, to show identity, plan, and intent. Wilson presented evidence at trial indicating that he was not the perpetrator of either the Lincoln or the Crete attack. Therefore, there was an issue of identity, and the State could properly introduce evidence tending to establish that Wilson was in fact the perpetrator of the crimes. Furthermore, the fact that no money was requested in the Lincoln incident served to prove that Wilson's plan and intent was not to commit a robbery in Crete, but instead to fulfill his desire to find out what it would be like to kill someone. Consequently, the evidence concerning the Lincoln incident was admitted for the proper purpose of establishing identity, plan, and intent.

(c) Probative Value

[7] Even when "other acts" evidence is relevant and has a proper purpose, it is still subject to overriding protection under § 27-403, which permits relevant evidence to 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. § 27-403; *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). Therefore, we proceed to consider whether evidence of the Lincoln incident should have been excluded because of unfair prejudice to Wilson or because of any of the other factors listed in § 27-403.

[8,9] "[E]vidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and circumstances to the offense or offenses charged as to have substantial probative value in determining the guilt of the accused." *State v. Scott*, 211 Neb. 237, 241, 318 N.W.2d 94, 97 (1982). Accord *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986) (defendant's prior act of choking his ex-wife 10 years earlier was properly admitted in trial for offense of choking present wife to death). A separate act or acts with distinctive patterns or procedures may have probative value in determining a defendant's guilt, *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762 (1989), and need not be identical to the act charged in order to be admissible, *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981).

[10] " ' "Probative value is a relative concept; the probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issues of the case." ' " *Messersmith*, 238 Neb. at 931, 473 N.W.2d at 907 (quoting *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986), quoting Andrew K. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. Cal. L. Rev. 220 (1976)). Accord *State v. Baltimore*, 236 Neb. 736, 463 N.W.2d 808 (1990).

In the instant case, the closeness in time and the similarities between the Lincoln and the Crete incidents make the Lincoln incident probative in determining Wilson's guilt of the charged offense. Furthermore, the admission of the "other acts" evidence did not result in unfair prejudice to Wilson, or stated another way, the evidence did not have an undue tendency to suggest a decision on an improper basis. See, *Messersmith*, *supra*; *State v. Lonnecker*, 237 Neb. 207, 465 N.W.2d 737 (1991). Likewise, admission of evidence concerning the Lincoln incident did not offend any of the other factors listed in § 27-403. Thus, the evidence of the similar Lincoln incident was probative and was not outweighed by the potential for unfair prejudice.

(d) Jury Instructions

The fourth prong of the test to determine admissibility of "other acts" evidence is satisfied because the court instructed the jury that it was to consider the evidence regarding the similar acts for the limited purposes of determining intent, plan, method of attack, identity, and absence of mistake or accident.

In sum, we find that the evidence concerning the Lincoln incident was relevant, admitted for a proper purpose, probative, and did not result in unfair prejudice, and the jury was properly instructed on the limited purposes for which it was to use the evidence. Therefore, we find no abuse of discretion in admitting the evidence of the similar Lincoln incident, and we find no merit in Wilson's first assignment of error.

2. Sufficiency of Evidence

[11,12] Wilson's second assignment of error is that the evidence was insufficient to sustain his conviction of attempted second degree murder. In reviewing Wilson's assignment of error, we are mindful of the well-settled rule that a defendant's conviction must be sustained if, taking the view of the evidence which is most favorable to the State, there is sufficient evidence to support it. See *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990). Stated another way, "[a] conviction will not be reversed on appeal unless, after the court views the evidence most favorably for the State . . . the evidence is so lacking in probative value that it is insufficient as a matter of law to support [the] verdict." *State v. Cortes*, 236 Neb. 257, 258, 460 N.W.2d 659, 660 (1990).

To be guilty of attempted second degree murder as he was charged, Wilson must have engaged in conduct which, under the circumstances as Wilson believed them to be, constituted a substantial step in a course of conduct intended to cause the death of a person intentionally and maliciously, but without premeditation. See, Neb. Rev. Stat. §§ 28-201 (criminal attempt statute) and 28-304 (second degree murder statute) (Reissue 1989); *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994).

The evidence included testimony by Kenney, the victim, identifying Wilson as the person who had attacked her by stabbing her neck with a long, cylindrical, metallic object which he had held in his left hand. Wilson's fiance, Leigh, testified that Wilson was left handed and had taken a screwdriver with him. Dr. Jons and Marvin, the physician's assistant who treated Kenney, both testified that Kenney had been placed in a situation involving a substantial risk of death, permanent disfigurement, or injury.

[13] The evidence, viewed most favorably to the State, also indicated that murder, not robbery, was Wilson's motive for the attack. Leigh testified that Wilson had repeatedly said that he wondered what it would be like to kill someone, and Wilson admitted making these statements. Additionally, Wilson's actions indicate that robbery was not his motive. Wilson did not demand money from the Crete victim, and even though the cash register drawer was open and within easy reach, he did not attempt to take any money until after being told to do so by the victim. Further, during the Lincoln incident, Wilson did not make any monetary demands, nor did he take anything from the Little King store. Although Wilson's own testimony is contradictory, in determining the sufficiency of the evidence to sustain a conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. See *Zitterkopf, supra*. Clearly, when the evidence is viewed in the light most favorable to the State, there was sufficient evidence to support the jury's finding that Wilson intended to cause the death of Kenney intentionally and maliciously, but without premeditation. Therefore, Wilson's contention that there was insufficient evidence to support his conviction for attempted second degree murder is without merit.

3. Excessive Sentences

Wilson's third assignment of error is that the sentences imposed upon him were excessive. Wilson was sentenced to consecutive terms of imprisonment of not less than 40 nor more than 40 years on the attempted second degree murder conviction, not less than 2 nor more than 2 years on the robbery conviction, and not less than 20 nor more than 20 years on the use of a weapon to commit a felony conviction. By fixing minimum and maximum terms, the court's sentences appear to be of an indeterminate nature while, at the same time, in reality sentencing Wilson to definite terms of years.

[14,15] The Nebraska indeterminate sentencing statute provides, in relevant part, that a court imposing an indeterminate sentence must fix the minimum and maximum limits of the sentence to be served within the limits provided by law. Neb. Rev. Stat. § 29-2204(1)(a) (Cum. Supp. 1994). In setting an indeterminate sentence, there must be a difference between the periods, and a sentence fixing identical minimum and maximum terms of imprisonment is not an indeterminate sentence. See, *Duffy v. State*, 730 P.2d 754 (Wyo. 1986); *People v. Buxton*, 28 Ill. App. 3d 429, 328 N.E.2d 703 (1975); *People v. Haggitt*, 33 Mich. App. 95, 189 N.W.2d 842 (1971) (Levin, J., dissenting); *The People v. Westbrook*, 411 Ill. 301, 103 N.E.2d 494 (1952); 21 Am. Jur. 2d *Criminal Law* § 542 (1981). Therefore, if the sentences imposed upon Wilson were intended to be indeterminate, they missed their mark. However, we do note that there is nothing in § 29-2204(1)(a) mandating that an indeterminate sentence must be imposed, nor is there a requirement that the minimum and maximum terms of such a sentence differ by any specific span of time. Indeed, the prior law setting a maximum minimum term of an indeterminate sentence, Neb. Rev. Stat. § 83-1,105 (Reissue 1987), was repealed by the Legislature in 1993 Neb. Laws, L.B. 529.

In sum, we find that setting the same minimum and maximum limit to a sentence is a violation of the indeterminate sentencing statute. Therefore, the district court's sentences of identical minimum and maximum terms were not indeterminate sentences. The total sentence imposed by the trial court was for a period of 62 years. During the sentencing hearing, the judge indicated to Wilson, "I think they will release you in 31 years." There is nothing to indicate whether Wilson would be eligible for parole in 31 years or whether he would be eligible to obtain a full discharge in 31 years. Although Wilson was sentenced to a definite term of years, the record reflects that the court attempted to set a minimum and a maximum limit as to each sentence. Therefore, we cannot find that the sentences were flat sentences. Frankly, we are uncertain as to what sentences were intended by the district court.

The criminal sentencing process demands more certainty than that provided by the sentences in this case. The question of whether a sentence is excessive depends, at the most fundamental of levels, upon what the sentence is. Since we are unable to make that determination here, we conclude that the sentences imposed were an abuse of discretion. Therefore, we must reverse Wilson's sentences and remand the cause for resentencing.

V. CONCLUSION

We affirm the admission of testimony concerning Wilson's similar acts under § 27-404(2), and we find that the evidence was sufficient to support Wilson's attempted second degree murder conviction. However, because we find that the sentences imposed upon Wilson were an abuse of discretion, we reverse, and remand for resentencing.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR RESENTENCING.

SIEVERS, Chief Judge, concurring in part, and in part dissenting.

I wholeheartedly concur in the opinion and decision of my colleagues, except that portion which remands this matter to the district court for resentencing. From that portion of the majority opinion, I find I must respectfully dissent. The majority's reasoning is that by announcing separate minimum and maximum sentences, without any differential between the minimum and maximum terms imposed, the district court violated the indeterminate sentencing statute.

The majority assumes, first, an intent to impose an indeterminate sentence by the trial judge and, second, that the indeterminate sentencing statute of necessity requires a differential between the minimum and maximum terms imposed. In the first instance, given the sentences imposed, it is difficult for me to attribute to the trial judge an intent that Wilson have the benefit of the indeterminate sentencing statute. In the second instance, I find nothing in the indeterminate sentencing statute which requires a differential between the minimum and maximum, although such a differential obviously makes sense if there truly is to be an indeterminate sentence. I believe that the trial judge intended flat sentences, rather than indeterminate sentences, and that he saw these sentences as the way to ensure that Wilson would do all of the time he was sentenced to do—except for such good time as he might earn while imprisoned. I can find no evidence that a flat sentence is prohibited by Nebraska sentencing statutes, and thus there is no basis to remand.

The majority concludes that it is "uncertain as to what sentences were intended by the district court." I do not have that problem—the trial judge clearly intended that it would be a long time, as it should be, before Wilson would again draw a breath of free air. I would affirm the sentences imposed by the district court.

IN RE INTEREST OF CRYSTAL T., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, DEPARTMENT OF SOCIAL SERVICES, APPELLANT, V. KEVIN T. AND LETTA T., APPELLEES.

546 N.W.2d 77

Filed April 16, 1996. No. A-95-717.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach conclusions independent of the trial court's findings. However, where the evidence is in conflict, the appellate court 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. **Child Support: Appeal and Error.** The determination of the amount of child support is initially entrusted to the discretion of the trial court, and although on

appeal the issue is tried de novo on the record, in the absence of an abuse of discretion, the trial court's award of child support will be affirmed.

3. **Child Support: Juvenile Courts.** Whether parents are ordered to contribute to the support, study, and treatment of a juvenile who has been placed by the county court with someone other than his or her parent is initially a matter entrusted to the discretion of the juvenile or county court under Neb. Rev. Stat. § 43-290 (Reissue 1993).
4. **Child Support: Rules of the Supreme Court.** When the Nebraska Child Support Guidelines are applicable, child support payments should be set according to such guidelines.
5. **Child Support: Rules of the Supreme Court: Presumptions.** The Nebraska Child Support Guidelines shall be applied as a rebuttable presumption, and all orders for child support shall be established in accordance with the guidelines, unless rebutted.
6. **Child Support: Rules of the Supreme Court: Proof.** When a party produces sufficient evidence to prove that application of the Nebraska Child Support Guidelines would result in an unfair and inequitable child support order, the court may and should deviate from the guidelines.
7. **Juvenile Courts: Child Support: Rules of the Supreme Court.** The Nebraska Child Support Guidelines and the specific factors enunciated in Neb. Rev. Stat. § 43-290 (Reissue 1993) must be considered together in a juvenile court's determination under § 43-290 of whether parental support should be ordered and, if so, the extent of such support.
8. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.
9. **Child Support: Adoption.** A subsidized adoption agreement is a source of money available for the support of a child and properly considered under Neb. Rev. Stat. § 43-290 (Reissue 1993).

Appeal from the County Court for Seward County: ALAN G. GLESS, Judge. Affirmed.

Don Stenberg, Attorney General, Royce N. Harper, and Beth Tallon, Special Assistant Attorney General, for appellant.

Brian C. Bennett, of Bennett Law Office, P.C., for appellees.

MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges.

MUES, Judge.

INTRODUCTION

The Nebraska Department of Social Services (DSS) appeals from an order of the county court for Seward County, sitting as a juvenile court, denying the State's motion for parental contribution in a juvenile proceeding wherein Crystal T. was adjudicated a juvenile within the meaning of Neb. Rev. Stat. § 43-247(3)(b) (Reissue 1993). Crystal's adoptive parents, Kevin T. and Letta T., resisted parental contribution based upon a subsidized adoption agreement with DSS.

BACKGROUND

Crystal was born August 2, 1980. In the spring of 1986, Crystal, then 5, became a foster child to Kevin and Letta. Upon Crystal's initial placement, Kevin and Letta were advised of behavioral problems anticipated with Crystal as a result of various experiences and conditions to which she had been exposed.

Before placement with Kevin and Letta, Crystal had undergone multiple placements. Formalized professional counseling had been recommended, and DSS was aware that the need for counseling Crystal in the future was predictable based upon the chaotic background of several placements, the death of a foster sister, and the lack of contact with her biological mother.

In January 1987, Kevin and Letta applied for participation in a subsidized adoption program with DSS. At that time, DSS recognized the possibility that Crystal had suffered psychological damage in her early years because of disruptions in relationships and the "very real possibility" that Crystal had been a victim of sexual abuse and fetal alcohol syndrome. In the paperwork accompanying the original subsidized adoption program documents, a DSS worker stated that anyone familiar with the effects of sexual abuse, multiple disruptive placements, and fetal alcohol syndrome was aware that many of the victims developed serious behavioral problems during their teenage years, including being a runaway, "continued victimization, becoming a sexual abuse perpetrator, [and] drug and alcohol abuse." Because of this, the initial adoption agreement provided not only for a monthly subsidy to Kevin and Letta, along with medical coverage, but also specifically for coverage of mental health costs incurred due to the possibility of "sexual abuse, incest, prenatal alcohol abuse, and possible drug abuse by

Crystal's mother." The agreement provided that such mental health coverage may include, but not be limited to, family counseling, group therapy, inpatient and outpatient care, and medications.

In the summer of 1987, Kevin and Letta adopted Crystal. Thereafter, subsidized adoption agreements were annually renewed with the last such agreement dated May 1994. The agreement continued the monthly maintenance assistance to Kevin and Letta in the amount $209, medicaid payments until Crystal was 19 years of age, and in language nearly identical to the first subsidized adoption agreement, payment for medical/mental health treatment for Crystal for those "pre-existing conditions" identified in the initial agreement, with the type of treatment for such "conditions" again stated to include "but . . . not limited to family counseling, group therapy, in patient & outpatient care and medications."

At some point prior to November 3, 1994, Crystal was placed at the Lincoln Regional Center under a mental health warrant. On November 3, the Seward County Attorney filed a petition in the Seward County Court, sitting as a juvenile court. The petition generally alleged that Crystal was a juvenile as described in § 43-247(3)(b) in that she was a child who, by reason of being wayward or habitually disobedient, was uncontrolled by her parents, deported herself so as to injure or endanger seriously the morals or health of herself or others, or was habitually truant from school or home. On November 14, Crystal was adjudicated under § 43-247(3)(b), and a dispositional hearing was set for December 13. The record before us does not contain the proceedings of the adjudication hearing, the dispositional hearing, or the dispositional order of the juvenile court.

On April 24, 1995, a hearing was held in the juvenile proceeding on the State's motion for an order of parental contribution. The State's motion is also not in the record. The sole evidence offered by the State in support of its motion consisted of an affidavit of a DSS child support caseworker; the most recent subsidized adoption agreement of May 1994; a basic net income and support calculation worksheet 1 from the Nebraska Child Support Guidelines, with supporting financial and income data of Kevin and Letta; and a letter to DSS from Kevin. The affidavit reflects that Crystal, as of February 24, 1995, was in the

> care and custody of the Nebraska Department of Social Services and has been placed in/at Grace's Children's Home since December 16, 1994. The Nebraska Department of Social Services has to pay $1833.82 per month for the care of Crystal at the above placement, plus medical expenses not covered by insurance.

The affidavit further states that the present plan was for Crystal to remain at this placement. The State's child support calculations asserted that under the guidelines, Kevin and Letta were obligated to pay a total of $425 per month toward the support of Crystal.

Kevin and Letta objected to the relevance of the State's evidence, generally arguing that DSS had a contractual obligation to provide for Crystal's care at Grace's Children's Home by virtue of the subsidized adoption agreement. Subject to that objection, they offered various financial records of Kevin and Letta along with the original January 1987 subsidized adoption agreement and accompanying memorandum from DSS evidencing DSS' recognition, at that time, of the likelihood of Crystal's future behavioral problems as set forth above. Kevin testified that at the time of the original agreement, he and Letta were concerned that when Crystal became a teenager, her behavior may become so disruptive that she could not stay in their home. He testified this was the entire point of the adoption subsidy, as they could not afford the psychiatric care which might become necessary. Kevin testified without objection that he had made it known to the State, at the time of the original agreement, of his inability to provide for the costs of Crystal's placements which might be needed based upon these preexisting conditions and that in his opinion, DSS had agreed to bear that cost. It was Kevin's understanding that DSS and the State would take care of all of the psychiatric care Crystal needed, including inpatient therapy. Kevin testified that the monthly subsidy amount was suspended immediately upon Crystal becoming a "ward of the state" and that he was not objecting to the suspension of that subsidy.

On June 14, 1995, the juvenile court entered an order denying the State's request for parental contribution. In so doing, the juvenile court judge reasoned that DSS had persuaded the adoption by entering into the subsidized adoption agreements and, in those agreements, had promised to pay for Crystal's extreme needs as were anticipated by DSS. The court concluded that DSS had agreed to pay far more than just medicaid coverage for those specialized needs that it believed would develop and that now that they had developed, DSS should honor its agreement. The court concluded:

> It has become necessary to make the juvenile a state ward, due to those same anticipated problems. . . .
>
> . . . .
>
> . . . I refuse to order these parents to pay any parental contribution to the cost of this juvenile's out of the home care and treatment without any regard to ability to pay. I refuse to make any findings relating to ability to pay.

DSS timely appeals from this order.

ASSIGNMENT OF ERROR

The sole assignment of error of DSS is that the juvenile court erred in not assessing any parental financial responsibility.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach conclusions independent of the trial court's findings. However, where the evidence is in conflict, the appellate court 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 J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994); *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994); *In re Interest of Tamika S. et al.*, 3 Neb. App. 624, 529 N.W.2d 147 (1995).

[2] The determination of the amount of child support is initially entrusted to the discretion of the trial court, and although on appeal the issue is tried de novo on the record, in the absence of an abuse of discretion, the trial court's award of child support will be affirmed. *Shiers v. Shiers*, 240 Neb. 856,

485 N.W.2d 574 (1992); *In re Interest of Tamika S. et al.*, *supra*.

PREFACE

Neb. Rev. Stat. § 43-290 (Reissue 1993) provides that pursuant to a petition filed in accordance with Neb. Rev. Stat. § 43-274 (Reissue 1993), whenever the care or custody of a juvenile is given by the court to someone other than his or her parents, or when the juvenile is given medical, psychological, or psychiatric study or treatment under order of the court, the court shall make a determination of support to be paid by the parent for the juvenile. Section 43-290 provides that the court

> may order and decree that the parent shall pay, in such manner as the court may direct, a reasonable sum that will cover in whole or part the support, study, and treatment of the juvenile, which amount ordered paid shall be the extent of the liability of the parent. The court in making such order shall give due regard to the cost of study, treatment, and maintenance of the juvenile, the ability of the parent to pay, and the availability of money for the support of the juvenile from previous judicial decrees, social security benefits, veterans benefits, or other sources.

Section 43-290 also provides that when medical, psychological, or psychiatric study or treatment is ordered by the court, or if such study or treatment is otherwise provided as determined necessary by the custodian of the juvenile, the court shall inquire as to the availability of insured or uninsured health care coverage or service plans which include the juvenile. This section further instructs that if the juvenile has been committed to the care and custody of DSS, DSS shall pay the costs for the support, study, or treatment of the juvenile which are not otherwise paid by the juvenile's parent.

Crystal was adjudicated under § 43-247(3)(b) and pursuant to Neb. Rev. Stat. § 43-284 (Reissue 1993), the court was empowered to commit the juvenile to the care and custody of DSS. While we do not have the dispositional order of the juvenile court before us, we presume that since the dispositional hearing was scheduled to be held December 13, 1994, and since DSS has had care and custody of Crystal since that date, the threshold requirement of § 43-290 that the care or custody of the juvenile has been given to "someone other than his or her parent" has been met.

We digress briefly to discuss basic requirements of § 43-290. Section 43-290 expressly states that its provisions are triggered when a petition is filed in accordance with § 43-274. Section 43-274 generally addresses the institution of proceedings under the Nebraska Juvenile Code. It expressly provides for the filing of a petition in writing specifying which subdivision of § 43-247 is alleged, and also "requesting the court to determine whether support will be ordered pursuant to section 43-290."

Neb. Rev. Stat. § 43-279(1) (Reissue 1993) speaks, inter alia, to various matters which the juvenile court shall inform the parties of when a petition alleges a juvenile to be within the provisions of § 43-247(3)(b). One such matter that the court must inform the parties of is the "nature of the proceedings and the possible consequences or dispositions pursuant to sections 43-284 to 43-287, 43-289, and *43-290* that may apply to the juvenile's case following an adjudication of jurisdiction." (Emphasis supplied.) § 43-279(1)(a).

The State's initiating petition in this case contains no allegation requesting a determination of whether support will be ordered pursuant to § 43-290. The record selected by DSS for appeal contains no showing that Kevin and Letta were given the advisements required under § 43-279(1), other than the "form" order dated November 14, 1994, which recites that at the hearing then held, the court informed the parties of "THE NATURE OF THE PROCEEDINGS AND THE RANGE OF POSSIBLE DISPOSITIONS." Evidence offered at the hearing on the State's motion for support causes us to question when Kevin and Letta were first informed of this potential. Specifically, in a February 14, 1995, letter from Kevin to DSS generally voicing his objection to the payment of child support, he states that at the court hearing which "made Crystal a state ward," DSS "started pressing the judge for a court date to set child support," and that the caseworker "immediately started badgering us about it being our financial responsibility because the subsidy agreement is void with Crystal being a state ward." Kevin went on to state: "At no time prior to the placement hearing was child support mentioned." We presume that the "placement hearing" referred to by Kevin was the dispositional hearing. Kevin was not examined at the hearing with regard to these statements, and they are uncontested in the record presented to us on appeal, except for the juvenile court's November 14, 1995, order.

A failure of the State to give timely notice to the parties of the potential for parental contribution, and a failure of the juvenile court to comply with § 43-279(1) in this regard, carries due process implications potentially disruptive of the adjudication process. See, e.g., *In re Interest of N.M. and J.M.*, 240 Neb. 690, 484 N.W.2d 77 (1992); *In re Interest of A.D.S. and A.D.S.*, 2 Neb. App. 469, 511 N.W.2d 208 (1994). However, because Kevin and Letta did not object to the procedure below on these grounds, because the record below on the proceedings at which they were supposedly advised of their rights under § 43-279(1) is not included in the bill of exceptions on this appeal, and because of our resolution of this appeal, we do not decide, in this case, the effect of the failure of the record on appeal to affirmatively show compliance with these provisions of the juvenile code.

DISCUSSION

DSS argues that the juvenile court erroneously refused to apply the child support guidelines as promulgated by the Nebraska Supreme Court pursuant to Neb. Rev. Stat. § 42-364.16 (Cum. Supp. 1994), as evidenced by its refusal to make any findings on the ability of Kevin and Letta to pay child support. DSS contends that pursuant to our decision in *In re Interest of Tamika S. et al.*, 3 Neb. App. 624, 529 N.W.2d 147 (1995), and Neb. Rev. Stat. § 43-2,113(3) (Cum. Supp. 1994), the guidelines should have been applied and that the evidence in this case does not justify any deviation from a strict application of those guidelines. Kevin and Letta contend that, if applicable, the circumstances of this case, including the existence of the subsidized adoption agreement, justify a deviation from the guidelines. Kevin and Letta further argue that the provisions of § 43-290 allow a juvenile court to consider the availability of money for the support of a juvenile from other sources in its determination of whether to order parental contribution and that the obligation of DSS under the agreement was properly viewed by the juvenile court in this case as such available source of money, thus justifying denial of any child support from them.

In *In re Interest of Tamika S. et al., supra*, a proceeding pursuant to § 43-290, we held that the guidelines apply in juvenile cases where child support is ordered. Section 43-2,113(3) provides further support for that conclusion, as it provides that all orders issued by a separate juvenile court or a county court which provide for child support shall be governed by Neb. Rev. Stat. §§ 42-347 to 42-379 (Reissue 1993, Cum. Supp. 1994 & Supp. 1995) and § 43-290. *In re Interest of Tamika S. et al.* did not hold that in proceedings under § 43-290, the guidelines applied in determining *whether* support should be ordered.

[3] Section 43-2,113(3) also specifies that juvenile or county court orders providing for child support shall be governed by § 43-290. Section 43-290 provides that the court *may* order parents to pay a reasonable sum to cover, in whole or in part, the support, study, and treatment of the juvenile and that in making such order, the court *shall* "give due regard to the cost of study, treatment, and maintenance of the juvenile, the ability of the parent to pay, and the availability of money for the support of the juvenile from . . . other sources." When the word "may" appears in a statute, permissive or discretionary action is presumed. Neb. Rev. Stat. § 49-802(1) (Reissue 1993). See *Eberspacher v. Hulme*, 248 Neb. 202, 533 N.W.2d 103 (1995). Thus, whether the parents are ordered to contribute to the support, study, and treatment of a juvenile who has been placed by the county court with someone other than his or her parent is initially a matter entrusted to the discretion of the juvenile or county court under § 43-290. In making such an order, such juvenile or county court shall give due regard to the aforementioned factors.

[4-6] *In re Interest of Tamika S. et al.* holds only that *where* child support is ordered, the guidelines apply. This court has not addressed the issue of whether the guidelines apply to the determination under § 43-290 of *whether* an order of parental contribution should be made. We find no Nebraska Supreme

Court case specifically addressing that issue. When the guidelines are applicable, child support payments should be set according to such guidelines. *Dike v. Dike*, 245 Neb. 231, 512 N.W.2d 363 (1994); *Knippelmier v. Knippelmier*, 238 Neb. 428, 470 N.W.2d 798 (1991). The guidelines shall be applied as a rebuttable presumption, and all orders for child support shall be established in accordance with the guidelines, unless rebutted. § 42-364.16; Nebraska Child Support Guidelines, paragraph C. When a party produces sufficient evidence to prove that application of the guidelines would result in an unfair and inequitable child support order, the court may and should deviate from the guidelines. *Shiers v. Shiers*, 240 Neb. 856, 485 N.W.2d 574 (1992); *In re Interest of Tamika S. et al., supra*; *Dworak v. Fugit*, 1 Neb. App. 332, 495 N.W.2d 47 (1992).

[7] Paragraph C of the guidelines sets forth certain circumstances under which deviations from the guidelines are permissible. Such circumstances include "for juveniles placed in foster care," "whenever the application of the guidelines in an individual case would be unjust or inappropriate," and "when there are extraordinary medical costs of [the] child." It would appear that the factors mentioned in § 43-290 are encompassed in substance, at least in part, by the foregoing grounds for deviation recognized in paragraph C of the guidelines. In any event, we conclude that the guidelines and the specific factors enunciated in § 43-290 must be considered together in a juvenile court's determination under § 43-290 of whether parental support should be ordered and, if so, the extent of such support.

[8] By applying the guidelines and the factors recognized in § 43-290, our de novo review of the record causes us to conclude that the juvenile court did not abuse its discretion in denying parental support in this case. We reach this conclusion based more on what the record does *not* show than on the evidence presented. A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *Grady v. Visiting*

Nurse Assn., 246 Neb. 1013, 524 N.W.2d 559 (1994); *Schlake v. Jacobsen*, 246 Neb. 921, 524 N.W.2d 316 (1994).

[9] The juvenile court's findings do not specifically refer to the guidelines, any deviation from the guidelines, or to one or more of the factors mentioned in § 43-290 as grounds for its decision not to order any parental support from Kevin or Letta. Yet, it is apparent that the primary factor motivating the judge's decision below was the subsidized adoption agreement and the obligations which the court determined the agreement created on the part of DSS with regard to Crystal's care and treatment. The juvenile court found that the necessity for Crystal becoming a state ward was "due to those same anticipated problems" which DSS believed, at the time of Crystal's initial placement with Kevin and Letta, would eventually manifest themselves. DSS does not contest this finding, and we find no evidence in the record to refute it. Having implicitly concluded that Crystal's placement with DSS and Grace's Children's Home (GCH) was necessitated by the "pre-existing condition(s)" specified in the agreement, the court apparently concluded that the monthly expense incurred at GCH fell within the parameters of the "medical/mental health treatment" for which DSS became obligated under that agreement. We believe a fair implication is that the court concluded that the DSS subsidized adoption agreement was a "source" of money available for the support of Crystal. This was a proper factor for it to consider under § 43-290.

Of course, just because Crystal was placed at GCH due to preexisting conditions recognized in the DSS agreement does not necessarily lead to the conclusion that DSS' obligations under the agreement was for the full expense of Crystal's stay at GCH. Yet, the juvenile court implicitly so found when it denied the motion for parental contribution and expressly stated: "NDSS persuaded these people to agree to the proposed subsidized adoption of this juvenile. NDSS promised to pay for this juvenile's extreme needs, as NDSS anticipated would develop. NDSS can now honor their agreement." Thus, while the agreement obligated DSS to pay only for "medical/mental health treatment" arising out of the specified preexisting conditions, the court apparently concluded that the entire monthly expense of GCH constituted such "treatment."

While logic suggests that the monthly expenses of Crystal at GCH *might* include things other than what would reasonably be considered medical or mental health treatment, the sparse record will not allow us to reach such a conclusion. The record is devoid of any evidence as to what GCH is, where it is, or what its function is. There is no evidence as to what services are being provided to Crystal for the $1,833.82 monthly charge from GCH to DSS. Since we do not have the juvenile court's dispositional order or the proceedings of the dispositional hearing before us, we do not know whether the juvenile court ordered medical, psychological, or psychiatric study or treatment of Crystal as part of its dispositional order or whether it is otherwise being provided by GCH.

In its brief, DSS occasionally refers to Crystal's placement at a "group home," presumably referring to GCH. Again, while we might speculate that expenses for group home placement include things other than what would normally be categorized as medical or mental health treatment, such as room, board, clothing, personal expenses, etc., we have no evidence that GCH is a group home, a maximum security prison, or just a home in which children live which is run by somebody named "Grace" for a per child monthly charge of $1,833.32. DSS further argues that its regulations prohibit paying for inpatient psychiatric care provided by "foster or group homes or child caring agencies." Brief for appellant at 10. DSS is apparently contending that since its regulations prohibit payment for such services at such places, its subsidized adoption agreement could not reasonably be interpreted to cover all the expenses of Crystal at GCH. Once again, we do not have any evidence that GCH is one of such establishments or that any of the services provided by it for Crystal are for "inpatient psychiatric care." More importantly, no such administrative rule or regulation appears in the record before us. Generally, the appellate courts of this state will not take judicial notice of administrative rules or regulations. It is incumbent upon the party relying on an administrative rule or regulation to prove both its existence and its language. *Sunrise Country Manor v. Neb. Dept. of Soc.*

Servs., 246 Neb. 726, 523 N.W.2d 499 (1994) (citing *Donahoo v. Nebraska Liquor Control Comm.*, 229 Neb. 197, 426 N.W.2d 250 (1988)).

The juvenile court judge who heard the State's motion for parental contribution was the same judge who had presided over the adjudication and the dispositional proceedings. He presumably was privy to substantially more background evidence than was offered at this hearing and, consequently, more than is before us on appeal. However, for evidence to be considered by this court, it must have been offered below and must appear in the record on appeal. Our de novo review is necessarily limited to the evidence before us.

We agree with DSS that the adoption of Crystal does not evaporate merely because juvenile proceedings are instituted.

> After a decree of adoption is entered, the usual relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between such adopted child and the person or persons adopting such child and his, her or their kindred.

Neb. Rev. Stat. § 43-110 (Reissue 1993).

One of the "legal consequences" of the adoption was that Kevin and Letta have the responsibility as Crystal's parents to provide support for her. While the agreement with DSS obligates DSS to provide certain subsidies to Kevin and Letta and to pay for certain medical and mental health treatment, it does not relieve Kevin and Letta of all financial obligations for the support and care of Crystal. Indeed, the agreement expressly provides: "Existence of subsidy does not diminish the adoptive parent's/parents' legal status or responsibility, including financial, for the child." The institution of these juvenile proceedings, some 7 years after the adoption took place, clearly "disrupted" their family relationship. It did not disrupt the adoption or the legal relationship created by it.

Nevertheless, our mission is to determine by a de novo review whether an abuse of discretion occurred. There is nothing to refute the lower court's implicit finding that Crystal's placement at GCH was necessitated by the same conditions that DSS agreed to pay the costs of treatment for and that the charges at GCH were solely for such treatment. We are thus constrained to find that parental contribution under these circumstances was properly denied. We also note that the monthly subsidy payment to Kevin and Letta from DSS of $209 has ceased. We construe the comment in the juvenile court's order that it was refusing to make any finding regarding Kevin and Letta's ability to pay to mean nothing more than that such finding was unnecessary given the implicit finding that DSS' obligation under the subsidized adoption agreement was an "other source" which fully funded Crystal's care at GCH.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WAYNE L. KONFRST, APPELLANT.

546 N.W.2d 67

Filed April 16, 1996. No. A-95-964.

1. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous.
2. ____: ____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate 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 it observed the witnesses.
3. **Constitutional Law: Search and Seizure.** The Fourth Amendment and the Nebraska Constitution protect people against unreasonable searches and seizures by the government, including police officers.
4. **Police Officers and Sheriffs: Search and Seizure: Proof.** If police have acted without a search warrant, the State has the burden to prove that the search was conducted under circumstances substantiating the reasonableness of such search or seizure.
5. **Police Officers and Sheriffs: Arrests: Search and Seizure: Motor Vehicles.** When a police officer has made a lawful custodial arrest of the occupant of an

automobile, the officer may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile and containers found within the passenger compartment.

6. **Arrests: Search and Seizure: Motor Vehicles.** The fact that a defendant has been removed from a vehicle does not prevent the search of the vehicle so long as the search is a contemporaneous incident of that arrest.
7. **Police Officers and Sheriffs: Search and Seizure.** A warrantless search by law enforcement officers is proper where the officers have obtained the consent of a third party who possesses common authority over the premises.
8. ____: ____. A warrantless search is valid when based upon consent of a third party who the police, at the time of the search, reasonably believed possessed common authority over the premises, but who in fact did not.
9. **Constitutional Law: Search and Seizure: Motor Vehicles.** The Fourth Amendment assures individuals not that no search of one's vehicle will occur unless one consents, but that no such search will occur that is unreasonable. The reasonableness of the search depends on the surrounding circumstances.
10. **Search and Seizure.** Even if an individual invites a search, where the surrounding circumstances are such that a reasonable person would objectively doubt the invitation's validity, the invitation should not be acted upon without further inquiry.
11. ____. Common authority justifying a valid consent to search rests on mutual use of the property by persons generally having joint access or control for most purposes.
12. **Police Officers and Sheriffs: Search and Seizure: Motor Vehicles: Probable Cause.** Probable cause to search a vehicle must be based on an officer's reasonable belief based on personal knowledge or other trustworthy information that an offense has been or is being committed.
13. **Arrests: Search and Seizure: Motor Vehicles.** An inventory search is permissible after an arrest where the search is preceded by lawful custody of the vehicle and the search is conducted pursuant to standardized inventory criteria or established routine.
14. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure: Proof.** The State bears the burden of proving that a law enforcement agency's search was made pursuant to standardized criteria or established routine as required by the Fourth Amendment. A failure of proof on the State's behalf requires a finding that the search suffered from constitutional infirmities.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Reversed and remanded with directions to dismiss.

Nile K. Johnson, of Johnson & Mock, for appellant.

Don Stenberg, Attorney General, and James A. Elworth for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges.

MILLER-LERMAN, Chief Judge.

Wayne L. Konfrst was convicted in a bench trial of possession of a controlled substance with intent to deliver, a violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1994). He appeals, claiming that the contraband evidence admitted at trial was seized in violation of his right to be free from unreasonable searches and seizures guaranteed by the 4th and 14th Amendments to the U.S. Constitution and article I, § 7, of the Nebraska Constitution. Because the evidence was seized in violation of Konfrst's constitutional rights, we reverse his conviction and remand the cause with directions to dismiss.

STATEMENT OF FACTS

Following amendment of the original information on June 16, 1995, and dismissal of another charge on July 10, Konfrst was charged with possession of a controlled substance with intent to deliver, the incident alleged to have occurred in Washington County, Nebraska.

Prior to trial, Konfrst filed a motion to suppress any evidence found as a result of the search of his vehicle. The motion was denied. The trial court made no specific findings regarding the basis for its denial. Konfrst properly objected to the admission of the challenged evidence at trial.

Konfrst also filed a motion to exclude testimony regarding statements allegedly made to officers by David Uehling. This motion was denied. The trial court made no specific findings regarding the basis for its denial. Uehling died in an automobile accident a short time after the initial arrest of Konfrst took place.

The record from the suppression hearing of November 4, 1994, and the trial conducted on July 10, 1995, shows the following facts. See *State v. Huffman*, 181 Neb. 356, 148 N.W.2d 321 (1967), *cert. denied* 386 U.S. 1024, 87 S. Ct. 1384, 18 L. Ed. 2d 466. See, also, *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925). At about 1:30 a.m. on June 25, 1994, Officer Larry Sanchez of the Blair Police Department was on patrol in downtown Blair. While he was stopped at a flashing red light, his attention was drawn to the loud sound of a motor vehicle starting. He looked in the direction of the sound and saw a gray Chevy Blazer drive up on the sidewalk. Sanchez activated his lights and followed the Blazer for approximately a block, during which time the Blazer turned into an alley behind the Blue Ribbon Bar. The Blazer turned westbound into the alley as Sanchez turned southbound, some distance behind the Blazer.

Sanchez' testimony is in conflict as to what happened next in the alley. At the suppression hearing, he testified that before he approached the Blazer, he observed three people exit it, Konfrst from the driver's side and Amy Goldyn and Uehling from the passenger side. At trial, he testified that all the occupants were inside the Blazer when he first approached it. Nevertheless, Sanchez testified at trial that the Blazer was stopped and parked in a marked parking stall behind the bar and was not on a public roadway blocking traffic in any way.

Sanchez approached Konfrst, whom he had observed driving the Blazer; asked for his driver's license and registration; smelled alcohol on Konfrst's breath; and then administered several field sobriety tests to Konfrst. The tests included the walk-and-turn test, the one-legged stand, the finger-to-nose test, and recitation of the alphabet. At all times that Sanchez had contact with Konfrst, Konfrst was outside the vehicle, and Sanchez did not look inside the vehicle. After Konfrst failed the field sobriety tests, Sanchez arrested him for driving while under the influence of alcohol (DUI), placed Konfrst in his patrol car, and removed him from the scene. Sanchez testified that he took Konfrst to a law enforcement facility.

Backup officer Jim Murcek arrived at the scene at some point during the administration of the field sobriety tests. Murcek testified that when he arrived at the scene, Konfrst was "some distance . . . approximately 25 feet" away from the vehicle, and one other male and one female were standing nearby. Murcek testified at trial that while standing next to Uehling approximately 25 feet away from Konfrst, he heard Konfrst say that Konfrst "wanted his vehicle released to Dave Uehling." Murcek then testified that he believed Uehling looked drunk and that he did not think Uehling should operate the vehicle. Murcek testified that Uehling stated "it would be better if Amy Goldyn took the vehicle."

The evidence regarding control and ownership of the vehicle is as follows: The parties stipulated to the testimony of Mary Jo Harris in an exhibit received into evidence at trial. The parties stipulated that if Harris were called she would state that she is the mother of Konfrst, that the Blazer was registered in her name, and that Konfrst was the purchaser of the Blazer and its primary operator up until the time of his arrest.

In connection with the control of the vehicle, Sanchez initially testified at the suppression hearing that the vehicle was left in the custody of his backup officers when he took Konfrst to the law enforcement facility and did not indicate that Konfrst said anything about giving anyone else at the scene control of the vehicle. However, Sanchez then testified during cross-examination that Konfrst told Cpl. Joseph Lager, a backup officer at the scene, that the vehicle was in the possession of Uehling. At trial, during direct examination, Sanchez testified that he did not hear Konfrst say "anything to anybody" prior to leaving the scene. On redirect, after refreshing his recollection with his police report, Sanchez testified that he had heard Konfrst say that he had had three or four beers, but Sanchez made no mention of Konfrst's delegating control of his vehicle to anyone else.

Lager was the supervisor on duty the night of June 25, 1994, and he went to the alley behind the Blue Ribbon Bar. Lager arrived after Sanchez and Murcek, but prior to Sanchez' removal of Konfrst from the scene. At both the suppression hearing and the trial, Lager testified that he asked Konfrst if he was the person in charge of the vehicle, and Konfrst stated that "he wasn't . . . the vehicle was his aunt's and that David Uehling was actually in charge of the vehicle." Lager also testified at the hearing and at trial that he heard Konfrst yell to Uehling to get Konfrst's money out of the Blazer and bail him out.

It is undisputed that prior to the time Konfrst was transported away from the parking lot, no search of the Blazer had been requested of him or performed. After Konfrst had been removed from the scene, Lager approached Uehling and told him that Konfrst had told Lager that Uehling had control of the Blazer.

Lager then asked Uehling if this was so. Uehling responded by saying, " 'I guess so.' "

Lager's testimony is consistent in that he quickly determined that Uehling was drunk. After determining that Uehling was under the influence of alcohol, Lager then asked if he could search the vehicle. Uehling responded by saying "to go ahead."

Lager moved the passenger seat forward and discovered a pile of cash on the floor under the seat. Lager testified at the suppression hearing that it was not until after the discovery of the cash that he then "had Mr. Uehling take control of the vehicle as Mr. Konfrst requested." According to Lager, Uehling picked up the money, revealing two plastic baggies which contained what were later determined to be controlled substances, marijuana and methamphetamine. Lager then arrested Uehling and Goldyn, who were searched, and police continued to search the vehicle, whereupon more of the methamphetamine was found inside a flashlight.

Based on the evidence found as a result of Lager's search of the passenger compartment, Lager had the vehicle impounded and towed away. Murcek later conducted an inventory search of the Blazer. Baggies and a triple-beam scale were found in a duffelbag in the cargo area of the Blazer during this later search. As a result of the foregoing, Konfrst was charged with possession of a controlled substance with intent to deliver.

Lager testified at both the suppression hearing and the trial that the Blair Police Department has a standard policy with regard to impoundment. At trial, Lager testified that the policy is written. The State did not offer into evidence the written policy to which Lager referred. At the suppression hearing, Lager stated that according to the policy, if there is a licensed operator who is competent to drive, the vehicle can be released to that person with permission of the arrestee. However, at trial, Lager testified that because the operator had been arrested for DUI, the vehicle would have been impounded anyway.

In connection with the impoundment, the record reveals that at all times, the vehicle was parked in a designated private parking stall; that the police had no reason to believe it was stolen; that the vehicle was not disabled or blocking traffic in a public roadway; that the driver had not been arrested for reckless driving or driving under a suspended license; and that there was an apparently eligible driver, Goldyn, available to remove the vehicle. At the suppression hearing, Lager stated that given his "knowledge of Mr. Konfrst . . . from previous contacts, I would have impounded that vehicle anyway." There is no dispute in the record that Lager did not make the initial arrest, and Konfrst did not have any outstanding warrants at the time he was arrested for DUI.

The State called Investigator Darwin Shaw at trial for the purpose of proving intent to deliver. Shaw offered the opinion, based on the amounts of controlled substances found, the weighing scale, the baggies, and the cash, that these "constitute the possibility that somebody is dealing drugs."

At the close of the State's case, Konfrst made a motion for a directed verdict, inter alia, on the ground that the State had insufficient evidence with regard to the intent to deliver. Konfrst argued that there was no evidence of Konfrst's selling drugs to anyone and no evidence that he had ever sold drugs to anyone. The trial court overruled Konfrst's motion.

Konfrst presented no witnesses.

The trial court found that Konfrst was guilty beyond a reasonable doubt of possession of a controlled substance with intent to deliver. A presentence report was ordered.

On September 1, 1995, Konfrst was sentenced to 30 months to 5 years' incarceration. Konfrst appeals.

ASSIGNMENTS OF ERROR

Konfrst assigns four errors, which may be summarized into two: (1) The trial court erred by denying his motion to suppress, overruling his renewed objection at trial, and admitting the challenged evidence, including the controlled substances, at trial, and (2) the trial court erred in overruling his motion for a directed verdict because there was insufficient evidence that he intended to deliver or distribute a controlled substance.

STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83

(1996); *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994).

[2] In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate 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 it observed the witnesses. *Grimes, supra*; *Dyer, supra*.

ANALYSIS

Konfrst argues that the warrantless search of his vehicle was unlawful. The State responds that the search was proper pursuant to the following exceptions to the warrant requirement: It was a search incident to an arrest, Uehling was authorized to and did give consent for the search, and there was probable cause to search the vehicle. We also address the issue of whether the search was a proper impound inventory search.

Warrantless Searches and State's Burden of Proof.

[3,4] The Fourth Amendment and the Nebraska Constitution protect people against unreasonable searches and seizures by the government, including police officers. The Fourth Amendment applies to the State pursuant to *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). Searches conducted pursuant to a warrant are generally considered reasonable. *State v. Neely*, 236 Neb. 527, 462 N.W.2d 105 (1990) (single-judge opinion). There are several categories of searches considered reasonable under the Fourth Amendment, although conducted without a warrant. *Neely, supra*. The law is clear, however, that "[i]f police have acted without a search warrant, the State has the burden to prove that the search was conducted under circumstances substantiating the reasonableness of such search or seizure." *State v. Vermuele*, 241 Neb. 923, 925, 492 N.W.2d 24, 27 (1992).

Search Incident to Arrest.

The State argues that the search of the vehicle and its containers was reasonable as a search incident to an arrest pursuant to *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), and *New York v. Belton*, 453

U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). We do not agree.

[5,6] The rationale for permitting the warrantless search authorized by *Chimel* and *Belton* was to ensure officer safety by preventing an arrestee from gaining possession of a weapon and to prevent the concealment or destruction of evidence. In *Belton*, the U.S. Supreme Court held that when a "[police officer] has made a lawful custodial arrest of the occupant of an automobile, [the officer] may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile" and "containers found within the passenger compartment." 453 U.S. at 460. We are aware that the cases generally state that the fact that a defendant has been removed from a vehicle does not prevent the search of the vehicle so long as the search is "a contemporaneous incident of that arrest." *Id.* See, e.g., *U.S. v. White*, 871 F.2d 41 (6th Cir. 1989) (holding that search of defendant's vehicle while defendant was at scene handcuffed in police car was proper); *U.S. v. Lorenzo*, 867 F.2d 561 (9th Cir. 1989) (holding that search of defendant's car was proper where trial judge found that search and arrest for drunk driving were "contemporaneous"); *U.S. v. Karlin*, 852 F.2d 968 (7th Cir. 1988), *cert. denied* 489 U.S. 1021, 109 S. Ct. 1142, 103 L. Ed. 2d 202 (1989) (holding that search of defendant's van while defendant was placed in rear of squad car was proper); *United States v. McCrady*, 774 F.2d 868 (8th Cir. 1985) (holding that search of glove compartment "immediately" after arrest of individual who was not defendant was proper). Contra *State v. Giffen*, 98 Or. App. 332, 778 P.2d 1001 (1989) (holding that search was improper where defendant was not in vehicle).

The cases which permit a search of a vehicle incident to an arrest where the arrestee is outside the vehicle clearly rest on a finding that the search is contemporaneous with the arrest. However, where the arrestee is outside the vehicle and the search is not contemporaneous with the arrest as required by *Belton*, the search is improper. E.g., *U.S. v. Vasey*, 834 F.2d 782 (9th Cir. 1987) (holding that where arrestee was handcuffed in rear of police vehicle and search of vehicle was not contemporaneous with arrest, search was constitutionally infirm). The U.S. Court of Appeals for the Ninth Circuit stated in *Vasey* that a search which is not contemporaneous with the arrest falls outside the *Belton* prophylactic rule. In *Vasey*, the court stated: "Simply because the officers had the right to enter the vehicle during or immediately after the arrest, a continuing right was not established to enter the vehicle without a warrant." *Id.* at 787.

In the instant case, the undisputed facts show that Sanchez pulled his patrol car into the parking lot of the Blue Ribbon Bar after Konfrst had parked the Blazer. Konfrst, Uehling, and Goldyn exited the car. Sanchez approached Konfrst and asked him to perform field sobriety tests. A period of time passed as Konfrst attempted to perform the tests. Murcek and Lager stood by as backup officers during the foregoing tests. Thereafter, Konfrst was arrested, placed in the patrol car, removed from the scene, and taken to a law enforcement facility. The officers did not ask Konfrst, the driver, to search the Blazer.

After Konfrst had been removed from the scene, Lager had a dialog with Uehling regarding the removal of the vehicle. Lager testified about his subsequent observation regarding Uehling's condition. Lager then asked Uehling if Lager could search the vehicle. Lager, who was not the arresting officer, eventually searched the Blazer after Konfrst had been taken away by Sanchez.

Under the cases, a search incident to an arrest must be contemporaneous with the arrest. *Belton, supra.* In the instant case, after Konfrst had been arrested, put in a patrol car, and removed from the scene, the searching officer engaged in conversation with Uehling and, thereafter, searched the vehicle. The facts of this case taken as a whole show that the search was delayed to the point that it could not be properly concluded that it was contemporaneous with the arrest. To the extent the trial judge approved of the search under the theory that it was a search incident to an arrest, the admission of evidence based on such an unlawful search was improper.

Consent to Search Konfrst's Vehicle.

As a preliminary matter, the State argues that Konfrst lacks standing to challenge the validity of the search of the vehicle based on Uehling's consent. Because the record shows that Harris transferred the vehicle to Konfrst, he has a possessory interest in the vehicle and has standing to challenge the search of the vehicle. See *Brown v. United States*, 411 U.S. 223, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973). As to the warrantless search of the duffelbag, Konfrst has standing to challenge the search under Neb. Rev. Stat. § 29-822 (Reissue 1995) because he is a person aggrieved by the search and seizure and the search was directed at him. See *State v. Van Ackeren*, 194 Neb. 650, 235 N.W.2d 210 (1975).

The State argues that the search was proper because Uehling was authorized to and did give consent to Lager to search the vehicle. We do not agree.

[7,8] In *United States v. Matlock*, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974), the U.S. Supreme Court held that a warrantless search by law enforcement officers is proper where the officers have obtained the consent of a third party who possesses common authority over the premises. In *Illinois v. Rodriguez*, 497 U.S. 177, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990), the U.S. Supreme Court held that a warrantless search is valid when based upon consent of a third party who the police, at the time of the search, reasonably believed possessed common authority over the premises, but who in fact did not. These propositions apply to automobile searches. See *Van Ackeren, supra*.

[9,10] The Fourth Amendment assures individuals "not that no . . . search [of one's vehicle] will occur unless [one] consents; but that no such search will occur that is 'unreasonable.' " *Rodriguez*, 497 U.S. at 183. The reasonableness of the search depends on the surrounding circumstances. *Id.* In *Rodriguez*, the U.S. Supreme Court held that a search based on the consent of an individual who appeared to possess common authority over the premises is valid, even if it is later demonstrated the individual did not possess such authority. Importantly, *Rodriguez* also noted that even if an individual invites a search, where the surrounding circumstances are such that a reasonable person would objectively doubt the invitation's validity, the invitation should not be acted upon without further inquiry.

In the case before us, although the testimony shows that Uehling responded to Lager's request to search with "go ahead," the surrounding facts would have caused a reasonable person to doubt Uehling's authority to give such consent, and the search should not have proceeded without further inquiry. In the instant case, the officers gathered in the parking lot of the Blue Ribbon Bar, and it was apparent that the driver of the Blazer was Konfrst, who was being arrested for DUI. None of the officers asked Konfrst, the individual obviously in physical control of the vehicle, for permission to search. Lager waited until after Konfrst was removed from the scene before asking for Uehling's consent. Uehling was known not to be the driver. The undisputed testimony is that Uehling was drunk and in no condition to drive and that Uehling never had physical control of the vehicle. Intoxication is a factor relevant to assessing the validity of consent. *State v. Melton*, 239 Neb. 790, 478 N.W.2d 341 (1992). So too, Uehling's consent to search articulated as "go ahead" approaches mere submission to authority. See *State v. Walmsley*, 216 Neb. 336, 344 N.W.2d 450 (1984).

In connection with a reasonable assessment of Uehling's interest in the vehicle, at trial, Murcek stated that Konfrst "made a comment to the fact that he wanted his vehicle released to Dave Uehling." Lager testified at the hearing on the motion to suppress that "I asked Mr. Konfrst if that was his vehicle. He said that it was his aunt's and his aunt gave control of the vehicle to David Uehling . . . ." His trial testimony was consistent with this statement.

[11] The State argues that Uehling had common authority over the vehicle, and therefore, his consent to search was valid. Common authority justifying a valid consent to search rests on "mutual use of the property by persons generally having joint access or control for most purposes." *Matlock*, 415 U.S. at 171 n.7. In the instant case, notwithstanding Lager's testimony that Uehling gave verbal consent, an objective view of the surrounding facts at the time preceding the consent to search reveals they are such that a reasonable person would doubt the validity of Uehling's consent.

The undisputed facts are that Konfrst was the only one to drive the Blazer. Uehling never took physical possession of the vehicle and never exhibited "mutual use." Uehling was too drunk to drive. The vehicle was said to belong to Konfrst's aunt, or, according to Murcek, the vehicle was Konfrst's. Common authority requires mutual use and joint access or control for most purposes. Uehling had no objective signs of control over the vehicle, and even if he had some measure of control, the officers would have been unreasonable in believing, without further inquiry, that the control of the aunt's or Konfrst's vehicle was "for most purposes." Lager also testified that before the search, Konfrst had indicated that there was money in the vehicle and that the money was Konfrst's, thus implying that use, if not exclusive, was Konfrst's. Lager also testified that after tilting the seat, he found a wad of bills on the floorboard behind the passenger seat and thereafter had Uehling "take control of the vehicle as Mr. Konfrst requested," thus implying Uehling was not in control of the vehicle at the time consent was sought from Uehling prior to the initial search under the passenger seat.

Based on an objective assessment of the facts, the officers did not have a reasonable belief that Uehling had common authority over the vehicle at the time they sought Uehling's consent, and it was subsequently shown at trial that he had no authority over the vehicle. Thus, the search of the vehicle was not justified under the common authority and consent exception. The admission of the evidence, if grounded on the basis of common authority, was improper.

Probable Cause to Search.

In its brief, the State limits its argument based on probable cause to the area in which the duffelbag was located, which was outside the passenger compartment and was searched subsequent to the search of the passenger compartment. Specifically, the State argues that the later search, which produced the duffelbag containing the baggies and triple-beam scale, was justified because the search of the passenger compartment was proper and the police had located methamphetamine and marijuana in this initial search. Thus, the State argues, the search of the passenger area was proper, and the contraband found there provided probable cause to search the remainder of the vehicle. We do not agree that the search of the passenger area was proper.

[12] Probable cause to search a vehicle must be based on an officer's reasonable belief based on personal knowledge or other trustworthy information that an offense has been or is being committed. *State v. Vermuele*, 241 Neb. 923, 492 N.W.2d 24 (1992); *State v. Neely*, 236 Neb. 527, 462 N.W.2d 105 (1990) (single-judge opinion); *State v. Hoer*, 231 Neb. 336, 436 N.W.2d 179 (1989). Probable cause is evaluated by reference to the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). The State does not argue that probable cause existed to search the passenger compartment. Although the officers knew that Konfrst had previously been arrested for possession of drugs and drug paraphernalia, the evidence shows that the officers had no particularized reason to search the passenger compartment of the vehicle on the evening in question. Because we conclude elsewhere in this opinion that the search of the passenger compartment was improper, the knowledge gained from that improper search taints the search of the cargo compartment where the duffelbag was found, and the evidence found in the duffelbag must be suppressed. See *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The admission of the evidence, if based on alleged probable cause, was improper.

Impoundment and Inventory.

The State does not specifically argue that the search was justified pursuant to the inventory exception. However, because there was officer testimony regarding impounding and inventorying the vehicle and the trial judge did not make a specific finding as to the basis for denying the motion to suppress and admitting the evidence, we briefly address the issue.

At trial, Lager testified that the Blair Police Department had a written policy and procedure regarding the impoundment of vehicles and the inventory of their contents. However, no such policy was offered in evidence at trial. Lager's testimony indicates that where a driver is available to drive a car away from the scene of an arrest, according to the applicable policy, the eligible driver should be permitted to do so. Somewhat in contradiction, Lager also states that where an individual has been arrested for DUI, the vehicle will be impounded.

[13,14] Under the cases, an inventory search is permissible after an arrest where the search is preceded by lawful custody of the vehicle and the search is conducted pursuant to standardized inventory criteria or established routine. *Florida v. Wells*, 495 U.S. 1, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990); *Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987); *Illinois v. Lafayette*, 462 U.S. 640, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983); *South Dakota v. Opperman*, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976). An inventory policy need not be in writing. *State v. Filkin*, 242 Neb. 276, 494 N.W.2d 544 (1993). Following standardized procedures curtails pretextual searches. See *id.* In *Filkin*, the Nebraska Supreme Court stated that in connection with an inventory search, "the State bears the burden of proving that a law enforcement agency's search was made pursuant to . . . standardized criteria or established routine [as] required by the Fourth Amendment. . . . A failure of proof on the State's behalf requires a finding that the search suffered from constitutional infirmities." (Citation omitted.) 242 Neb. at 284, 494 N.W.2d at 550.

The testimony regarding the Blair Police Department's impoundment and inventory procedure is inadequate on this record. The evidence fails to establish that the alleged impoundment and inventory were conducted pursuant to standardized criteria or established routine such as those requiring the removal of a vehicle which is illegally parked, on a public roadway blocking traffic, or defective, or due to the unavailability of an eligible driver. See, e.g., *State v. Boster*, 217 Kan. 618, 539 P.2d 294 (1975), *overruled on other grounds*, *State v. Fortune*, 236 Kan. 248, 689 P.2d 1196 (1984). Indeed, the record shows that Goldyn was apparently sober and available to drive the Blazer home, which would appear to conform with the stated policy in Blair. Nor is there a statute applicable to this case requiring impoundment. See, e.g., Neb. Rev. Stat. § 60-6,217 (Reissue 1993) (requiring vehicle that is registered to driver to be impounded following arrest of driver for second-offense reckless driving); Neb. Rev. Stat. § 60-4,110 (Reissue 1993) (requiring impoundment of vehicle where driver is arrested for driving while his or her license was suspended or revoked). To the extent there is testimony regarding the Blair procedures, it is incomplete and inconsistent. The State failed to prove that the search was performed pursuant to standardized criteria or established routine, and therefore, the admission of the evidence, if based on a search pursuant to an inventory policy, was not proper. See *Filkin, supra*.

Sufficiency of Evidence.

Konfrst argues that even if the evidence was properly admitted, there is insufficient evidence to convict him of possession with intent to deliver because he did not possess the drugs upon arrest and there is insufficient evidence that the drugs were intended for sale. Because we conclude that the evidence, including the controlled substances, should have been suppressed, we briefly discuss this assigned error and conclude that upon the exclusion of the challenged evidence, there would be insufficient evidence to convict Konfrst of possession of a controlled substance with intent to deliver as charged. See, *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987); *State v. Noll*, 3 Neb. App. 410, 527 N.W.2d 644 (1995).

Because the officers' search of the vehicle violated constitutional protections against unreasonable searches and seizures, we conclude that the challenged evidence should have been excluded, and Konfrst's conviction is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

IN RE ESTATE OF WALTER SNOVER, DECEASED. MERRILL SNOVER AND DOROTHY WILLNERD, COPERSONAL REPRESENTATIVES OF THE ESTATE OF WALTER SNOVER, DECEASED, APPELLANTS AND CROSS-APPELLEES, V. WILLIAM G. LINE, INDIVIDUALLY AND AS FORMER PERSONAL REPRESENTATIVE OF THE ESTATE OF WALTER SNOVER, DECEASED, APPELLEE AND CROSS-APPELLANT.

546 N.W.2d 341

Filed April 23, 1996. No. A-94-579.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Decedents' Estates: Attorney and Client.** Unless restricted by the will or by an order in a formal proceeding, a personal representative is authorized to employ persons, including attorneys, to advise or assist in the performance of administrative duties.
3. **Prejudgment Interest: Claims.** Prejudgment interest is recoverable when a claim is liquidated, that is, when there is no reasonable controversy as to either the plaintiff's right to recover or the amount of such recovery.
4. ____: ____. Prejudgment interest is recoverable when a claim is unliquidated if a plaintiff complies with the statutory requirements of Neb. Rev. Stat. § 45-103.02 (Reissue 1993).
5. **Prejudgment Interest.** Neb. Rev. Stat. § 45-103.02 (Reissue 1993) applies to all causes of action accruing on or after January 1, 1987.
6. **Attorney Fees.** The rule in Nebraska is that attorney fees may be recovered only when authorized by statute or when a recognized and accepted uniform course of procedure has been to allow such a recovery.
7. ____. Neb. Rev. Stat. § 25-824 (Reissue 1995) allows a court to award reasonable attorney fees against an attorney or party who has brought or defended a civil action that alleges a claim or defense which the court determines is frivolous or made in bad faith.
8. **Actions.** Any doubt about whether or not a legal position is frivolous or taken in bad faith must be resolved in favor of the party whose legal position is in question.
9. **Costs.** The Nebraska Supreme Court has held that only such items as are prescribed by statute or expressly authorized by agreement of the parties may be taxed as costs.
10. **Decedents' Estates.** A personal representative is a fiduciary who is obligated to observe the standards of care applicable to trustees.
11. ____. A personal representative is obligated to observe the standards in dealing with assets that would be observed by a prudent man dealing with the property of another, and if the personal representative has special skills, he is under a duty to use those skills.

Appeal from the District Court for Dodge County, ROBERT R. STEINKE, Judge, on appeal thereto from the County Court for Dodge County, GERALD E. ROUSE, Judge. Judgment of District Court affirmed in part and in part reversed, and cause remanded for further proceedings.

Charles H. Wagner, of Edstrom, Bromm, Lindahl, Wagner & Miller, for appellants.

Thomas A. Grennan and Alison L. McGinn, of Gross & Welch, P.C., for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges.

IRWIN, Judge.

I. INTRODUCTION

The successor copersonal representatives of an estate brought a surcharge action against the former personal representative. The county court awarded various damages, including a refund of the former personal representative's fees, reimbursement of interest and penalties incurred because of the former personal representative's failure to timely file an estate tax return, attorney fees incurred by the successor copersonal representatives in securing the former personal representative's removal and in bringing the surcharge action, and costs. The district court affirmed in part and reversed in part, reversing the county court's award of prejudgment interest and attorney fees and reducing the award of costs. The successor copersonal representatives appealed the district court's order, and the former personal representative cross-appealed. We affirm the decision of the district court in all regards except that portion of the decision regarding attorney fees. In that regard, we remand because we find the county court should make a finding on whether or not the former personal representative's actions in the case were frivolous.

II. BACKGROUND

This is the fourth time various aspects of this estate proceeding have been reviewed by the Nebraska appellate courts. The three previous occasions have been: *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989) (judgment of district court removing William G. Line as personal representative for estate affirmed); *Line v. Rouse*, 241 Neb. 779, 491 N.W.2d 316 (1992) (judgment of district court denying Line's petition for writ of prohibition as former personal representative against Judge Rouse affirmed); and *State ex rel. Line v. Rouse*, 241 Neb. 784, 491 N.W.2d 320 (1992) (judgment of district court denying Line's motion for writ of mandamus as former personal representative against Judge Rouse affirmed).

Walter Snover died on December 24, 1985. William G. Line was appointed personal representative of the estate on January 10, 1986, by the Dodge County Court. Line is also an attorney licensed to practice law in the State of Nebraska. Line began to carry out his duties as personal representative and collected the assets of the estate, filed an inventory, and began county, state, and federal inheritance tax determinations.

Line paid himself attorney fees of $11,600.22 and personal representative fees of $4,649. Line failed to file a federal estate tax return within the statutory period and also failed to request an extension. Merrill Snover and Dorothy Willnerd, two of the heirs of the estate, filed a request for supervised administration of the estate in the county court. On January 23, 1987, the county court entered a progression order requiring Line to complete all matters of the estate within 45 days. On May 29, a hearing was conducted, at which time Line admitted that he had not complied with the progression order and had not yet filed a federal estate tax return.

On May 12, 1987, Snover and Willnerd filed a motion in the county court to have Line removed as personal representative. The Dodge County Court denied the motion. On appeal, the district court for Dodge County reversed the county court judgment and ordered Line removed. On further appeal to the Nebraska Supreme Court, the district court judgment was affirmed. See *In re Estate of Snover, supra*. On August 11, 1989, the Supreme Court held that Line's failure to comply with the progression order and his failure to file the estate tax return constituted a breach of his fiduciary duty and warranted his removal as personal representative. *Id.*

Snover and Willnerd were appointed successor copersonal representatives on October 10, 1989. The Internal Revenue

Service (IRS) determined that $35,000 in estate taxes was owed in addition to a penalty of $5,455.86 and interest of $11,451.67 for late filing. The successor copersonal representatives paid the estate taxes and penalties in February 1990.

Snover and Willnerd, as successor copersonal representatives, brought a motion to surcharge Line for damages caused to the estate by the breach of his fiduciary duty. A hearing was held on the fourth amended motion to surcharge on October 19 through 21, 1992. Snover and Willnerd asserted that Line failed to observe the standard of care applicable to personal representatives who are also attorneys, and they sought recovery of the penalty and interest assessed by the IRS for the late estate tax return, reimbursement for an unauthorized excess distribution to one of the heirs, reimbursement of the personal representative and attorney fees which Line had paid to himself and interest on the reimbursements, reasonable attorney fees incurred in the action to remove Line as personal representative, reasonable attorney fees incurred in the surcharge action, and costs incurred in the surcharge action. Line argued primarily that the county court did not have jurisdiction over the case because the allegations in the motion were more properly considered complaints of attorney malpractice. Additionally, Line argued that the statute of limitations had run and, through questioning at trial, that his actions had been authorized by the will and were therefore not the proper subject of a surcharge action.

On March 18, 1993, the county court entered a "Surcharge Action Judgment." The court made specific findings of fact and conclusions of law. The court held that Line breached his duties as personal representative and that he failed to observe the requisite standard of care for personal representatives who possess special skills. The court further held that Line's breach resulted in damage to the estate. The court granted the surcharge motion and assessed damages against Line as follows: (1) Line was ordered to reimburse the interest of $11,451.67 and penalty of $5,455.86 assessed by the IRS for the late filing of the estate tax return, (2) Line was ordered to reimburse his personal representative fees of $4,649, (3) Line was ordered to pay interest of $1,301.72 on the reimbursement of his personal representative fees, (4) Line was ordered to reimburse the estate $786.48 for the unauthorized excess distribution to one of the heirs, (5) Line was ordered to pay attorney fees of $15,385.41 incurred in the action to remove Line as personal representative, (6) Line was ordered to pay attorney fees incurred by the estate in the surcharge action in an amount determined at a later hearing to be $47,310.50, and (6) Line was ordered to pay costs incurred by the estate in the surcharge action in an amount determined at a later hearing to be $1,515.56. The court further held that attorney fees Line had paid to himself for work performed while he was personal representative were reasonable for work performed, and the court declined to surcharge Line for them.

Line appealed the county court decision to the district court for Dodge County. Line again asserted that the county court lacked jurisdiction over the proceeding because it was primarily a case of attorney malpractice, that the statute of limitations had run, and that the county court erred in granting the surcharge. In a May 10, 1994, order the district court found that the county court had properly removed all malpractice allegations from the proceedings by sustaining demurrers to the alleged malpractice claims and by specifically finding that the county court was without authority to hear any matters pertaining to attorney malpractice. As such, the district court determined that the county court had limited the case to matters directly pertaining to Line's conduct as a personal representative.

The district court affirmed the decision of the county court in part and reversed the decision in part. Specifically, the district court affirmed the following portions of the county court judgment: (1) surcharging Line for the penalty of $5,455.86 and interest of $11,451.67 assessed by the IRS; (2) ordering Line to reimburse the estate for his personal representative fees of $4,649; (3) ordering Line to reimburse the estate $786.48 for the unauthorized excess distribution to one of the heirs; (4) ordering Line to pay costs incurred by the estate in the surcharge action, but only in the amount of $715.96; and (5) finding that the attorney fees which Line paid to himself were reasonable for work performed.

The district court reversed the following portions of the county court judgment: (1) assessing interest against Line for the reimbursement of the personal representative fees, (2) ordering Line to pay attorney fees incurred by the heirs to secure Line's removal as personal representative, (3) ordering Line to pay attorney fees incurred by the estate in the surcharge action, and (4) ordering Line to pay costs incurred by the estate in the surcharge action in any amount exceeding $715.96.

This appeal timely followed.

III. ASSIGNMENTS OF ERROR

Snover and Willnerd assign five errors on appeal. They assert the district court erred in the following respects: (1) in failing to order Line to reimburse the attorney fees he paid to himself while he was serving as personal representative, (2) in reversing the county court's award of interest on the reimbursement of Line's personal representative fees, (3) in reversing the county court's award of attorney fees incurred in securing removal of Line as personal representative, (4) in reversing the county court's award of attorney fees incurred in bringing the surcharge action, and (5) in decreasing the county court's award of costs incurred in bringing the surcharge action.

Line assigns five errors on cross-appeal, which we have consolidated for discussion to two. He asserts the district court erred in the following respects: (1) in failing to find that the action was for attorney malpractice, rather than surcharge, and (2) in failing to find that his actions were authorized.

IV. STANDARD OF REVIEW

[1] An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Holt*, 246 Neb. 50, 516 N.W.2d 608 (1994); *In re Estate of Trew*, 244 Neb. 490, 507 N.W.2d 478 (1993).

V. ANALYSIS

1. Snover and Willnerd's Appeal

(a) Reimbursement of Line's Attorney Fees

The county court found that the work done by Line "in the filing of the inventory, etc. was proper work" and that the attorney fees Line paid to himself for the work were proper for work performed. The county court did not surcharge Line for the attorney fees which he had paid to himself during the time he was personal representative. The district court affirmed the county court's holding with respect to these fees. On appeal, Snover and Willnerd assert that Line should have been surcharged and ordered to reimburse the fees.

At the outset, we note that no one raises any question concerning Line's authority to pay himself both attorney fees and personal representative fees for the work he performed in the dual capacity as both personal representative and attorney for the personal representative. As such, we expressly make no finding regarding the propriety of such action and limit our review to the question of whether the attorney fees were "proper for work performed."

[2] Unless restricted by the will or by an order in a formal proceeding, a personal representative is authorized to employ persons, including attorneys, to advise or assist in the performance of administrative duties. Neb. Rev. Stat. § 30-2476 (Reissue 1989). The propriety of employment of any person, including attorneys, by a personal representative and the reasonableness of compensation paid such person by the personal representative may be reviewed by the court. Neb. Rev. Stat. § 30-2482 (Reissue 1995). When reviewing the compensation paid to an attorney employed by a personal representative, the court is to consider the following factors:

> (a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the service properly;
>
> (b) The likelihood, if apparent to the personal representative, that the acceptance of the particular employment will preclude the person employed from other employment;
>
> (c) The fee customarily charged in the locality for similar services;
>
> (d) The amount involved and the results obtained;
>
> (e) The time limitations imposed by the personal representative or by the circumstances;

> (f) The nature and length of the relationship between the personal representative and the person performing the services; and
>
> (g) The experience, reputation, and ability of the person performing the services.

Id.

In support of their claim that the attorney fees which Line paid to himself were excessive, Snover and Willnerd called Gale Tessendorf to testify. Tessendorf was qualified as an attorney with expertise in estate matters. Tessendorf testified that he had reviewed Line's handling of the estate and that he did not think Line was entitled to any compensation for the work performed.

On cross-examination, Tessendorf admitted that Line did perform certain tasks properly in his capacity as attorney for the personal representative. Specifically, Tessendorf found no fault with Line's preparation of the will for probate, such as the determination of heirs and preparation and filing of the registrar's statement, and he found no fault with the drafting and filing of the application for informal probate, the preparation and filing of the statement of values and income, the preparation and filing of the letters of the personal representative, the compliance with publication requirements, the preparation of the affidavit of mailing notice and filing of notice, the preparation of the petition for determination of inheritance tax, the preparation of an accounting, or the phone calls, correspondence, and similar administrative activities. Tessendorf found fault only with Line's preparation of and failure to timely file the federal estate tax return.

Aside from Tessendorf's testimony, there was no evidence presented to suggest the amount of attorney fees which Line paid to himself was unreasonable for performance of the above services. Tessendorf simply testified that Line was entitled to no compensation because he failed to timely file the estate tax return. We find no error in the district court's affirmance of the county court's denial of reimbursement for the attorney fees which Line paid to himself. This assigned error is without merit.

(b) Interest on Reimbursement of Personal Representative Fees

The county court ordered Line to reimburse the estate for his personal representative fees. Additionally, the county court ordered Line to pay interest on the reimbursement from the date of removal in 1989. The district court reversed the county court award of interest, holding that there was no authority to allow an award of prejudgment interest in this case.

[3] The Nebraska Supreme Court has held that prejudgment interest is recoverable when a claim is liquidated, that is, when "there is no reasonable controversy as to either plaintiff's right to recover or the amount of such recovery." *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 482, 507 N.W.2d 465, 477 (1993). See, also, *Albee v. Maverick Media, Inc.*, 239 Neb. 60, 474 N.W.2d 238 (1991); *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989); *Graff v. Burnett*, 226 Neb. 710, 414 N.W.2d 271 (1987); *Fee v. Fee*, 223 Neb. 128, 388 N.W.2d 122 (1986). The claim in the present case was not liquidated, however, because there was reasonable controversy as to Snover and Willnerd's right to recover all or a portion of the personal representative fees. The disputes between the parties as to Line's performance required the trial court to calculate the amount to be reimbursed only after exercising its opinion and discretion in the factfinding process. See *Lange Indus. v. Hallam Grain Co., supra.*

[4] Prejudgment interest is also recoverable when a claim is unliquidated if a plaintiff complies with the statutory requirements of Neb. Rev. Stat. § 45-103.02 (Reissue 1993). Compare § 45-103.02 (Cum. Supp. 1994). At the time the present case was tried, § 45-103.02 provided, in relevant part:

> [J]udgment interest shall also accrue on decrees and judgments for the payment of money from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the rendition of judgment if all of the following conditions are met:
>
> (1) The offer is made in writing upon the defendant by certified mail, return receipt requested, to allow judgment to be taken in accordance with the terms and conditions stated in the offer;

(2) The offer is made not less than ten days prior to the commencement of the trial;

(3) A copy of the offer and proof of delivery to the defendant in the form of a receipt signed by the party or his or her attorney is filed with the clerk of the court in which the action is pending; and

(4) The offer is not accepted prior to trial or within thirty days of the date of the offer, whichever occurs first.

§ 45-103.02 (Reissue 1993).

[5] Section 45-103.02 applies to all causes of action accruing on or after January 1, 1987. *Elson v. Pool*, 235 Neb. 469, 455 N.W.2d 783 (1990). There is nothing in the record to reflect that Snover and Willnerd complied with the provisions of § 45-103.02. Thus, the district court properly held that Snover and Willnerd are not entitled to prejudgment interest on the reimbursement of Line's personal representative fees. This assigned error is without merit.

(c) Attorney Fees for Surcharge Action

(i) General Rule

In the surcharge action, Snover and Willnerd requested an award of the attorney fees incurred in bringing the surcharge action against Line. The county court awarded these fees as damages. The district court found that there was no statutory authority or uniform course of practice to justify such an award of attorney fees and reversed the county court's award.

[6] The rule in Nebraska is that attorney fees may be recovered only when authorized by statute or when a recognized and accepted uniform course of procedure has been to allow such a recovery. *First Nat. Bank in Morrill v. Union Ins. Co.*, 246 Neb. 636, 522 N.W.2d 168 (1994); *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994); *Rosse v. Rosse*, 244 Neb. 967, 510 N.W.2d 73 (1994). Snover and Willnerd do not provide us with any authority, nor have we found any, that suggests any statutory authority or uniform course of practice which would allow attorney fees to be awarded in a surcharge action. However, Snover and Willnerd assert that Neb. Rev. Stat. § 25-824 (Reissue 1995), the frivolous pleadings statute,

should be applied to Line's defense of the surcharge action and to pleadings he filed during the surcharge action.

(ii) Frivolous Pleadings

Snover and Willnerd argue that the frivolous pleadings statute, § 25–824(4), would authorize recovery of these attorney fees. They argue that Line acted frivolously in contesting and appealing his removal as personal representative and in contesting the surcharge action. Snover and Willnerd raised this statute as a basis for their request for attorney fees before the county court. The court awarded the attorney fees, but did not provide a specific basis for its finding that attorney fees were warranted. From the record it is apparent, however, that the fees were *not* awarded on the basis of the frivolous pleadings statute.

During Snover and Willnerd's argument, the court stated that "if your side prevails and the Court decides to award your attorney's fees, in essence then, whether there [were] frivolous pleadings or not, defending against those frivolous pleadings, you're going to be awarded your attorney's fees anyway." The court further stated that "the Court isn't saying in any way, shape or form, that there [were] frivolous pleadings in this particular matter." As such, the court did not appear to make any determination whether Line acted in a frivolous manner.

[7,8] Section 25–824 allows a court to award reasonable attorney fees against an attorney or party who has brought or defended a civil action that alleges a claim or defense which the court determines is frivolous or made in bad faith. The Nebraska Supreme Court has defined "frivolous," for the purposes of § 25–824, as being a legal position wholly without merit, that is, without a rational argument based on law and evidence to support the litigant's position in the lawsuit. *First Nat. Bank in Morrill v. Union Ins. Co., supra*; *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993). "The term 'frivolous,' . . . connotes an improper motive or a legal position so wholly without merit as to be ridiculous." *Behrens v. American Stores Packing Co.*, 236 Neb. 279, 288, 460 N.W.2d 671, 677 (1990). Any doubt about whether or not a legal position is frivolous or taken in bad faith must be

resolved in favor of the party whose legal position is in question. *Sports Courts of Omaha v. Meginnis, supra.*

The Supreme Court has further held that " 'attorneys and litigants should not be inhibited in pressing novel issues or in urging a position that can be supported by a good-faith argument for an extension, modification or reversal of existing law . . . .' " *Shanks v. Johnson Abstract & Title*, 225 Neb. 649, 655, 407 N.W.2d 743, 747 (1987) (quoting *Ltown Ltd. v Sire Plan*, 108 A.D.2d 435, 489 N.Y.S.2d 567 (1985)). Further, the determination of whether a particular claim or defense is frivolous must depend upon the facts of the particular case. See *Shanks v. Johnson Abstract & Title, supra.* A claim or defense that is simply without merit is not by definition frivolous. *Id.*

The present case is a complex and embattled estate proceeding. The entire proceedings concerning the estate have been before the courts for 10 years now. The record presented to the county court consists of several hundred pages of testimony and several hundred exhibits totaling thousands of pages. Although the record before us is indeed enormous, Snover and Willnerd do not cite us to any portion of the record, and we can find none, to indicate precisely which of Line's claims and defenses are claimed to have been frivolous. This, in conjunction with the fact that the issue was raised but not ruled on by the county court, leads us to the conclusion that the matter should be remanded to the county court for further proceedings and a determination of whether Snover and Willnerd are entitled to attorney fees for the surcharge action under the provisions of § 25-824.

(d) Attorney Fees for Removal Action

In the surcharge action, Snover and Willnerd pled as damages the attorney fees incurred in securing Line's removal as personal representative in the prior removal action. The county court awarded the fees, but the district court reversed, finding that there was no statutory authority or uniform course of practice to support the award.

Snover and Willnerd do not provide a statutory basis or uniform practice to support the award, but, rather, argue on appeal that the attorney fees incurred in the removal proceeding may be recovered as damages in the surcharge proceeding under an exception set out in the Nebraska Supreme Court's opinion in *Tetherow v. Wolfe*, 223 Neb. 631, 392 N.W.2d 374 (1986). We do not agree.

In *Tetherow*, the Nebraska Supreme Court recognized that an exception to the general rule governing the recovery of attorney fees in Nebraska exists when a plaintiff attempts to recover as damages attorney fees incurred in a prior suit brought *by a third party* because of the defendant's negligence. The court held:

> "One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action *against a third person* is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action."

(Emphasis supplied.) *Id.* at 638, 392 N.W.2d at 379 (quoting Restatement (Second) of Torts § 914(2) (1979)). Snover and Willnerd argue that because of Line's breach of fiduciary duty, they were required to act in the protection of their interests by bringing the removal action and are therefore entitled to recover as damages in the present action any attorney fees they incurred in the prior action.

"The rule . . . applies when the preceding action was brought against the present plaintiff either *by a third person* or by the state, and also when the present plaintiff has been led by the defendant's tort to take legal proceedings *against a third person.*" (Emphasis supplied.) Restatement, *supra*, § 914(2), comment *b*. at 493. We can find no case, and Snover and Willnerd cite us to none, where the Supreme Court has applied this exception to a situation where the prior action involved the *same* parties rather than a *third* party. As such, the general rule applies, and attorney fees are not recoverable absent some statutory authority or uniform course of procedure.

Additionally, we note an apparent inconsistency in Snover and Willnerd's argument. Snover and Willnerd assert that the attorney fees incurred in the removal action are "damages" to the estate caused by the fact that Line breached his fiduciary duties as personal representative and made the removal action necessary. Snover and Willnerd do not, however, provide any explanation as to why that reasoning should be applied to the attorney fees for the removal action when Nebraska law would clearly not allow the reasoning to be applied to the attorney fees in the surcharge action presently being appealed. We decline to apply Snover and Willnerd's reasoning, and attorney fees for the removal action are not recoverable in the surcharge action in the absence of a statutory basis or uniform course of practice authorizing such fees.

(e) Costs for Surcharge Action

Snover and Willnerd sought recovery of the costs incurred in bringing the surcharge action. On May 6, 1993, the court conducted a hearing on the amount of costs to be awarded. Snover and Willnerd submitted an exhibit which itemized expenses totaling $1,515.56, of which Snover and Willnerd sought recovery. The county court awarded that amount. The district court affirmed the award of costs, but limited recovery to $715.96, finding that the county court had awarded recovery of expenses which are not properly taxed as costs.

[9] The district court noted that "[m]any of the expenses taxed as 'costs' consisted of photocopying, postage, and fax charges." The Nebraska Supreme Court has held that only such items as are prescribed by statute or expressly authorized by agreement of the parties may be taxed as costs. *Kliment v. National Farms, Inc.*, 245 Neb. 596, 514 N.W.2d 315 (1994). We have been directed to no statutes or case law, nor have we found any, which defines costs to include photocopying, postage, or fax charges. Accordingly, the district court was correct in reducing the amount of costs awarded. This assigned error is without merit.

2. LINE'S CROSS-APPEAL

(a) Malpractice Versus Surcharge

On cross-appeal, Line asserts that Snover and Willnerd's motion for surcharge was actually a claim for attorney malpractice with alleged damages in excess of $15,000. Accordingly, Line argues that the county court had no subject matter jurisdiction to hear the claim. Line also argues that the statute of limitations for professional malpractice claims had expired and should have barred the claim. Finally, Line argues that the county court erred in failing to certify the action to the district court. It is Line's contention that the district court erred in rejecting these arguments.

(i) Subject Matter Jurisdiction of County Court

Line alleges that the motion for surcharge asserted claims premised on alleged malpractice. Line argues that Snover and Willnerd were trying to recover for damages caused by Line's actions "as an attorney" rather than "as a personal representative." This case is complicated somewhat by the fact that Line served in the dual capacity as personal representative and attorney.

In one of the previous appeals of this case, *Line v. Rouse*, 241 Neb. 779, 491 N.W.2d 316 (1992), Line appealed from the district court's denial of a writ of prohibition. In that action, Line sought a writ of prohibition to prevent the county court from hearing the motion to surcharge because the action was one for legal malpractice, similar to his argument on appeal in the present action. The Supreme Court recognized that the motion to surcharge "combined allegations against only Line in his capacity as the former personal representative, with allegations against Line and his law firm sounding in tort and, in effect, alleging legal malpractice." *Id.* at 783, 491 N.W.2d at 319. The court affirmed the denial of the writ of prohibition, holding that a writ of prohibition was not the proper remedy to prevent the county court from exercising jurisdiction over the malpractice allegations. *Id.*

Since the original motion to surcharge was filed, Snover and Willnerd have filed four amended motions. On October 19, 1992, the court sustained demurrers to any allegations in the third amended motion to surcharge which pertained to alleged professional negligence by Line. Snover and Willnerd filed a fourth amended motion to surcharge in which all references to actions by Line in his capacity as an attorney were eliminated. The court thus limited its review of Line's actions to a review of his actions in his capacity as a personal representative.

[10,11] Neb. Rev. Stat. § 30-2464 (Reissue 1995) provides that a personal representative is a fiduciary who is obligated to

observe the standards of care applicable to trustees as described in Neb. Rev. Stat. § 30-2813 (Reissue 1995). Accordingly, a personal representative is obligated to observe the standards in dealing with assets that would be observed by a prudent man dealing with the property of another, and if the personal representative has special skills, he is under a duty to use those skills. See §§ 30-2464 and 30-2813. As a result, because Line is an attorney, when he acted as a personal representative he was under a duty to use his special skills as an attorney.

Upon a review of the fourth amended motion to surcharge and the record in this case, it is clear that the matter proceeded to trial *only* on a review of Line's actions in his capacity as a personal representative *with the special skills of an attorney*. Line cannot escape liability for his actions simply by claiming that he was at all times wearing his "attorney hat" rather than his "personal representative hat." To assert that Line's actions in the present case constitute only malpractice, rather than a breach of his duty as personal representative, would have the practical effect of shielding him from liability to the estate solely because of his unique position of being an attorney who was appointed personal representative.

In a case with some factual similarities, the Washington Supreme Court has specifically held that beneficiaries of an estate are not entitled to bring a malpractice suit against an attorney hired by the personal representative. See *Trask v. Butler*, 123 Wash. 2d 835, 872 P.2d 1080 (1994). That court held that an attorney hired by the personal representative owes no duty of care to the estate or the beneficiaries. *Id.* The court held that the attorney is generally hired in contemplation of benefiting the personal representative in the exercise of his duties, and the beneficiaries therefore have no standing to sue the attorney for professional negligence. *Id.*

Similarly, the Nebraska Supreme Court has recognized that when a personal representative hires an attorney, the *personal representative* is the attorney's client, not the estate. *In re Estate of Wagner*, 222 Neb. 699, 386 N.W.2d 448 (1986). The Supreme Court has also held that attorney malpractice claims can be brought only by the client of the attorney, because the attorney-client relationship is uniquely personal. *Earth Science*

Labs. v. Adkins & Wondra, P.C., 246 Neb. 798, 523 N.W.2d 254 (1994). Specifically in the context of estate matters, the court has held that an attorney who drafts a will owes no duty to the beneficiaries, but, rather, owes a duty to the decedent only. *St. Mary's Church v. Tomek*, 212 Neb. 728, 325 N.W.2d 164 (1982).

As a result, if we accepted Line's argument that liability for his breach of duty as a personal representative may be assessed only in a malpractice action, he would no doubt assert in such action that the only party entitled to bring a claim of professional malpractice against Line, in his capacity as *attorney* for the personal representative, would be Line himself, in his capacity as *personal representative*. Line's actions as personal representative are not transformed into actions by an attorney simply because he wore "both hats." Because any claim premised on an allegation that Line failed to observe the standard of care owed *by attorneys* to their clients was removed from the surcharge proceeding, and because Line's actions were reviewed only as actions conducted by a personal representative with special skills, the county court did have jurisdiction over the matter.

Line also asserts that it is unconstitutional to allow a county court to entertain a malpractice action under the guise of the probate code's authority for surcharge actions. As noted, this was not a malpractice action, but was a proper surcharge action against Line and his actions as personal representative. This assigned error is without merit.

(ii) Statute of Limitations

Line asserts that the statute of limitations for malpractice actions should have governed this case. As noted above, as the action was tried to the county court it was not an action for professional malpractice, but, rather, was a proper surcharge action in probate. This assigned error is without merit.

(iii) Failure to Certify Action

Line asserts that the county court erred in not certifying the action to the district court because the action was one for professional malpractice. He asserts that the district court erred in not finding that the county court so erred. As noted above, as the action was tried to the county court it was not an action for professional malpractice, but, rather, was a proper surcharge action in probate. This assigned error is without merit.

(b) Authority for Actions

Finally, Line also asserts that he should not have been surcharged because his actions were authorized by the will. We find the argument to be without merit.

Section 30-2464(b) provides that a personal representative shall not be surcharged for acts of administration or distribution if the conduct was authorized at the time. Line argues that the will and Nebraska statutes authorized him, as personal representative, to pay estate taxes, including any interest or penalties. Because of this authority, Line deduces that the court had no authority to surcharge him for his actions in the present case.

Line fails to provide us with any authority, and we have found none, that authorizes a personal representative to breach his fiduciary duty by failing to timely file the estate tax return, thereby incurring penalties and interest against the estate. Neb. Rev. Stat. § 30-2490 (Reissue 1995) provides that issues of liability between the estate and the personal representative may be resolved in a surcharge action. Because Line was found to have breached his fiduciary duty to the estate by failing to timely file the estate tax return, the issues of liability for damages caused by his breach were an appropriate subject of a surcharge action. This assigned error is without merit.

VI. CONCLUSION

The decision of the district court is affirmed in all regards, except that portion of the decision regarding attorney fees for the surcharge action. In that regard, we reverse the decision because the county court failed to make a finding on whether or not Line's actions in defending against the surcharge action were frivolous, and the cause is remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

THE TRAVELERS INSURANCE COMPANY, A CORPORATION, APPELLEE, V. JOSEPH S. NELSON AND D. MARGARET NELSON, HUSBAND AND WIFE, APPELLANTS.

546 N.W.2d 333

Filed April 23, 1996. Nos. A-94-730, A-94-980.

1. **Homesteads: Sales: Notice: Mortgages.** The notice requirements, the failure of which can potentially lead to the setting aside of a sale, are not applicable when the debt is secured by a mortgage upon the premises executed and acknowledged by both husband and wife.
2. **Homesteads: Sales: Mortgages: Waiver.** The exemption provided for in Neb. Rev. Stat. § 40-103 (Reissue 1993), which subjects a homestead to execution or forced sale, merely recognizes that some debtors may wish to waive their homestead exemption when mortgaging land in order to increase their borrowing power.
3. **Debtors and Creditors: Mortgages.** When an instrument executed by the parties is intended as security for a debt, it is in equity a mortgage, whatever its form or name may be.
4. **Trusts: Deeds: Mortgages: Sales.** The Nebraska Trust Deeds Act's amendment by implication of Neb. Rev. Stat. § 76-251 (Reissue 1990) is that every deed, including trust deeds, which is intended as security, even though the deed provides for an absolute conveyance, is considered a mortgage except when, under a trust deed and as allowed under Neb. Rev. Stat. § 76-1006 (Reissue 1990), the trustee exercises the power of sale without judicial proceedings, as opposed to the beneficiary's using the judicial procedure for foreclosure of mortgages.
5. **Trusts: Deeds: Mortgages.** A trust deed can be the functional equivalent of a mortgage, depending upon the remedy selected by the beneficiary, the options being a nonjudicial trustee sale or judicial foreclosure under Neb. Rev. Stat. § 76-1005 (Reissue 1990).
6. **Judgments: Appeal and Error.** If a judgment is not superseded, it is effective notwithstanding appeal.
7. **Judgments: Supersedeas Bonds: Appeal and Error.** In the absence of a supersedeas bond, the judgment retains its vitality and is capable of being executed upon during pendency of appeal.

Appeal from the District Court for Garden County: BRIAN SILVERMAN, Judge. Affirmed.

Lawrence H. Crosby, of Crosby & Associates, and Joseph S. Nelson and D. Margaret Nelson for appellants.

Timothy V. Haight and Kelly R. Dahl, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellee.

HANNON, SIEVERS, and INBODY, Judges.

SIEVERS, Judge.

The foreclosure proceedings by The Travelers Insurance Company upon the ranch of Joseph S. Nelson and D. Margaret Nelson have spawned numerous appeals in this court. The legal proceedings began on August 3, 1992, when Travelers filed a petition in foreclosure and application for receiver against the Nelsons, alleging a past-due principal sum of $569,186.33 together with substantial accrued interest. The Nelsons' debt was secured by a deed of trust covering over 8,800 acres of ranchland in Morrill and Garden Counties. A receiver was appointed, and the Nelsons appealed to this court in case No. A-93-346, alleging that the receiver should not have been appointed. On that issue, we affirmed the district court's judgment by a memorandum opinion and judgment on appeal dated December 6, 1994, holding:

> Given the extensive discretion granted to the trial court in the appointment of receivers and considering the uncertainty of the value of the land unless actually sold, we cannot conclude that the district court erred when it found that a comparison of debt against value justified the appointment of a receiver.

In the earlier appeal, the Nelsons assigned as error the broad issue: "Whether or not Joseph S. Nelson and D. Margaret Nelson have been denied due process of law." We gave their brief an expansive reading and addressed what we perceived to be their primary complaint relating to due process, i.e., that "the district court of Garden County continued to exercise jurisdiction over the land and them, by holding further court proceedings and ultimately jailing Mr. Nelson for contempt because of their failure to comply with the court's order when they had appealed this case to the Court of Appeals." We relied upon *Production Credit Assn. of the Midlands v. Schmer*, 233 Neb. 785, 448 N.W.2d 141 (1989), and held that the district court's order appointing the receiver was not superseded and thus was capable of enforcement by the district court during the pendency of the appeal to the Court of Appeals. As a result, we found no denial of due process.

The instant appeals also come from the district court for Garden County, case No. 2762, the same case with which we dealt in our opinion of December 6, 1994. In the first of the two appeals now before us, case No. A-94-730, the Nelsons appeal the district court's decree of foreclosure entered July 1, 1994, which found the principal sum due Travelers to be in the amount of $834,155.03 as of May 10, 1994, together with interest accruing at $230 per day. The court ordered that the Nelson ranch property, which was legally described in full in the decree of foreclosure, be sold as a single unit. The decree of foreclosure is appealed in case No. A-94-730.

In case No. A-94-980, the Nelsons appeal the district court's order of October 3, 1994, confirming the sale of the involved real estate to Travelers for the amount of $761,136.20. The court made specific findings that the sale was in conformity with the law of the State of Nebraska, that the property was sold for fair value under the circumstances and conditions of the sale, that a subsequent sale would not realize a greater amount, and that the sale should in all respects be confirmed. We have combined these two appeals for briefing, argument, and decision.

ASSIGNMENTS OF ERROR

The Nelsons assert three assignments of error: (1) The trial court erred in ordering the sale of the property without requiring Travelers to allow the Nelsons to designate, or reserve the right to designate, a homestead before the property was sold by decree of foreclosure; (2) the trial court erred in confirming the foreclosure sale when Travelers had not provided the Nelsons "homestead exemption procedures at least ten days before judicial confirmation of the sale"; and (3) the trial court erred in continuing to assert jurisdiction by proceeding with the foreclosure after the Nelsons had appealed to the Court of Appeals.

ANALYSIS

Order of Foreclosure Sale Without Designation of Homestead Rights.

Neb. Rev. Stat. § 40-103 (Reissue 1993) precludes a debtor's homestead exemption when the underlying debt is secured "by mortgages upon the premises executed and acknowledged by both husband and wife." The Nelsons argue that because

Travelers was foreclosing on a trust deed rather than a mortgage, § 40-103 does not apply here, and, consequently, they are entitled to a homestead exemption. Other than federal cases dealing with the federal Agricultural Credit Act, which are not pertinent, the Nelsons do not cite authority for their proposition that the § 40-103 preclusion of the homestead exemption for mortgages does not apply in the instances of trust deeds.

The statute, § 40-103, provides:

> The homestead is subject to execution or forced sale in satisfaction of judgments obtained (1) on debts secured by mechanics', laborers', or vendors' liens upon the premises; and (2) on debts secured by mortgages upon the premises executed and acknowledged by both husband and wife, or an unmarried claimant.

The Nelsons argue that they repeatedly attempted to have their homestead set aside to them and that because Travelers did not give them prior notice of their homestead rights and the opportunity to designate their homestead prior to foreclosure, the decree of foreclosure must be set aside under Neb. Rev. Stat. § 25-1531 (Reissue 1995). This statute provides:

> If the court, upon the return of any writ of execution, or order of sale for the satisfaction of which any lands and tenements have been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has in all respects been made in conformity to the provisions of this chapter and that the said property was sold for fair value, under the circumstances and conditions of the sale, or, that a subsequent sale would not realize a greater amount, the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make the purchaser a deed of such lands and tenements. Prior to the confirmation of sale pursuant to this section, the party seeking confirmation of sale shall, except in the circumstances described in section 40-103, provide notice to the debtor informing him or her of the homestead exemption procedure available pursuant to Chapter 40, article 1. The notice shall be given by certified mailing at

> least ten days prior to any hearing on confirmation of sale. The officer on making such sale may retain the purchase money in his or her hands until the court shall have examined his or her proceedings as aforesaid, when he or she shall pay the same to the person entitled thereto, agreeable to the order of the court. If such sale pertains to mortgaged premises being sold under foreclosure proceedings and the amount of such sale is less than the amount of the decree rendered in such proceedings, the court may refuse to confirm such sale, if, in its opinion, such mortgaged premises have a fair and reasonable value equal to or greater than the amount of the decree. The court shall in any case condition the confirmation of such sale upon such terms or under such conditions as may be just and equitable. The judge of any district court may confirm any sale at any time after such officer has made his or her return, on motion and ten days' notice to the adverse party or his or her attorney of record, if made in vacation and such notice shall include information on the homestead exemption procedure available pursuant to Chapter 40, article 1. When any sale is confirmed in vacation the judge confirming the same shall cause his or her order to be entered on the journal by the clerk. *Upon application to the court by the judgment debtor within sixty days of the confirmation of any sale confirmed pursuant to this section, such sale shall be set aside if the court finds that the party seeking confirmation of sale failed to provide notice to the judgment debtor regarding homestead exemption procedures at least ten days prior to the confirmation of sale as required by this section.*

(Emphasis supplied.)

It is the emphasized portion of § 25-1531 which forms the basis of the Nelsons' argument that they are entitled to have the sale set aside, because they claim that Travelers did not provide them notice regarding homestead exemption procedures 10 days prior to the confirmation of the sale.

[1,2] It is clear that the notice requirements, the failure of which can potentially lead to the setting aside of a sale, are not applicable when the circumstances are as described in § 40-103,

i.e., debt secured by a mortgage upon the premises executed and acknowledged by both husband and wife. The trust deeds at issue here were executed by both of the Nelsons, and there is no claim to the contrary. It has been said that the exemption provided for in § 40–103, which subjects a homestead to execution or forced sale, merely recognizes that some debtors may wish to waive their homestead exemption when mortgaging land in order to increase their borrowing power. *Federal Land Bank of Omaha v. Blankemeyer*, 228 Neb. 249, 422 N.W.2d 81 (1988).

When §§ 40–103 and 25–1531 are considered together, it becomes clear that the question which must be answered in this appeal is whether a trust deed, such as is involved in this case, is to be treated in the same way as a mortgage. If a trust deed is treated as a mortgage, then under § 40–103 there is an exclusion, as the homestead may be pledged, and the notice of homestead rights and corresponding sale set-aside provisions of § 25–1531, when notice is not given, do not apply.

In answering the question of whether a trust deed is treated like a mortgage, we first quote Neb. Rev. Stat. § 76–251 (Reissue 1990), which provides:

> Every deed conveying real estate, which, by any other instrument in writing, shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage. The person for whose benefit such deed shall be made shall not derive any advantage from the recording thereof, unless every writing operating as a defeasance, or explaining its effect as a mortgage, or conditional deed, is also recorded therewith and at the same time.

[3] On its face, a trust deed is a conveyance absolute in form, but which is intended *only* as security for a debt, as in the nature of a mortgage. In construing this statute, the Nebraska Supreme Court has held that when an instrument executed by the parties is intended as security for a debt, it is in equity a mortgage, whatever its form or name may be. *Campbell v. Ohio National Life Ins. Co.*, 161 Neb. 653, 74 N.W.2d 546 (1956). We quote from *Campbell*:

> It is also generally accepted that if an instrument executed by parties is intended by them as security for a debt, whatever may be its form or name, it is in equity a mortgage. This doctrine proceeds from the broad equitable principle that equity regards substance and not form. It may be said as a general rule that if an instrument transferring an estate is originally intended between the parties as security for money or for any other encumbrance, whether the intention is exhibited by the same instrument or by any other, it is considered in equity as a mortgage. Northwestern State Bank v. Hanks, *supra;* Annotations, 79 A. L. R. 937, 155 A. L. R. 1104. This jurisdiction adheres to the doctrine alluded to in the foregoing discussion and it has been made the policy of the state by legislative declaration. Section 76-251, R. R. S. 1943, provides: "Every deed conveying real estate, which, by any other instrument in writing, shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage. * * *" This court has frequently and consistently accepted and applied this doctrine in the decision of cases appropriate for its application. It said in Doran v. Farmers State Bank, 120 Neb. 655, 234 N. W. 633, that: "A deed, absolute on its face, but which, in fact, was given as security for certain obligations, and by which grantors were to receive any sum over and above such obligations for which the land conveyed should be sold, is, in nature and effect, a mortgage."

161 Neb. at 659, 74 N.W.2d at 552.

There can be no question that the trust deeds involved in this matter were intended as security for the loans made to the Nelsons by Travelers and that the ranch being foreclosed upon in this action was used as security for that debt.

In *Blair Co. v. American Savings Co.*, 184 Neb. 557, 169 N.W.2d 292 (1969), the Supreme Court dealt with a declaratory judgment action to determine the constitutional validity of the Nebraska Trust Deeds Act, Neb. Rev. Stat. §§ 76-1001 to 76-1018 (Reissue 1990 & Cum. Supp. 1992). The argument advanced by the petitioner before the Supreme Court was that the act was amendatory and did not contain all sections amended: specifically the act did not include § 76-251. The Supreme Court held that that act was constitutional as an independent act, not amendatory in nature, and therefore was not in violation of the Nebraska constitutional provision which requires that amendatory acts shall contain all the sections amended. In answering the petitioner's argument, the court stated:

> The Nebraska Trust Deeds Act authorizes the use of a security device which was not available prior to its enactment. The act permits the use of an instrument which may be foreclosed by sale without the necessity of judicial proceedings. It authorizes and permits a method of financing which was not formerly available, *since trust deeds have been considered to be subject to the same rules and restrictions as mortgages*. See Comstock v. Michael, 17 Neb. 288, 22 N. W. 549. The act is complete in that it prescribes in detail the procedures to be followed in the execution and enforcement of trust deeds. It does not cover the entire subject of secured real estate transactions but it does cover the subject of trust deeds. We conclude that the act is an independent act, not amendatory in nature, and not in violation of Article III, section 14, Constitution of Nebraska. To the extent that section 76-251, R. R. S. 1943, may be in conflict with the Nebraska Trust Deeds Act, it is modified by implication. Chicago & N. W. Ry. Co. v. County Board of Dodge County, 148 Neb. 648, 28 N. W. 2d 396.

(Emphasis supplied.) *Blair Co. v. American Savings Co.*, 184 Neb. at 558-59, 169 N.W.2d at 294.

[4] The conflict alluded to in *Blair Co.* is that the Nebraska Trust Deeds Act allowed for sale of the trust property by the trustee without judicial proceedings, although at the option of the beneficiary, "a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property," as long as the power of sale is expressly provided for in the trust deed. § 76-1005. Thus, the Nebraska Trust Deeds Act's amendment by implication of § 76-251 is that every deed,

including trust deeds, which is intended as security, even though the deed provides for an "absolute conveyance," is considered a mortgage *except* when, under a trust deed and as allowed under § 76-1006, the trustee exercises the power of sale without judicial proceedings, as opposed to the beneficiary's using the judicial procedure for foreclosure of mortgages. In those instances when the beneficiary chooses to foreclose a trust deed as a mortgage, it is then treated as a mortgage, and under § 40-103, the exclusion from the requirements of the notice and set-aside provisions of § 25-1531 is operable.

[5] From the foregoing, we believe the conclusion is inescapable that a trust deed can be the functional equivalent of a mortgage, depending upon the remedy selected by the beneficiary, the options being a nonjudicial trustee sale or judicial foreclosure under § 76-1005. In the instant case, the trust deed was foreclosed as in the case of a mortgage, and as a consequence, the exclusion provided for in § 40-103 applies to the trust deeds executed by the Nelsons. Thus, their argument that the decree of foreclosure and the order confirming sale must be set aside because they did not receive the notice of homestead rights provided for in § 25-1531 must, of necessity, fail.

Farm Homestead Protection Act.

In support of the Nelsons' contention that they were not provided with appropriate notice of homestead exemption procedures prior to the sale, which now allegedly gives them the right to set aside the sale, they cite us to the Farm Homestead Protection Act, Neb. Rev. Stat. §§ 76-1901 to 76-1916 (Reissue 1990). Their argument is that

> Nelsons repeatedly asked for their homestead rights under Nebraska law. These rights were not allotted to them by the trial court at any point. Nelsons received no opportunity to designate their homestead prior to the foreclosure by The Travelers. . . .
>
> The insurance company-Lender resisted Nelsons' rights at every point. The foreclosure should be voided for failure to allow Nelsons designation of a homestead.

Brief for appellants at 19-20.

This is the sum and substance of this argument. Frankly, the Nelsons' brief is of little assistance, since it ignores much of the statutory law on the subject and quickly moves past the fact that the record before this court fails to demonstrate that the Nelsons fulfilled the statutory prerequisites for relief under the Farm Homestead Protection Act. Nonetheless, we briefly address their argument.

The Farm Homestead Protection Act provides that in the body of a mortgage or trust deed instrument executed on or after November 21, 1986, upon agricultural land, the mortgagor or trustor may make a designation of homestead. However, even if such designation is not made, the act provides that the mortgagor or trustor shall be deemed to have reserved the right to defer his or her designation of homestead until such time as a decree of foreclosure is entered upon such mortgage or trust deed. § 76-1904. The act provides at § 76-1904(3)(a) that the mortgagor or trustor may disclaim in writing the right to make a designation of homestead, but stringent requirements are imposed on the mortgagee or trustee who seeks to rely on any written disclaimer. Section 76-1904(3)(b) also provides for a waiver of the right to make designation, but again stringent notice and filing requirements imposed upon the mortgagee or trustee are set forth in the statute.

This case involves foreclosure of a trust deed of July 15, 1984, clearly prior to the effective date of the Farm Homestead Protection Act. However, it also involves the foreclosure of the trust deed executed November 17, 1989, well after the effective date of the act. Travelers does not cite us to any such disclaimer or waiver by the Nelsons which Travelers procured at the time of the 1989 trust deed. In addition, we have been unable to uncover in the record in the cases before us, or in the voluminous record in the previous case decided by our opinion of December 6, 1994, any disclaimer or waiver of the right to designate homestead by the Nelsons. Despite the lack of waiver or disclaimer by the Nelsons, the claim to relief under the Farm Homestead Protection Act is resolved by the apparent failure of the Nelsons to follow the procedures set forth in § 76-1906 et seq. for the "redemption of [their] redemptive homestead." Section 76-1906 requires the Nelsons, as trustors, to file a petition, signed and sworn to, in the foreclosure action not later than 20 days after rendition of the decree of foreclosure in order to claim the redemptive homestead. According to § 76-1907, that petition must set forth the designation of the homestead and include a written appraisal prepared by a licensed and certified real estate appraiser setting forth the appraiser's estimate and the basis for the current fair market value of the entire real estate, the redemptive homestead if sold separately from the balance of the protected real estate, and the balance of the protected real estate if sold separately from the redemptive homestead. Section 76-1908 then provides for trial court procedures for such redemption. However, the obvious trigger under the Farm Homestead Protection Act is the filing by the trustor or the mortgagor of the petition requesting redemption of the redemptive homestead. In the case at hand, although alluding to the act in their brief, the Nelsons once again do not cite us to any pleading in the record showing compliance with the very specific requirements of §§ 76-1906 and 76-1907. We have been unable to uncover any such petition in our examination of the record before us. The decree of foreclosure was filed July 1, 1994, and therefore under the act, the Nelsons' petition must have been filed within 20 days after that date. Absent the petition for redemption of redemptive homestead required by § 76-1906, no relief is available to the Nelsons under the Farm Homestead Protection Act.

Effect Upon District Court's Jurisdiction of Appeal to Court of Appeals.

The Nelsons argue that the district court for Garden County was without jurisdiction to take further action, including ordering a sale and confirming the sale, once their appeal of the appointment of the receiver was pending in this court in case No. A-93-346. At the outset, certain uncontroverted matters should be set forth. The record in the earlier appeal, as well as these appeals, fails to establish the posting of any supersedeas bond. We operate on the basis that the Nelsons have never superseded any of the orders of the district court for Garden County. Both of the orders of the district court for Garden County under attack here were in fact entered while the earlier appeal, case No. A-93-346, was pending in this court. The Nelsons support their claim that the pendency of the earlier appeal prevented the entry of the two orders under attack here by citations to *Carlson v. Bartels*, 143 Neb. 680, 10 N.W.2d 671 (1943), and *State v. Allen*, 195 Neb. 560, 239 N.W.2d 272 (1976).

Admittedly, *State v. Allen, supra*, holds that an order made by the district court after the vesting of jurisdiction in an appellate court is void and of no effect. However, *State v. Allen* is a criminal case and involved the trial court's ruling on a motion to withdraw the plea of guilty after an appeal had been perfected to the Supreme Court. We do not consider *Allen* as authoritative in the instant case.

In *Carlson v. Bartels, supra*, the plaintiffs sought a decree that they were children of the decedent entitled to an award for support, education, and maintenance against the decedent's estate. This request was in the context of a declaratory judgment action, but the Supreme Court observed that the estate was being administered in the county court for Wayne County, which had original jurisdiction in all matters of probate, and that such court in the proper exercise of its original jurisdiction may be called upon to determine the question of whether the plaintiffs were children of the decedent. Accordingly, the Supreme Court held that the county court, in such an event, "should not be confronted with a decision of this court, determining that question." *Carlson v. Bartels*, 143 Neb. at 687, 10 N.W.2d at 675. *Carlson* certainly does not represent authority for the blanket proposition which the Nelsons advance.

The Nelsons also cite *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994), which admittedly states the broad proposition that a lower court is without jurisdiction to hear a case involving the same matter which has been appealed to an appellate court. That ruling was in the context of a motion for new trial made to the Nebraska Equal Opportunity Commission, whose decision was already on appeal to the Supreme Court after it had been affirmed by the district court.

[6,7] It appears that the Nelsons fail to apprehend the difference between a court taking further action with respect to a final judgment already on appeal and a court enforcing its

judgment during an appeal when such judgment has not been superseded. The law is established that if a judgment is not superseded, it is effective notwithstanding appeal. *Lincoln Lumber Co. v. Elston*, 1 Neb. App. 741, 511 N.W.2d 162 (1993). In the absence of a supersedeas bond, the judgment retains its vitality and is capable of being executed upon during pendency of appeal. *Production Credit Assn. of the Midlands v. Schmer*, 233 Neb. 785, 448 N.W.2d 141 (1989). Consequently, as we earlier ruled in the first appeal, because there was no supersedeas bond, the district court could properly enforce its order appointing a receiver, including by use of its contempt powers. Since the appointment of the receiver was but a preliminary step on the road to foreclosure of a past-due mortgage, when there is no supersedeas bond filed, the district court is free to proceed with the determination of whether the property should be sold, and if sold, whether such sale should be confirmed. Thus, there was no error in entering the order directing the sale or in the confirming the sale while the order appointing a receiver, which was not superseded, was being appealed to this court.

CONCLUSION

Having carefully considered the assignments of error raised by the Nelsons, we find no merit to any of them. Therefore, we affirm the decree of foreclosure and the order confirming sale entered by the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHRISTOPHER M. MOORE, APPELLANT.

547 N.W.2d 159

Filed April 23, 1996. No. A-95-338.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence.
3. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion by the sentencing court.
4. **Sentences.** An abuse of discretion occurs when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
5. **Criminal Law: Trial: Evidence: Appeal and Error.** The 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. Further, erroneous admission of evidence in a criminal trial is not prejudicial if it can be said that the error was harmless beyond a reasonable doubt.
6. **Motions for Mistrial: Appeal and Error.** A motion for mistrial is directed to the discretion of the trial court. Its ruling will not be disturbed on appeal absent a showing of abuse of discretion.
7. **Sentences: Pleas.** It is clear that a defendant may not receive a more severe sentence because he or she pled not guilty and put the State to the expense of a trial.
8. **Sentences.** In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
9. **Sentences: Appeal and Error.** The mere fact that a defendant's sentence differs from those which have been imposed on coperpetrators in the same court does not, in and of itself, make the defendant's sentence an abuse of discretion; each defendant's life, character, and previous conduct may be considered in determining the propriety of the sentence.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed in part, and in part reversed and remanded for resentencing.

Martin J. Kushner, of Kushner Law Office, for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

HANNON, SIEVERS, and INBODY, Judges.

INBODY, Judge.

INTRODUCTION

By jury verdict, Christopher M. Moore was convicted of three counts of first degree sexual assault upon Brian K., Jr.; Daniel K.; and Sean K. He was sentenced to not less than 10 nor more than 15 years' imprisonment on each count, the sentences to run consecutively. Moore contends that certain evidence was improperly admitted, that the court improperly denied his request for a mistrial, that the evidence was insufficient to support the guilty verdicts, and that the sentences imposed were excessive. For the reasons set forth below, we affirm in part, and in part reverse, and remand for resentencing.

STATEMENT OF FACTS

We review the facts in the light most favorable to the State as we are required to do. See *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994).

This matter involves seven codefendants who were charged with sexually assaulting one or more of the above-named victims at about the same time. However, the other six individuals were not on trial with Moore. Ultimately, the codefendants were convicted of various offenses against one or more of the above-named victims.

All three victims in this case are the biological children of Brian K., Sr., and Kelly T. Brian Jr., who was 11 years old at the time of the trial, was born on March 29, 1983. Daniel, who was 9 years old at the time of the trial, was born on May 29, 1985. Sean, who was 7 years old at the time of the trial, was born on August 6, 1987. Brian Sr. and Kelly were never married and at the time of the offenses were not residing together. However, Brian Sr. is now married to Laurie K., and they reside in Council Bluffs, Iowa.

In addition to the alleged victims in this case, Kelly also has four younger children. From December 1992 through August 1993, Kelly and all of the children lived in a Park Avenue duplex in Omaha. In August 1993, the children were removed from Kelly, apparently for reasons other than these assaults, and the children were all placed in foster care at that time, except Daniel and Sean, who went to live with Brian Sr. and Laurie. Brian Jr. was placed in foster care initially, but subsequently came to live with his father in late March 1994.

On the evening of February 28, 1994, Brian Sr. first learned of the sexual assaults of Daniel and Sean when he overheard them in their bedroom saying "you're gonna suck my dick" to each other. When he asked them where they had learned that, they told him from their mother, Kelly. The boys then told their father and Laurie about having been sexually assaulted by the various defendants between December 1992 and August 1993, while they were living with their mother on Park Avenue. The boys gave the names of the parties who had assaulted them; one of the names given by the boys was of a Native American male, "Chris," later found to be Moore.

On March 1, 1994, Brian Sr. and Laurie gave statements to Officer Steven Henthorn of the Omaha Police Division concerning the sexual assault allegations that Daniel and Sean had made the night before. Daniel and Sean were also interviewed by Officer Henthorn on March 1. Sean stated that he had been assaulted 5 or 6 times at the Park Avenue duplex and gave the names of "Jessie, Willie, Roger, Chris, Lilley, Louis and Louie" as the parties who assaulted him. Daniel gave the names of "Willie, Jessie, Chris, and Roger." Daniel also spoke of being hit with leather belts and "crib sticks" and threatened by the parties not to tell anyone. Both boys stated that the parties were drinking when they sexually assaulted them, and the boys knew the parties by their first names. The first day that Officer Henthorn talked to Sean and Daniel, he also spoke to Kelly. Kelly was able to provide Officer Henthorn with the last names of some of the suspects; however, she did not know either Chris' or Lilley's last name.

On March 7, 1994, Officer Henthorn talked to Brian Jr. for the first time. At that time, Brian Jr. denied that he had been sexually assaulted, but he said he had watched it happening to Daniel and Sean. Later that month, Officer Henthorn was contacted by Brian Sr., who stated to Officer Henthorn that the boys had been discussing things, and Brian Jr. had said that he had also been sexually assaulted. Officer Henthorn subsequently interviewed Brian Jr. again on March 31. At that time, Brian Jr. told him of being sexually assaulted by a person named "Chris," and Brian Jr. showed Officer Henthorn notes he had written the night before which described the alleged assaults and identified Chris and others as the alleged perpetrators.

At some point, Officer Henthorn talked to Peggy K., who is the sister of Brian Sr. Peggy was able to provide Officer Henthorn with the last name of Lilley and thought that Chris' last name was Walker. With that information, Officer Henthorn "pulled up a Chris Walker Indian male out of the computer" and was able to obtain an Omaha Police Division photograph of him. However, during the first week of April 1994, when he showed each of the boys the photograph of Walker, none of them recognized him.

Officer Henthorn then received an anonymous phone call from someone who told him that Chris Moore was the party the police were looking for in this case. Officer Henthorn was able to obtain a photograph of Moore, and during the second week of April 1994, he individually showed each of the three boys Moore's photograph. All three boys identified Moore as being the "Chris" who had sexually assaulted them.

On June 7, 1994, Moore was charged in an original information with two counts of sexual assault of a child, both Class IV felonies. The first count alleged sexual contact between Moore and Sean, and the second count alleged sexual contact between Moore and Daniel.

In an amended information filed December 9, 1994, 1 business day before Moore was scheduled to go to trial, Moore was charged with three counts of first degree sexual assault on a child, all Class II felonies. Those charges alleged sexual penetration by Moore upon each of the three boys, Brian Jr., Daniel, and Sean, between December 1, 1992, and August 2,

1993. Moore, through counsel, objected to the substantial change in charges at a date so close to trial. The court allowed the amended charges to be filed and continued the matter to give defense counsel time to investigate the new charges.

On February 14, 1995, Moore filed six motions in limine in the district court. On February 15, the court held a *Wade* hearing on the sixth motion in limine, which was subsequently overruled. See *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). On February 28, the court ruled on the five remaining motions in limine. The first, third, and fifth motions were sustained; the second and fourth motions were overruled. The third motion in limine requested the court to enter an order preventing any mention whatsoever of any allegations of sexual misconduct with any victims other than the three children (Brian Jr., Daniel, and Sean) who were the subjects of the amended information filed against Moore.

At trial, Daniel was the first individual called to the stand. Daniel stated that at the time in question, he lived with his mother, Kelly, in a blue duplex on Park Avenue. He stated that "the Indians" came to visit his mother at that location. Daniel was able to list names of some of the individuals he was including in the group he referred to as "the Indians"; one of the individuals he referred to as "Chris." When asked if he saw "Chris" in the courtroom, Daniel identified Moore. Daniel testified at trial that Moore put his "wienie" in Daniel's mouth when Daniel was upstairs playing in his bedroom. Daniel testified that these assaults happened two times. Later in his testimony, Daniel testified that the individual he identified as Chris came to the duplex mostly in the summer months; however, that individual was also there "in the winter in the beginning."

Brian Jr. was the next individual called to testify. Brian testified that when he lived at the blue duplex, a group of people he called "the Indians" would come over to the house. This group of people included Moore. Brian Jr. also testified that these people visited at the duplex from around the time his family moved in until the time he moved out. Brian Jr. stated that they were over to the house at "[d]ifferent times." When asked by counsel if "Chris" was in court, Brian Jr. pointed out

Moore. Brian Jr. testified that while he was in his sister's room, Moore came into the room and pushed him down on the floor. When asked what happened, Brian Jr. testified that "[h]e . . . pulled down his pants and he got on, sat on my chest. Then he put his wienie in my mouth." Brian Jr. further testified that he thought that Moore was at the duplex during both the winter and the spring months.

Sean was also called to the stand. Sean testified to remembering living in a "blue house," but he could not remember when that was. He testified that he lived at the blue house with "[m]y mom and the Indians," and "my brothers and sisters." When asked who the Indians were, Sean testified: "The people that did stuff to you." Sean identified Moore when asked if "Chris" was in the courtroom. When asked what Moore did to him, Sean testified that when he was in his bedroom, Moore tied him down with rope and "stuck his wienie in my mouth." Sean testified that he could not remember if this happened more than once, but he did know Moore did it that one time.

Later in the trial, Officer Henthorn was called as a witness by the State. Officer Henthorn testified that at the beginning of the investigation, he did not know Chris' last name. He had thought Chris might be Chris Walker, but later found that this was not the correct individual. Henthorn testified that he first got the name of Chris Moore through an anonymous telephone call.

Several other witnesses were called by the State, including Laurie and Brian Sr. After the State rested, the defense made a motion for a directed verdict of acquittal, but the motion was overruled by the court.

Moore then testified on his own behalf. Moore denied committing any of the acts alleged by the victims. He stated that he could not have been involved in events that occurred from December 1992 through August 1993, because most of that time (December 14, 1992, through June 2, 1993) he was in jail in Pottawattamie County, Iowa. Following the testimony of Moore, the defense rested and renewed its motion for a directed acquittal. The motion was again overruled by the court.

After deliberation, the jury found Moore guilty as to all three counts of first degree sexual assault on a child. Moore was sentenced to 10 to 15 years' imprisonment on each of the three counts for which he was convicted. The court indicated that these sentences were to run consecutively, and accordingly, Moore had received a total sentence of 30 to 45 years. This appeal followed.

ASSIGNMENTS OF ERROR

On appeal, Moore assigns as error that (1) the trial court erred in admitting a substantial amount of hearsay and double hearsay from various witnesses over the continuing objections of Moore's counsel, (2) the trial court erred in denying Moore's motion for a mistrial when a State's witness provided information in violation of the court's order with regard to Moore's third motion in limine, (3) there was insufficient evidence upon which the jury could have validly based its verdict of guilty with regard to any of the charges against Moore, and (4) the sentences imposed were excessive, and as such were an abuse of discretion.

STANDARD OF REVIEW

[1] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

[2] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. Anderson*, 245 Neb. 237, 512 N.W.2d 367 (1994).

[3,4] A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion by the sentencing court. *State v. Manzer*, 246 Neb. 536, 519 N.W.2d 558 (1994); *State v. Wood*, 245 Neb. 63, 511 N.W.2d 90 (1994); *State v. Ice*, 244 Neb. 875, 509 N.W.2d 407 (1994); *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993). An abuse of

discretion occurs when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Wood, supra*; *State v. Lowe*, 244 Neb. 173, 505 N.W.2d 662 (1993), *postconviction relief granted on other grounds* 248 Neb. 215, 533 N.W.2d 99 (1995).

ANALYSIS

Admission of Evidence.

Moore argues that the district court erred in admitting a substantial amount of hearsay, and double hearsay, from various witnesses over the objections of Moore. In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. *Wiekhorst Bros. Excav. & Equip. v. Ludewig*, 247 Neb. 547, 529 N.W.2d 33 (1995). The admission of hearsay is controlled by the Nebraska Evidence Rules. *Wiekhorst Bros. Excav. & Equip., supra*. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Neb. Rev. Stat. § 27-801(3) (Reissue 1995).

Moore complains that Officer Henthorn and Brian Sr. testified to statements that constituted hearsay. Officer Henthorn related the things that the boys had told him about Moore's assaulting them. During this testimony, a drawing which Officer Henthorn used to have Sean describe where he touched or was touched by Moore was offered into evidence by the State and objected to by Moore. Brian Sr. testified that he first found out about the sexual abuse of his boys by talking to Daniel and Sean. Brian Sr. stated that he had talked to Brian Jr. about the incidents and that Brian Jr. denied that anything had happened to him. Brian Jr. ultimately told his father that all three boys had been told that Brian Sr. would be killed if they told anyone.

As previously noted, Daniel identified Moore during the trial and testified that Moore had put his "wienie" in Daniel's mouth when Daniel was upstairs playing in his bedroom. Brian Jr. identified Moore during the trial and testified in reference to Moore that "[h]e . . . pulled down his pants and he got on, sat on my chest. Then he put his wienie in my mouth." Sean identified Moore during the trial and testified that when he was in his bedroom, Moore tied him down with rope and "stuck his wienie in my mouth."

It appears from the questioning and statements of Moore's counsel that the defense was implying that each of the boys had been told or forced by their father or stepmother to tell these stories of abuse in order for their father to gain custody of them. Without going through each witness' testimony here, suffice it to say that it is clear that the victims were questioned about whether their father or stepmother had told them what to say or whether their father or stepmother had "reminded" them of what they had said earlier.

Section 27-801(4)(a) states that a statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . ." Brian Sr. was the last witness called by the State. Therefore, the court properly allowed the State to have Brian Sr. testify as to his sons' statements in order to rebut the implication that the boys had been told what to say. See *State v. Tlamka*, 244 Neb. 670, 508 N.W.2d 846 (1993).

Officer Henthorn was the second to last witness to testify in the State's case, and his testimony was also admissible to rebut the implication that the boys had been told what to say.

Moore next complains that the court erred in allowing into evidence the notes written by Brian Jr. concerning the assault. The State contends that these notes were offered to support Brian Jr.'s testimony that Moore had assaulted him and to show that he had not changed his story since he first disclosed what had happened.

[5] The 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*, 231 Neb. 495, 437 N.W.2d 134 (1989); *State v. Max*, 1 Neb. App. 257, 492 N.W.2d 887

(1992). Further, erroneous admission of evidence in a criminal trial is not prejudicial if it can be said that the error was harmless beyond a reasonable doubt. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). We conclude that even if any of this evidence was erroneously admitted, the statements and exhibits were repetitive of the properly admitted testimony of Brian Jr., Daniel, and Sean. Since it was cumulative evidence, its admission was not reversible error.

Mistrial.

Moore next complains that the trial court erred in refusing to grant a mistrial based upon a violation of one of his motions in limine. Prior to the commencement of trial, Moore's counsel filed numerous motions in limine. The third motion in limine requested the court to enter an order preventing any mention whatsoever of any allegations of sexual misconduct with any victims other than the three children (Brian Jr., Daniel, and Sean) who were the subjects of the amended information filed against Moore. The judge sustained this motion. During the trial, Brian Jr. was asked by the State whether Moore did anything else similar to a previous incident described by Brian Jr., *to Brian Jr.* Brian Jr., in response to this question, answered: "To my sister, to my sister." Moore immediately objected and moved for a mistrial based on the violation of the court's ruling with regard to the motion in limine. The trial judge overruled the motion, finding that the question itself, as asked by the State, was not intended to elicit the response that the witness barely whispered. The judge went on to indicate that it was questionable whether the answer was audible to the jury. The judge found that the incident did not rise to the level of prejudice necessary to grant a mistrial. In discussing whether the jury should be instructed to disregard the answer, counsel for Moore specifically indicated that he did not want the jury so instructed. No admonition was given to the jury.

[6] A motion for mistrial is properly granted only 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. *State v. Palser*, 238 Neb. 193, 469

N.W.2d 753 (1991). A motion for mistrial is directed to the discretion of the trial court. Its ruling will not be disturbed on appeal absent a showing of abuse of discretion. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993).

Moore agrees that there was no prosecutorial misconduct, but argues that since the evidence adduced was inadmissible it is presumed to be prejudicial. This issue was discussed in *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991), where a deputy sheriff volunteered that a shotgun found close by the defendant was stolen. The Nebraska Supreme Court stated that the defendant must prove that the alleged error actually prejudiced him, rather than create the mere possibility of prejudice. The court found that the prosecutor's question to the deputy was not improper, and the prosecutor bore no responsibility for the deputy's wanderings. Since the defendant could show no prejudice from the statement, the trial court properly denied the motion for mistrial.

Here, the witness who made the statement was 11 years old, and the record indicates that he either did not understand the question or was confused by it. Moore declined to have the jury admonished to disregard the statement. Moore has the burden to show that he was prejudiced by the volunteered statement of the witness, and he has not done so. Under these circumstances, it was not an abuse of discretion for the trial court to refuse to declare a mistrial.

Insufficiency of Evidence.

Moore next contends that the evidence adduced to the jury was insufficient as a matter of law to sustain his convictions for first degree sexual assault on these three boys. He contends that in this case the potential is great for an emotional decision, not a decision based on the evidence presented. We are aware that the victims are Caucasian and that Moore is Native American, but those facts alone do not constitute prejudicial error.

To be guilty of first degree sexual assault on a child as he was charged, Moore must have been a person of 19 years of age or older who subjected a person of less than 16 years of age to sexual penetration.

It is uncontested that between December 1, 1992, and August 2, 1993, Moore was a person of 19 years of age or older and that Brian Jr., Daniel, and Sean were persons of less than 16 years of age.

While it is clear that the testimony of Brian Jr., Daniel, and Sean was somewhat confused, they all consistently identified Moore as one of the individuals who sexually penetrated them. The evidence established that he was named when the boys talked to their father and stepmother about the incidents. Moore was named when the boys talked to the police. Each of the boys identified Moore in court as one of the individuals who assaulted them. Moore, while testifying, denied having committed any of the assaults on these boys which were alleged against him. The amended information stated that the assaults were alleged to have occurred from December 1992 through August 1993. Evidence was presented that Moore was incarcerated in the Pottawattamie County jail from December 14, 1992, through June 2, 1993. Moore also testified that he was at the boys' home after being released from jail in June 1993.

It is not for this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Those matters are for the finder of fact, and a conviction rendered by a jury will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

Clearly, when the evidence is viewed in the light most favorable to the State, there is sufficient evidence to support the jury's finding that Moore was guilty of first degree sexual assault on each of these three children. Therefore, Moore's contention that there was insufficient evidence to support his convictions on these charges is without merit.

Excessive Sentences.

Moore's next assignment of error is that the sentences imposed upon him were excessive.

First degree sexual assault on a child is a Class II felony, punishable by imprisonment of not less than 1 nor more than 50 years. Neb. Rev. Stat § 28-319(1)(c) and (2) (Reissue 1989) (first degree sexual assault on a child statute); Neb. Rev. Stat. § 28-105 (Reissue 1989) (felony sentences statute). Moore was sentenced to a term of imprisonment of not less than 10 nor more than 15 years on each count. These sentences are to run consecutively.

A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion by the sentencing court. *State v. Manzer*, 246 Neb. 536, 519 N.W.2d 558 (1994); *State v. Wood*, 245 Neb. 63, 511 N.W.2d 90 (1994); *State v. Ice*, 244 Neb. 875, 509 N.W.2d 407 (1994); *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993). An abuse of discretion occurs when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Wood, supra*; *State v. Lowe*, 244 Neb. 173, 505 N.W.2d 662 (1993).

Election to Go to Trial.

Moore complains that he was punished by the trial court for electing, as was his constitutional right, to force the State to produce its evidence and have his guilt determined by a jury of his peers. Moore bases his argument on the fact that the trial court informed him prior to trial that he would likely be punished more severely if he went to trial and was convicted of these charges by a jury than if he pled guilty to one count of the information as part of a plea bargain.

The record reflects that the following colloquy took place on the first morning of the jury trial:

> MR. KUSHNER: . . . .
>
> Judge, there are a couple of things I'd like to bring up on the record with Mr. Moore present to make sure there is no misunderstanding. The first is to confirm that I have discussed with Mr. Moore the status of plea negotiations prior to starting trial this afternoon. I've indicated to Mr. Moore that the County Attorney's office has stated they would be willing to let him plead to one count of this

charge against him, this Information, which would be one count of Class II sexual assault, felony Class II.

The Court has, as I understand, given some indication to me, that given what the Court knows thus far from prior trials and related matters and various things, that there is a substantial likelihood of a sentence in the four- to seven-year range. Although the Court made it clear that there is no guarantee of that, and that various additional things would have to be looked at. That I've given Mr. Moore some sense that it's my opinion that that would be a likely outcome in the case of a plea.

I've made him aware of the other options, to go to trial on all three counts, and obviously if acquitted, there's no consequence to him. But if convicted, it is my professional opinion that his sentence could be substantially longer.

And Mr. Moore and I have discussed that. We've discussed it on two different phone calls yesterday, discussed it at the jail, I believe a week ago Saturday. We've discussed it numerous times. And it's my understanding that Mr. Moore still wishes to proceed to trial. Is that right, Chris?

THE DEFENDANT: Yes.

THE COURT: Thank you, Mr. Kushner. And you are correct, counsel for the State, as well as counsel for Mr. Moore, have had several conversations with the Court, and the Court is mindful of the importance of plea bargains. And for that reason, the Court did have a conversation with counsel for the State and counsel for Mr. Moore about the probability of what the sentence would be if Mr. Moore did take the State up on its offer. The Court is aware that it should encourage plea bargains, but more importantly, the Court is aware that in this particular case of what the testimony is likely to be in this case, since the Court has had many opportunities to listen to the testimony of the victims and the other witnesses in this case.

So this is a little different situation. And Mr. Kushner, you're very correct, that there is a substantial likelihood that *if the jury comes back after hearing the testimony of*

> *the witnesses and does make a finding of guilty, that the sentence will be nowhere near what it was proposed to be in the event that Mr. Moore did decide to plead to just the one charge.*
>
> Again, the Court can make no promises, and as the Court has indicated before to Mr. Moore, that *having looked at his background and knowing what the Court does know about this particular case, these particular cases, that the Court probably would follow the suggestions of the attorneys regarding the sentence.*
>
> And I think you are correct, Mr. Kushner, for making a record so that it is very clear that you have advised your client in a very professional and in a very intelligent manner.
>
> MR. KUSHNER: Thank you.

(Emphasis supplied.)

It is evident that this colloquy could create an appearance that the trial judge was participating in the plea bargaining process with Moore and the State.

[7] It is clear that a defendant may not receive a more severe sentence because he or she pled not guilty and put the State to the expense of a trial. See, *State v. Jallen*, 218 Neb. 882, 359 N.W.2d 816 (1984); *State v. Lacy*, 195 Neb. 299, 237 N.W.2d 650 (1976). Moore contends that the trial judge participated in the plea negotiations and then enhanced his sentences solely as punishment to Moore for having elected to go to trial.

The Nebraska Supreme Court has stated that it strongly discourages judicial participation in the plea bargaining process. *State v. Ditter*, 232 Neb. 600, 441 N.W.2d 622 (1989). In taking that position, our Supreme Court quotes from *United States v. Gilligan*, 256 F. Supp. 244 (S.D.N.Y. 1966):

> "A judge's prime responsibility is to maintain the integrity of the judicial system; to see that due process of law, equal protection of the laws and the basic safeguards of a fair trial are upheld. . . .
>
> ". . . As has been urged: 'Our concept of due process must draw a distinct line between, on the one hand, advice from and "bargaining" between defense and prosecuting attorneys and, on the other hand, discussions by judges

> who are ultimately to determine the length of sentence to be imposed.' "

State v. Svoboda, 205 Neb. 175, 182–83, 287 N.W.2d 41, 45 (1980).

The most common objection to the trial judge's participating in plea bargaining has usually arisen in the context of a defendant who is seeking to set aside a guilty plea on the basis that it was not voluntary. However, the judge's participation in the plea bargaining process is also as objectionable when a plea bargain is not reached as when it is. This is due to the fact that a judge cannot encourage a plea bargain without risking, at a minimum, the appearance that the judge is attempting to coerce the defendant, the State, or both. It is one thing for a defendant to receive a more severe sentence from a judge than he was offered from the county attorney and another thing for a defendant to receive a more severe sentence than he was offered in a plea bargain when that judge had encouraged or appeared to attempt to pressure the defendant into accepting a plea bargain.

Proportionality.

Moore contends that he was sentenced more heavily than the coperpetrators in this case, who did not have jury trials. He argues that this supports his theory that the trial court was punishing him for electing to proceed with the jury trial.

As previously noted, there were seven individuals who were alleged to have participated in acts of sexual contact with one or more of the victims in this case. By virtue of an order expanding the record in this case, Moore is asking us to compare the sentences received by the other individuals to the sentences imposed upon him. Supplemental bills of exceptions were filed containing the plea hearings, trial, and sentencing hearings conducted by the same trial judge for Jesse Hallowell, William Hallowell, Roger McKinley, and Lilley Keller.

The Nebraska Supreme Court stated in *State v. Shonkwiler*, 187 Neb. 747, 751, 194 N.W.2d 172, 174 (1972):

> At least as early as 1905, this court expressed its view that where two or more defendants are convicted for the same offense and different penalties are inflicted, and it

> appears from the evidence that the defendant receiving the least punishment is at least equally guilty, it may be necessary for this court to examine the evidence to determine whether there were justifiable reasons for the distinctions and whether the higher sentence should be reduced.

See, also, *State v. Nix*, 215 Neb. 410, 338 N.W.2d 782 (1983), *overruled on other grounds, State v. Morrow*, 220 Neb. 247, 369 N.W.2d 89 (1985); *State v. Kruse*, 215 Neb. 408, 338 N.W.2d 781 (1983); *State v. Komor*, 213 Neb. 376, 329 N.W.2d 120 (1983); *State v. Javins*, 199 Neb. 38, 255 N.W.2d 872 (1977); *State v. Burkhardt*, 194 Neb. 265, 231 N.W.2d 354 (1975).

Moore contends that for basis of comparison the closest situations to his own are the cases of McKinley and William Hallowell. He further argues that the next closest would be the case of Jesse Hallowell.

McKinley appeared before the court on two counts of first degree sexual assault on a child. As part of a plea bargain, McKinley entered pleas of no contest to both counts, and a charge of first degree sexual assault on a child unrelated to this particular incident was dismissed. McKinley waived a presentence investigation and was sentenced the same day to the Nebraska Department of Correctional Services for a period of 5 to 9 years' imprisonment on each count. These sentences were to run concurrently.

William Hallowell was originally charged with two counts of first degree sexual assault on a child. As part of a plea bargain, he pled guilty to one count, and the other was dismissed. William waived a presentence investigation and proceeded immediately to sentencing. He was then sentenced to the Nebraska Department of Correctional Services for a period of 9 to 10 years' imprisonment.

Jesse Hallowell came before the court on three counts of first degree sexual assault on a child. A bench trial was held on a stipulated set of evidentiary exhibits, and the matter was submitted. Later, the court found Jesse guilty on all three counts and ordered a presentence investigation. Following a sentencing hearing, Jesse was sentenced to the Nebraska Department of

Correctional Services for a period of 5 to 8 years' imprisonment on each count. These sentences were to run concurrently.

[8] In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Lowe*, 244 Neb. 173, 505 N.W.2d 662 (1993); *State v. Ellen*, 243 Neb. 522, 500 N.W.2d 818 (1993).

[9] The mere fact that a defendant's sentence differs from those which have been imposed on coperpetrators in the same court does not, in and of itself, make the defendant's sentence an abuse of discretion; each defendant's life, character, and previous conduct may be considered in determining the propriety of the sentence. *State v. Sobieszczyk*, 2 Neb. App. 116, 507 N.W.2d 660 (1993).

Prior to actually sentencing William Hallowell, the trial judge told William that she would give him credit for not making the boys go through their testimony again and that she was willing not to give him the maximum sentence. She then sentenced him to a period of 9 to 10 years' imprisonment.

During the sentencing hearing of Jesse Hallowell, he told the court: "I just wanted to say I feel badly for all the people that had to go through this." The court responded:

> Thank you sir. I'm glad to hear you say that. . . .
>
> As you very well know, we have had a lot of hearings in this case, and all of these cases involving the co-defendants. . . .
>
> So if there's anything commendable about this terrible situation, it's the fact that you didn't make those three boys come in and have to testify any more than they already have. You certainly have a right to exercise your constitutional right to a trial, either by a jury — you chose to submit the matter to the Court. So I'm taking that into consideration.

It is not unusual for a defendant to request credit for not requiring the State to proceed to a trial. A defendant has no absolute right to a reduced sentence because he saves the State the expense of a trial, relieves the victim from having to appear in court, and accepts the responsibility of his actions. See *State v. Suffredini*, 224 Neb. 220, 397 N.W.2d 51 (1986). However, those factors may certainly be considered by the court when imposing a sentence.

However, that does not answer the question here because, in the case at bar, the trial judge created the appearance that she was participating in the plea bargain with Moore. When a judge creates the appearance of participation or actually participates in plea bargaining by encouraging or pressuring a defendant to accept a plea bargain instead of going to trial, the following rule applies:

> [C]ourts must not use the sentencing power as a carrot and stick to clear congested calendars, and they must not create an appearance of such a practice.
>
> Accordingly, once it appears in the record that the court has taken a hand in plea bargaining, that a tentative sentence has been discussed, and that a harsher sentence has followed a breakdown in negotiations, the record must show that no improper weight was given the failure to plead guilty. In such a case, the record must affirmatively show that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty.

United States v. Stockwell, 472 F.2d 1186, 1187–88 (9th Cir. 1973). See, *Hess v. United States*, 496 F.2d 936 (8th Cir. 1974); *State v. Jallen*, 218 Neb. 882, 359 N.W.2d 816 (1984).

It appears that when a judge advises the defendant of the penalty that would be imposed upon a plea of guilty and then imposes a significantly harsher sentence when the defendant is found guilty after a trial, the judge then bears the burden of establishing that the increased sentence is due solely to the facts of the case and the personal history of the defendant. If the trial court, which was involved in the plea bargaining or created the appearance thereof, fails to establish the reason for the harsher sentence, the failure to so establish renders the harsher sentence an abuse of discretion.

In *U.S. v. Mazzaferro*, 865 F.2d 450 (1st Cir. 1989), the defendant maintained his sentence was unduly harsh because he refused a plea bargain, and he had received a greater sentence than his codefendants. The *Mazzaferro* court stated:

> "When there is substantial disparity in sentences imposed upon different individuals for engaging in the same criminal activity, [where some have pled guilty and others have gone to trial], the preservation of the appearance of judicial integrity and impartiality requires that the sentencing judge record an explanation.". . .
>
> . . . In *Longval v. Meachum*, 693 F.2d 236 (1st Cir.1982) . . . the trial judge told the defendant that if he refused to plea bargain, a substantial sentence might be imposed on him. The defendant did not plea bargain and he was sentenced to 40 to 50 years imprisonment, while his co-defendant, who did plead guilty, was sentenced to 3 years. Following [the U.S. Supreme Court's holding] that a presumption of vindictiveness arises whenever a detrimental action is taken after a defendant exercises a legal right in circumstances in which there is a "reasonable likelihood of vindictiveness," we held that "the on-the-surface differential, and the total sentence imposed, are too great to allay a reasonable apprehension that the sentencing judge's original remarks were unjudicial urgings to plead, and that the sentences were a retaliatory consequence of the defendant's refusal."

(Emphasis omitted.) 865 F.2d at 459. The *Mazzaferro* court set aside the defendant's sentence and remanded the case with directions that the defendant be resentenced by a different judge.

Here, at sentencing the judge stated that in sentencing Moore she was considering the fact that his past criminal record contained numerous entries, with two felony convictions, including a 1992 robbery in Iowa and an escape charge from Nebraska. The judge also expressed her opinion that Moore committed perjury at the trial and that she has a duty to protect the public. The judge specifically mentioned the numerous times that the victims had to testify and that their memories of disgusting and depraved things will never be erased. The judge also stated that Moore had a right to a jury trial, which no one could take away, and a right to testify, but he had no right to commit perjury. Just prior to imposing the sentences, the judge stated that "I have a duty to punish you, Mr. Moore, for what you did to those little boys, and I have a duty to protect the public. And for those reasons, I'm going to send you to prison for a very, very long time."

The difficulty with the judge's statement at sentencing is that it must be read in light of the statement the judge made in encouraging the plea bargain that indicated she had looked at Moore's background and "knowing what the Court does know about this particular case . . . that the Court probably would follow the suggestions of the attorneys regarding the sentence." This would have resulted in a sentence of not less than 4 nor more than 7 years.

The record reflects that some, but not all, of the codefendants had criminal records comparable to Moore's record. Further, the record discloses that the codefendants did essentially the same acts as Moore, and yet the trial judge did not feel it was necessary to impose such long sentences against them to protect the public. The only fact that the judge indicated that she became aware of after the plea bargain had been disclosed on the record was that Moore committed perjury during the trial. The record does not indicate that Moore was convicted of perjury.

Based on this record, we cannot say that the court met the required burden of stating adequate reasons why Moore was sentenced more severely on each count than the sentence he was offered on one count as part of the plea bargain which had been disclosed on the record or why he was sentenced, as to each count, more severely than his codefendants. As a result, we have no alternative but to conclude that the court sentenced Moore more severely because he insisted upon his right to a jury trial and that, consequently, Moore's sentences were an abuse of discretion. Thus, we must determine that the sentence imposed on each of the three counts by the trial judge is clearly untenable and unfairly deprived Moore of a substantial right and a just result.

CONCLUSION

We affirm the court's ruling concerning the admission of evidence, and we find that the evidence was sufficient to support

Moore's convictions. However, we find that the sentences imposed upon Moore were an abuse of discretion because the sentencing judge's reasons for the sentences were clearly untenable and unfairly deprived Moore of a substantial right and a just result. Therefore, we reverse in part, and remand for resentencing by a different judge.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR RESENTENCING.

LAWRENCE ROSE, APPELLANT, V. VICKERS PETROLEUM, APPELLEE.

546 N.W.2d 827

Filed April 30, 1996. No. A-94-394.

1. **Administrative Law: Appeal and Error.** When a petition seeking review of an agency's decision under the Administrative Procedure Act is filed in the district court on or after July 1, 1989, the review shall be conducted by the district court de novo on the record. The judgment rendered or final order made by the district court may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Judgments: Appeal and Error.** An appellate court, in reviewing a judgment of the district court for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
3. **Federal Acts: Civil Rights: Fair Employment Practices.** Because the Nebraska Fair Employment Practice Act is patterned from that part of the Civil Rights Act of 1964 contained in 42 U.S.C. § 2000e (1994), it is appropriate to look to federal court decisions construing similar and parent federal legislation.
4. **Fair Employment Practices: Proof.** The well-known order and allocation of proof and burdens set forth in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981), are applicable to discriminatory employment treatment claims, as well as retaliatory claims.
5. ____: ____. An employee must first prove to the fact finder by a preponderance of the evidence a prima facie case of retaliation. If the employee proves a prima facie case, the employer has the burden to articulate a legitimate nondiscriminatory reason for the employment decision in order to rebut the inference of retaliation raised by the employee's prima facie claims. Once the employer

produces such a reason, the employee then has the burden to prove by a preponderance of the evidence that the legitimate reasons offered by the employer were but a pretext for retaliation.

6. **Fair Employment Practices: Proof: Intent.** At all times, the employee retains the ultimate burden of persuading the fact finder that he has been the victim of intentional impermissible conduct.
7. ___: ___: ___. The employee must prove not only falsity of the proffered reasons given by the employer, but also that discriminatory motive was the true reason for the discharge.
8. ___: ___: ___. The trier of fact in a discriminatory employment case may rely on inferences rather than direct evidence of intentional acts, but intent must be proved by a preponderance of the evidence, whether direct, circumstantial, or otherwise.
9. **Fair Employment Practices: Proof.** The elements of a prima facie case for retaliation are that the employee must show that (1) he or she was engaging in a protected activity, (2) he or she suffered an adverse employment decision, and (3) there was a causal link between the protected activity and the adverse employment decision.
10. ___: ___. An employee is not required to prove the merits of the underlying discrimination charge which forms the basis for the alleged retaliatory treatment so long as the employee possessed a good faith belief that the offensive conduct violated the law.
11. **Fair Employment Practices.** Finding of unlawful employer retaliation does not depend on the merits of the underlying discrimination complaint.
12. ___. Employer retaliation even against those whose charges are unwarranted cannot be sanctioned.
13. ___. The law does not permit an employee's well-founded, albeit unsuccessful, complaint of racial discrimination to be used by an employer as an excuse to retaliate by firing the employee.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Affirmed.

Jerold V. Fennell, of Domina & Copple, P.C., for appellant.

Michael T. Levy for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges.

MILLER-LERMAN, Chief Judge.

Lawrence Rose appeals the order of the district court for Douglas County, which affirmed the final order of the Nebraska Equal Opportunity Commission (NEOC) dismissing Rose's complaint. In his complaint and at the hearing, Rose claimed that he was the victim of a retaliatory firing several days after he had complained to the operations manager of Vickers

Petroleum (Vickers) that a supervisor had made a racial slur against him. The recommended order of the hearing examiner, as adopted as the final order of the NEOC, concluded that Rose had not participated in protected activity and was not a protected person within the meaning of the Nebraska Fair Employment Practice Act (NFEPA), Neb. Rev. Stat. § 48-1101 et seq. (Reissue 1988 & Cum. Supp. 1990), and that "[e]ven if [Rose] had proved a prima facie case of discrimination by retaliation, [Vickers had] successfully articulated a reasonable non-discriminatory explanation for its decision to terminate [Rose] from its employment." Although we find that the hearing examiner misstated the law, and it appears that his misstatement was adopted by the NEOC and by the district court which affirmed the decision, we conclude that the recommended order and dismissal were supported by competent evidence, and, accordingly, we affirm.

STATEMENT OF FACTS

Rose, an African-American, was employed with Vickers as a cashier at its 40th and Cuming Streets location in Omaha.

On March 7, 1991, Robert Settlemyer, the district manager, came to the station. According to Rose's testimony, Settlemyer looked at Rose, who was not in a Vickers uniform, and said, "Where's your smock at, boy?" There is some evidence that Settlemyer repeated this comment a second time. Rose testified that he ignored the remark because he knew the comment was being directed at him and because the term "boy" was "a polite way of calling me a nigger."

After Settlemyer left, Rose told his manager, Cenon Ortiz, that he was upset over Settlemyer's use of the racial slur and that he wanted to call the home office to complain.

The next day, Rose called Vickers' home office in Denver and spoke with Denise K. Beisel, the operations manager, to register a complaint. In accordance with Vickers' policy, Beisel then called the Equal Employment Opportunity Commission coordinator for Vickers.

Approximately on March 11, 1991, Settlemyer called Rose concerning the complaint and apologized. This call was in response to Beisel's instruction to him to call Rose and apologize.

On March 25, 1991, Vickers fired Rose. This dismissal occurred after Rose called his employer twice that day to inform the employer that he would be late to work, evidently because Rose was working with the police in an effort to recover tires and rims stolen from Rose's car. Rose's supervisor, Rick Tangeman, attempted to find a replacement for Rose and, when he was unable to get coverage, directed Rose to report for work. Rose did not come in at 2 p.m. as scheduled, but showed up 3 hours later. Rose was fired upon his arrival. The firing was consistent with company policy to fire workers for insubordination, but not consistent with a policy that one could not terminate an employee without consulting another supervisor.

The record shows that Tangeman was assigned as manager of the 40th and Cuming Streets location 5 days before Rose's dismissal. Tangeman testified that prior to firing Rose, he was aware that Rose had complained about Settlemyer's remark.

Rose filed a complaint with the NEOC based on a claim of retaliatory termination. A hearing was conducted on January 11 and 12, 1993. Five witnesses testified live. Their testimony consumes about 230 pages. Twenty-seven exhibits were received in evidence. In addition, three witnesses appeared by deposition. A "Recommended Order and Decision" was issued on April 5, 1993, recommending dismissal of the complaint as noted above. The NEOC's final order adopting the recommendations over Rose's objection was filed May 21, 1993. Rose appealed the dismissal to the district court, which affirmed the order. This appeal followed.

ASSIGNMENTS OF ERROR

Rose assigns the following three errors: (1) The NEOC erred in determining that Rose " 'did not participate in a protected activity' "; (2) the NEOC erred in not finding that Rose made a prima facie showing of discrimination by retaliation; and (3) the NEOC erred in failing to find that Vickers' proffered reason for Rose's discharge was not the true reason for the employment decision.

STANDARD OF REVIEW

[1,2] Rose appealed the NEOC decision under the Administrative Procedure Act. See Neb. Rev. Stat. § 84-917 (Reissue 1994). When a petition seeking review of an agency's decision under the Administrative Procedure Act is filed in the district court on or after July 1, 1989, the review shall be conducted by the district court de novo on the record. § 84-917(5)(a). The judgment rendered or final order made by the district court may be reversed, vacated, or modified by an appellate court for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Cum. Supp. 1990); *Metro Renovation v. State*, 249 Neb. 337, 543 N.W.2d 715 (1996); *Bell Fed. Credit Union v. Christianson*, 244 Neb. 267, 505 N.W.2d 710 (1993); *Davis v. Wright*, 243 Neb. 931, 503 N.W.2d 814 (1993). An appellate court, in reviewing a judgment of the district court for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Id.* See, also, *Ballard v. Nebraska Dept. of Soc. Servs.*, 2 Neb. App. 809, 515 N.W.2d 437 (1994).

ANALYSIS

[3] The Nebraska Supreme Court has stated:

> Because the NFEPA is patterned from that part of the Civil Rights Act of 1964 contained in 42 U.S.C. §§ 2000e et seq. (1976), it is appropriate to look to federal court decisions construing similar and parent federal legislation. See, *Richards v. Omaha Public Schools*, 194 Neb. 463, 232 N.W.2d 29 (1975); *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, [217 Neb.] 289, 348 N.W.2d 846 (1984).

Airport Inn v. Nebraska Equal Opp. Comm., 217 Neb. 852, 856, 353 N.W.2d 727, 731 (1984). Accord, *City of Fort Calhoun v. Collins*, 243 Neb. 528, 500 N.W.2d 822 (1993); *Bluff's Vision Clinic v. Krzyzanowski, ante* p. 380, 543 N.W.2d 761 (1996).

[4-6] The well-known order and allocation of proof and burdens set forth in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981), are applicable to discriminatory employment treatment

claims, as well as retaliatory claims. *Harris v. Misty Lounge, Inc.*, 220 Neb. 678, 371 N.W.2d 688 (1985). See, also, *Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985). Thus, Rose must first prove to the fact finder by a preponderance of the evidence a prima facie case of retaliation. If Rose proves a prima facie case, Vickers has the burden to articulate a legitimate nondiscriminatory reason for the employment decision in order to rebut the inference of retaliation raised by Rose's prima facie claims. Once Vickers produces such a reason, Rose then has the burden to prove by a preponderance of the evidence that the legitimate reasons offered by Vickers were but a pretext for retaliation. See *Texas Dept. of Community Affairs v. Burdine, supra*. At all times, Rose retains the ultimate burden of persuading the fact finder that he has been the victim of intentional impermissible conduct. See *id.*

[7] The U.S. Supreme Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), heightened the employee's burden in discrimination cases. It is now incumbent upon an employee to prove not only falsity of the proffered reasons given by the employer, but also that discriminatory motive was the true reason for the discharge. *Id.* We note that the Nebraska Supreme Court recently adopted the *St. Mary's Honor Center* burdens in the context of a housing discrimination claim in *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994).

[8] The trier of fact may rely on inferences rather than direct evidence of intentional acts, but intent must be proved by a preponderance of the evidence, whether direct, circumstantial, or otherwise. See, *Texas Dept. of Community Affairs v. Burdine, supra*; *Board of Trustees v. Sweeney*, 439 U.S. 24, 99 S. Ct. 295, 58 L. Ed. 2d 216 (1978); *Crawford v. Western Elec. Co., Inc.*, 614 F.2d 1300 (5th Cir. 1980).

It is important at the outset to note that Rose's claim is for alleged retaliatory discharge, not for racial discrimination based on the comment uttered by Settlemyer. Section 48-1114 of the NFEPA provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his or her

> employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he or she (1) has opposed any practice made an unlawful employment practice by sections 48-1101 to 48-1125, (2) has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under sections 48-1101 to 48-1125, or (3) has opposed any practice or refused to carry out any action unlawful under federal law or the laws of this state.

Under § 48-1114, an individual who has opposed discriminatory employment practices is protected under § 48-1114(1). Thus, Rose's claim is for retaliation, and the issue before the fact finder was whether or not Vickers retaliated against Rose by firing him either because he had complained to headquarters about Settlemyer's comment or because he had otherwise opposed an unlawful practice.

[9-12] In analyzing the evidence in a retaliation case, the courts have stated that the elements of a prima facie case for retaliation are that "the plaintiff must show (1) that [he or] she was engaging in a protected activity, (2) that [he or] she suffered an adverse employment decision, and (3) that there was a causal link between the protected activity and the adverse employment decision." *Ruggles v. California Polytechnic State University*, 797 F.2d 782, 785 (9th Cir. 1986). See, also, *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033 (2d Cir. 1993); *Rath v. Selection Research, Inc.*, 978 F.2d 1087 (8th Cir. 1992); *Petitti v. New England Tel. & Tel. Co.*, 909 F.2d 28 (1st Cir. 1990); *Manoharan v. Columbia U. Col. of Phys. & Surgeons*, 842 F.2d 590 (2d Cir. 1988). Although there is authority to the contrary, the majority view is that an employee is not required to prove the merits of the underlying discrimination charge which forms the basis for the alleged retaliatory treatment so long as the employee possessed a good faith belief that the offensive conduct violated the law. *Cosgrove v. Sears, Roebuck & Co., supra*; *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304 (6th Cir. 1989); *Manoharan v. Columbia U. Col. of Phys. & Surgeons, supra*; *Womack v. Munson*, 619 F.2d 1292

(8th Cir. 1980), *cert. denied* 450 U.S. 979, 101 S. Ct. 1513, 67 L. Ed. 2d 814 (1981); *Pettway v. American Cast Iron Pipe Company*, 411 F.2d 998 (5th Cir. 1969); *James v. Runyon*, 843 F. Supp. 816 (N.D.N.Y. 1994); *Hulme v. Barrett*, 480 N.W.2d 40 (Iowa 1992). Thus, in *James v. Runyon, supra*, the trial court stated that a "finding of unlawful retaliation . . . does not depend on the merits of the underlying discrimination complaint." 843 F. Supp. at 825. Elsewhere it has been stated that "employer retaliation even against those whose charges are unwarranted cannot be sanctioned." *Womack v. Munson*, 619 F.2d at 1298.

In his "Recommended Order and Decision," the hearing examiner concluded that Rose did not participate in a protected activity when he complained about Settlemyer's comment and was, therefore, not a protected person under the NFEPA. In his discussion, the hearing examiner includes a string of citations of authority composed of numerous cases which hold that an isolated racial slur by a coemployee does not amount to an unlawful employment practice. See, e.g., *Winfrey v. Metropolitan Utilities Dist.*, 467 F. Supp. 56 (D. Neb. 1979). The hearing examiner reasoned that "if there were no 'unlawful employment practice' then it would be improper to consider whether an employer's actions were discriminatory or not." Thus, the hearing examiner concluded that because Rose's complaint about Settlemyer's isolated racial remark would not succeed in establishing an unlawful employment practice, his claim based on retaliatory firing for having registered an unmeritorious complaint could not succeed. We do not agree.

[13] As noted above, the law does not permit an employee's well-founded, albeit unsuccessful, complaint of racial discrimination to be used by an employer as an excuse to retaliate by firing the employee. The hearing examiner misapprehended the law when he concluded otherwise. Notwithstanding this conclusion, the examiner, nevertheless, considered the remainder of the evidence and elsewhere concluded that "[e]ven if [Rose] had proved a prima facie case of discrimination by retaliation, [Vickers] successfully articulated a reasonable non-discriminatory explanation for its

decision to terminate [Rose] from its employment." The hearing examiner further found:

> [Rose] failed to show by a preponderance of the evidence [Vickers'] explanation for his termination was mere pretext for discrimination by retaliation. [Vickers'] actions were, more than likely, motivated by valid reasons for [Rose's] termination rather than by intent to retaliate against [Rose] on account of his having allegedly engaged in any protected activities.

In its de novo consideration of the appeal, the district court stated that it had made a complete review of the record and that

> the Court finds that the decision of the hearing officer of the Equal Opportunity Commission should be and the same is hereby affirmed. The Court having found that said decision was supported by competent, material, and substantial evidence in view of the entire record as made, and said decision was not arbitrary or capricious.

We have reviewed this appeal for error on the record, as we must. Although the hearing examiner misapprehended the law, he went on to consider the evidence and concluded that Rose's claim of retaliation was not adequately proved. Specifically, he found that there was sufficient evidence of a legitimate reason for terminating Rose due to tardiness and other reasons and insufficient evidence that the explanations were pretextual. Thus, the hearing examiner found that Rose failed to prove causation between his complaint and subsequent discharge. The district court adopted this reasoning.

The record shows that Rose came into work 3 hours late on March 25, 1991, and was fired by an individual who, although aware of it, was not involved in the racial slur incident. There was other evidence that Rose had been late on other occasions. During Tangeman's first week working at the 40th and Cuming Streets station, Rose left after 1 hour due to illness. There were ongoing problems with cigarette counts and reported cash shortages at the station during Tangeman's first week. Rose presented evidence that his performance was generally satisfactory and that other employees who had been tardy were not fired.

It is for the finder of fact to weigh the evidence and resolve the conflicts that may be presented. It was for Rose to establish to the fact finder that in the absence of his reporting of Settlemyer's remark, he would not have been fired. Rose failed to prove to the fact finder the causal link between the protected activity and the adverse employment decision. See, *Ruggles v. California Polytechnic State University*, 797 F.2d 782 (9th Cir. 1986); *Muehlhausen v. Bath Iron Works*, 811 F. Supp. 15 (D. Me. 1993); *Triplett v. Electronic Data Systems (EDS)*, 710 F. Supp. 667 (W.D. Mich. 1989); *Tate v. Dravo Corp.*, 623 F. Supp. 1090 (W.D.N.C. 1985). See, also, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). The hearing examiner concluded that even if Rose had demonstrated his prima facie case of retaliatory discharge, Vickers terminated Rose's employment for nondiscriminatory reasons and that Rose failed to prove that the reasons articulated by Vickers were pretextual in nature. There is competent evidence in the record to support these findings. In our review of this appeal for error on the record, we conclude that the district court, which reviewed the record de novo, did not err in finding that Rose's complaint was properly dismissed by the NEOC.

AFFIRMED.

BARBARA OSBORN ET AL., APPELLANTS, V. KRISTI J. KELLOGG AND NEBRASKA EQUAL OPPORTUNITY COMMISSION, APPELLEES.

547 N.W.2d 504

Filed May 7, 1996. No. A-94-1227.

1. **Administrative Law: Judgments: Final Orders: Appeal and Error.** A judgment rendered or final order made by the district court pursuant to the Administrative Procedure Act may be reversed, vacated, or modified on appeal for errors appearing in the record.

2. **Judgments: Appeal and Error.** An appellate court, in reviewing a judgment of the district court for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
3. **Discrimination: Proof.** In housing discrimination cases, (1) the plaintiff must establish a prima facie case of discrimination; (2) if the plaintiff succeeds in so doing, the defendant has the burden of articulating a legitimate, nondiscriminatory reason for its action; and (3) if the defendant successfully rebuts with a legitimate, nondiscriminatory reason, the plaintiff must establish by a preponderance of the evidence that the legitimate reason offered by the defendant was not its true reason, but a pretext for discrimination.
4. ____: ____. In order to establish a prima facie case of housing discrimination, the plaintiff must prove by a preponderance of the evidence (1) that he or she is a member of a racial minority, (2) that he or she applied for and was qualified to rent or purchase the housing, (3) that he or she was rejected, and (4) that the housing opportunity remained available.
5. ____: ____. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.
6. **Discrimination: Proof: Words and Phrases.** The term "pretext" means pretext for discrimination; to establish that the proffered reason for the action taken by the employer was a pretext for discrimination, the employee must show both that the proffered reason was false and that discrimination was the real reason.
7. **Appeal and Error.** To be considered by an appellate court, an error must be both assigned and discussed in the brief of the one claiming that prejudicial error has occurred.

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

Thomas R. Lamb and Amie C. Martinez, of Anderson, Creager & Wittstruck, P.C., for appellants.

Jeffrey S. Schmidt, of Burns & Associates, for appellees.

HANNON and MUES, Judges, and WARREN, District Judge, Retired.

WARREN, District Judge, Retired.

Kristi J. Kellogg filed a complaint with the Nebraska Equal Opportunity Commission (NEOC), alleging racial discrimination in housing against Barbara Osborn, Keith Osborn, and Pam Lyman (hereinafter referred to as the Osborns). Kellogg claimed that the Osborns denied her rental application because her live-in boyfriend was black. The NEOC found for Kellogg, and the judgment was affirmed by the Lancaster County District Court. The Osborns now appeal to this court.

FACTUAL BACKGROUND

Kellogg, the complainant in this action brought under the Nebraska Fair Housing Act, is a 31-year-old white female and the mother, by a previous relationship, of Mindy, an 11-year-old girl. Kellogg's boyfriend is James Greene, a 41-year-old black male. Two of the defendants are Keith Osborn and Pam Lyman, husband and wife, who own the house located at 240 North 31st Street, Lincoln, Nebraska, that Kellogg and Greene attempted to lease. Keith and Pam live in Illinois. Barbara Osborn, Keith's mother, is the remaining defendant, who manages Keith's property in Lincoln.

Both Kellogg and Barbara work at the Nebraska Department of Motor Vehicles (DMV). On May 4, 1993, Barbara overheard Kellogg talking to two coworkers about how hard it was for her "to find a place that accepts pets." Barbara then went to Kellogg's desk and gave her a note which reads as follows: "Chris [sic], I have a lower half of house at 240 No. 31st. Back yd all fenced (almost). Dog okay if mature. Yardwork, water & sewer & garbage pd. 1 yr lease $375[.]" The note was signed "Barb." Kellogg testified that she read the note and asked Barbara how many bedrooms it had, to which Barbara replied that it had one. Kellogg further testified that she told Barbara that she needed two bedrooms because her boyfriend and child would also be living there. According to Kellogg, Barbara then said: " 'Well, the people that lived there before used the laundry room as a bedroom, and two children slept in the basement.' " Kellogg also testified that Barbara "said it would be workable, that we could work something out."

The Osborns' house at 240 North 31st Street is separated into two parts, the upper half, which is leased separately, and the lower half, which Kellogg and Greene desired to rent. The lower half of the house contains only one bedroom and one bathroom. There is evidence in the record, however, that past tenants have used both the laundry room and the basement as bedrooms, despite the Osborns' contention that the basement is not habitable.

At 4 p.m. on May 4, 1993, Kellogg and Barbara met at the house so that Kellogg could view the premises. Kellogg testified that Barbara asked if Kellogg's boyfriend "could fix the fence, because half of it was down, and keep the gutters clean," to which Kellogg replied affirmatively. Before leaving, Barbara gave Kellogg the key to the house so that she could bring her boyfriend over after Kellogg got off work from K mart, where she worked part time.

Kellogg returned to the house with Greene at approximately 10:30 that night. According to Kellogg, they spent about 15 minutes inside the house. A neighbor, Clyde Zweerink, who told Barbara that he would keep an eye on the vacant lower half of the house, saw that the lights were on and that the curtains were moving. As a result, Zweerink went over to startle whoever was inside the house. Kellogg apparently was standing between the closed screen door and the open inner door, trying to get the key out of the inner door, when she observed Zweerink through the screen door. Kellogg screamed, and Greene ran from the living room to her aid, stopping somewhere behind and off to the side of Kellogg. Greene testified that he was able to see a white male through the screen door. Zweerink, however, testified that he did not see anyone besides Kellogg, even though the lights were still on inside the house. After being told by Kellogg that she had Barbara's permission to be there, Zweerink returned home, where he continued to watch the house from his porch. Zweerink testified that he saw two to three figures leave the house but was unable to identify them or their race.

The following day, Kellogg and her daughter, Mindy, met Barbara at the house. While Kellogg showed Mindy around, Barbara, according to Kellogg, went over to Zweerink's house to see when he was going to fix the garbage disposal. When Barbara came back over, she gave Kellogg two applications and told her that she would also need a deposit check, which according to Keith is standard application procedure and does not mean that an application has been approved. According to Kellogg, Zweerink came over 10 minutes later and started working on the garbage disposal. Barbara testified that she talked to Zweerink only about the garbage disposal.

Kellogg returned the completed applications with the deposit check on the morning of May 6, 1993. Kellogg testified that Barbara told her that Keith would make the final decision. On May 8, Kellogg received a letter from Barbara, dated May 7, 1993, rejecting their applications. The reasons proffered were as follows:

> Although you're a really nice girl, we like to limit the number of people residing at any one residence to no more than three total. This is based on 30 years experience. With the tenant upstairs already in residence now for four years, the total with your applications would come to four people. Also, we feel because the downstairs unit has only one bedroom, there really isn't room for three people to be satisfied for very long of a time. Therefore, we try to rent to only one person in that unit and not more than two people.
>
> Although I have never met your boyfriend, and no references were proficed [sic] on his application form, his income wouldn't be sufficient to cover the expenses should anything happen to you, i.e., severe illness or loss of employment.

At that point in time, both Kellogg and Greene had already given notice to their landlords that they would be moving, believing that they already had the lower half of the Osborns' house rented. As a result of being pressed for time, Kellogg and Greene signed a year lease for another place that was $75 higher in rent per month ($450 compared to $375), although it is undisputed that it also had superior facilities.

On her rental application, Kellogg listed that between her two jobs at the DMV and K mart, both of which she had worked for during the past 6½ years, she earned approximately $1,700 per month. Kellogg listed both bank references and credit references. Furthermore, although she had a pet dog, she stated on the application that she agreed not to bring or allow pets on the premises without written permission. On his rental application, Greene, who worked at Weathercraft Roofing as a roofer, listed his income at $800 per month. However, Greene did not list any bank or credit references. We note that the application did not inquire as to the race of the applicant.

On May 16, 1993, the Osborns leased the house to Huishen and Ying Li. On the Lis' application, they listed that, in addition to themselves and their 10-month-old daughter, two of their parents who were "visiting [the] U.S. for [a] short stay," would be residing with them. Furthermore, they listed their income at $20,500 per year. We note from their application that only Huishen was employed and that together they had no credit references. The record also contains the lease of Jimmy and Angelique Suggett, dated January 28, 1993, for the same property. The Suggetts, who also had one child, listed no bank or credit references in their rental application. Only Jimmy was employed, earning a wage of $6.25 per hour.

At trial, Keith testified that although his mother screens the applicants, he reserves the final decision. However, Keith further testified that he did not make the final decision in Kellogg's case. According to Keith, on May 4, 1993, he had a conversation with Barbara in which she stated that she might have someone interested in renting the house. Keith testified that he talked with Barbara again on May 6, in which conversation he learned that she had received a deposit for the house. At trial, Keith confirmed that it was his mother's decision to not accept the applications, based on his advice and that of others. According to Keith, he told Barbara that due to property damage from the pets of past tenants he "in no way, shape, or form" wanted to rent the house to anyone who had a pet. Keith also claimed that he told his mother that he did not care whether the property sat empty for 6 months because he wanted somebody who had good credit references, a good job, and did not smoke. The record also demonstrates that Keith was concerned with the habitability of the basement.

At trial, Barbara claimed that it was not until May 5, 1993, that she discovered that Kellogg's boyfriend would be renting the house with Kellogg. Barbara further claimed that she did not learn that Greene was black until the week after she rejected Kellogg's application. Barbara also insisted that she never talked with Zweerink about anything except the garbage disposal on May 5. When asked whether she had talked to Keith about Zweerink's having seen Kellogg's boyfriend, she replied, "No. His name never came up. Never." When Keith was asked whether his mother said anything to him that indicated that she knew that one of the applicants was black, Keith replied, "Never." Keith claimed that he did not find out about Greene until weeks later when his mother told him that Kellogg was telling people at work that her application was rejected because Greene was black. Keith also claimed that he did not have any information that the neighbor, Zweerink, had seen a black man.

At trial, Barbara explained that in her letter she listed only the four most remote reasons for rejecting Kellogg's application because Barbara wanted to be nice to Kellogg. Barbara claimed that there were in fact at least 16 reasons for rejecting Kellogg's application, though she could only list the following reasons in addition to those given in the rejection letter: (1) She did not want two unmarried people living together because she felt that it was morally wrong, although her son and his wife lived together before their marriage; (2) Kellogg wanted two bedrooms and a shower, both of which the lower half of the house did not contain; (3) Kellogg had a dog, which both Keith and a terminally ill neighbor requested that the new tenant not have; (4) Kellogg proved unreliable and untrustworthy because she "played sick" from work, did not return the key to the house as requested, and returned the applications and deposit during work hours at the DMV, contrary to Barbara's instructions; (5) Greene had no credit references; (6) she had not met Greene and could not understand why a roofer would not get off work until 11 p.m.; (7) Greene's income was insufficient if Kellogg got sick or lost her job; (8) she did not want an unsupervised 11-year-old girl in the house; (9) the tenant upstairs did not want tenants downstairs who smoked; (10) Kellogg received a bad reference from her prior landlord; (11) Kellogg wanted to move in before June 1, 1993; and (12) Keith told her that he did not want a " 'bunch of singles' " living in the house.

Randall Chapp, an investigator for the NEOC, interviewed Keith over the telephone regarding Kellogg's rejection. At trial, Investigator Chapp testified as follows:

> I asked him if he was aware or if his mother was aware that the complainant's boyfriend was black prior to receiving the applications, and he said yes, mom had said

> that Clyde, the neighbor across the street, had told her that the complainant and a black man had been looking at the house late at night and that — he went on to say that she was not aware that the black gentleman was going to be part of the renters in the house until after she had received the applications from the complainant and then realized that the black man was her boyfriend.

Investigator Chapp also testified, contrary to Keith's earlier testimony, that Keith told him that although he set guidelines for his mother, all decisions regarding applications were made by his mother. With Keith's permission, Investigator Chapp taped that phone conversation, the relevant part of which was offered into evidence and is as follows:

> MR. CHAPP: Did your mother say anything about [Kellogg's] boyfriend being black?
>
> MR. OSBORN: She mentioned that the neighbor who came over that evening to see who was going through the house mentioned that there was a black man with her, and I don't think that he even knew at first that that person was thinking of renting the apartment or anything like that. He was just basically checking out who was over there, and the lady said that, "Well, Barb gave me the key to look over the apartment to see about renting it."
>
> MR. CHAPP: Okay.
>
> MR. OSBORN: But he may have mentioned that there was a black man with this woman, but I had no idea at that time that this man would be involved in the renting of the property until the next day when Mom got the applications and stuff from this person.

Investigator Chapp testified that he also interviewed Barbara, who told him that she did not think that it was right that an 11-year-old girl should have to go through an unmarried couple's bedroom to use the bathroom.

The NEOC hearing examiner first concluded that Kellogg met her burden of establishing a prima facie case of housing discrimination, finding that Kellogg was a member of a protected class under the act by virtue of her association with Greene; that the Osborns were aware of Greene's race at least by May 6, 1993, when Kellogg returned the applications to

Barbara; that Kellogg applied for and was qualified to rent the subject property; that Kellogg was rejected for the housing; and that the housing opportunity remained available after her rejection.

The NEOC hearing examiner also concluded that the Osborns met their burden of articulating legitimate, nondiscriminatory reasons for rejecting Kellogg's application. Although the Osborns gave many reasons for rejecting Kellogg's application, the NEOC hearing examiner found that only the following six reasons were legitimate, nondiscriminatory reasons for their action: (1) The Osborns wanted to limit the total number of people in the house to three, (2) there was insufficient space for three people to live in the lower half of the house, (3) Greene did not list any credit references and his income would be insufficient to cover expenses if Kellogg was unable to work, (4) Kellogg's dog was unacceptable, (5) Kellogg and Greene were not married and Mindy would have to pass through their bedroom to get to the bathroom, and (6) the upstairs tenant did not want any downstairs tenants who smoked.

Lastly, the NEOC hearing examiner concluded that Kellogg met her final burden of proving by a preponderance of the evidence that the reasons offered by the Osborns were not their true reasons, but were, instead, a pretext for intentional housing discrimination. The NEOC hearing examiner found the following as evidence of pretext:

> 1. Ms. Osborn's testimony that she wanted to limit the total number of occupants in the whole residence (upper and lower units) to three (3); yet she rented to the Li family which had five (5) members; and she also rented to the Suggett family which had three (3) members, just as the Complainant's family did.
>
> 2. Respondents' requiring two (2) separate rental applications from the Complainant and Mr. Greene, while only requiring one (1) from the Li Family and Suggett Family.
>
> 3. Respondents' requirement that the Complainant have a secondary source of income, when no such demand was made upon Ying Li or Jimmy Suggett. Complainant's total

income was approximately $20,000.00 per year, which was about the same as Ying Li's annual income. Mrs. Li was unemployed and provided no additional income. Jimmy Suggett's annual income was approximately $12,000.00, which was far less than the Complainant earned annually. Mrs. Suggett was unemployed and provided no additional income. Nevertheless, Mr. Greene's $9,600.00 annual salary was a secondary source of income for the Complainant. However, the Respondents still would not rent to her.

4. The Complainant had been on both of her current jobs in excess of six (6) years; Mr. Greene had been on his current job for approximately three (3) years; Ying Li had been on his current job for only one (1) year; and Jimmy Suggett had been on his current job for only nine (9) months.

5. Respondents' rejection letter (Exhibit 2) mentions the lack of bank references and credit references on Mr. Greene's rental application (Exhibit 5) as a reason for the rejection. I specifically note that Ying Li's rental application (Exhibit 7) did not list credit references; Jimmy Suggett's rental application (Exhibit 8) did not contain either bank references or credit references. The Complainant's rental application (Exhibit 4) was complete with bank references, credit references and person references,yet [sic] she was rejected for the housing.

6. Ms. Osborn told the Complainant that the final decision on the applications would be made by Keith Osborn; however, Mr. Osborn testified that Ms. Osborn made the final decision on the Complainant's and Mr. Greene's applications.

7. Barbara Osborn's note (Exhibit 1) stating that a dog would be acceptable, and her subsequent usage of the existence of Complainant's dog as a reason for the rejection.

8. Ms. Osborn's attempt to shun responsibility for the rejection, by suggesting that the tenant in the upstairs unit did not want a smoker living in the lower unit.

> 9. Ms. Osborn suggested that the subject housing unit would be adequate for the Complainant's needs, by telling her that the people who lived there before had two (2) children sleeping in the basement, and something could be worked out. Complainant agreed that it was adequate and told Ms. Osborn that she would take the housing unit. Subsequently, in her letter of rejection, Ms. Osborn stated that there was not enough space for three (3) people to be satisfied for long.

The NEOC hearing examiner consequently ordered the Osborns to (1) pay Kellogg $900 (the difference in rent for the period June 1, 1993, to May 31, 1994); (2) cease and desist from maintaining the discriminatory housing practice of refusing to rent any house, duplex, or apartment to any individual on account of that person's race or race by association; (3) pay Kellogg $1,197.60 in attorney fees and costs; and (4) pay $2,000 as a civil penalty for the discriminatory acts committed by them against Kellogg.

The Lancaster County District Court, which reviewed the judgment de novo, adopted the findings of fact and conclusions of law of the NEOC hearing examiner and affirmed the decision.

ASSIGNMENTS OF ERROR

The Osborns argue that the district court erred in finding that the NEOC's ruling was supported by competent, material, and substantive evidence in view of the entire record and in determining that the NEOC's ruling was not arbitrarily and capriciously made.

STANDARD OF REVIEW

[1,2] A judgment rendered or final order made by the district court pursuant to the Administrative Procedure Act may be reversed, vacated, or modified on appeal for errors appearing in the record. Neb. Rev. Stat. § 84-918(3) (Reissue 1994); *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994). An appellate court, in reviewing a judgment of the district court for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Ventura v. State, supra.*

ANALYSIS

The Nebraska Fair Housing Act, as codified at Neb. Rev. Stat. §§ 20-301 to 20-344 (Reissue 1991), went into effect on September 6, 1991, and is designed to prevent discrimination in the acquisition, ownership, possession, or enjoyment of housing throughout the State of Nebraska. See § 20-302. The test that a plaintiff, who alleges discrimination in housing, must satisfy in order to recover under the act was articulated by the Nebraska Supreme Court in *Ventura*, where the Nebraska Supreme Court looked to the U.S. Supreme Court for guidance, specifically to *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), all of which were employment discrimination cases.

[3] The resulting standard is as follows: (1) The plaintiff must establish a prima facie case of discrimination; (2) if the plaintiff succeeds in so doing, the defendant has the burden of articulating a legitimate, nondiscriminatory reason for its action; and (3) if the defendant successfully rebuts with a legitimate, nondiscriminatory reason, the plaintiff must establish by a preponderance of the evidence that the legitimate reason offered by the defendant was not its true reason, but a pretext for discrimination. *Synacek v. Omaha Cold Storage*, 247 Neb. 244, 526 N.W.2d 91 (1995) (age discrimination in employment); *Ventura, supra*.

Kellogg's Prima Facie Case.

[4,5] In order to establish a prima facie case of housing discrimination, the plaintiff must prove by a preponderance of the evidence (1) that she is a member of a racial minority, (2) that she applied for and was qualified to rent or purchase the housing, (3) that she was rejected, and (4) that the housing opportunity remained available. *Ventura v. State, supra*. The plaintiff always retains the ultimate burden of persuasion. *Id.*

The NEOC hearing examiner concluded that Kellogg made a prima facie showing of racial discrimination in housing. While Kellogg is not a member of a racial minority, we note that she qualifies as an "aggrieved person," as defined in § 20-304(1) as a person who claims to have been injured by a discriminatory housing practice. It is undisputed that Greene is a member of a racial minority. The evidence further shows that Kellogg applied for and was qualified to rent the house from the Osborns, as evidenced by the rental applications of the Lis and the Suggetts; that her application was rejected, which is undisputed; and that the housing opportunity remained available, which is also undisputed. We conclude that the district court did not err in adopting the NEOC hearing examiner's conclusion that Kellogg met her initial burden of production.

The Osborns' Rebuttal.

As set forth above, the NEOC hearing examiner found that the Osborns articulated only six legitimate, nondiscriminatory reasons for rejecting Kellogg, even though, at trial, the Osborns, Barbara in particular, proffered many more. We reiterate that in reviewing a judgment of the district court for errors appearing on the record, we will not substitute our factual findings for those of the district court where competent evidence supports those findings. *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994). Since competent evidence supports the findings of the NEOC hearing examiner, as adopted by the district court, we cannot say that the court erred in finding that only six of the Osborns' proffered reasons were legitimate. However, the Osborns carried their burden of production, and therefore, the presumption raised by the prima facie case is rebutted and drops from the case. See *St. Mary's Honor Center v. Hicks, supra.*

Pretext for Discrimination.

[6] Kellogg must show that the Osborns' stated reasons were in fact a pretext for discrimination. The term "pretext" means pretext for discrimination; to establish that the proffered reason for the action taken by the employer was a pretext for discrimination, *the employee must show both that the proffered reason was false and that discrimination was the real reason. Synacek v. Omaha Cold Storage, supra*. Although *Synacek* was an employment discrimination case, we find that this pretext

standard applies to housing discrimination cases because of the Nebraska Supreme Court's earlier application of employment discrimination standards to housing discrimination cases. See *Ventura v. State, supra*.

The NEOC hearing examiner found that Kellogg proved by a preponderance of the evidence that the Osborns' seemingly legitimate reasons for rejecting Kellogg were, in fact, a pretext for intentional discrimination. Having viewed all the evidence, including Investigator Chapp's tape-recorded conversation with Keith, the rental applications of the Lis and the Suggetts, and the inconsistencies between the testimony of the Osborns, we conclude that competent evidence supports the NEOC hearing examiner's factual findings. We cannot say that the district court erred in adopting the findings of the NEOC hearing examiner, who concluded that the Osborns racially discriminated against Kellogg in violation of the Nebraska Fair Housing Act. We further find that the award of $900 to Kellogg for the increased cost of rent was supported by the evidence.

Compensatory Damages.

[7] Lastly, Kellogg argues that she is entitled to an award of $25,000 in compensatory damages. However, the alleged error is not assigned in her brief, and her brief is not labeled as a cross-appeal as required by Neb. Ct. R. of Prac. 9D(4) (rev. 1996). To be considered by an appellate court, an error must be both assigned and discussed in the brief of the one claiming that prejudicial error has occurred. *Standard Fed. Sav. Bank v. State Farm*, 248 Neb. 552, 537 N.W.2d 333 (1995); *Pantano v. McGowan*, 247 Neb. 894, 530 N.W.2d 912 (1995). See, also, *Wellman v. Birkel*, 220 Neb. 1, 367 N.W.2d 716 (1985) (court did not consider appellee's argument because she neglected to cross-appeal and make assignments of error); *National Farmers Organization, Inc. v. McCook Feed & Supply Co.*, 196 Neb. 424, 243 N.W.2d 335 (1976) (court did not consider appellee's argument because there was no cross-appeal or assignments of error). As this argument has not been properly presented for our consideration, we need not address it.

CONCLUSION

We conclude that the district court did not err in adopting the findings of fact and conclusions of law of the NEOC hearing examiner. The judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF TEELA H., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE, V. KATHY H., APPELLANT.

547 N.W.2d 512

Filed May 7, 1996. No. A-95-963.

1. **Parental Rights: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court 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. **Child Custody.** In controversies touching the custody of children, the welfare and the best interests of the child surpass considerations of strictly legal rights.
3. **Constitutional Law: Parental Rights: Child Custody.** The right of a parent to the custody and control of his or her child is a natural right protected by the Constitution, but such right is subject to the paramount interest which the public has in the protection of children from abuse and neglect.
4. **Child Custody.** A court's duty to decide custody cases is based upon the best interests of the child.
5. **Juvenile Courts: Child Custody.** Consideration by the juvenile court of the psychological impact upon a juvenile, if separated from the foster parents with whom he or she has bonded, can be an appropriate consideration, in the mix of factors to consider.

Appeal from the County Court for Scotts Bluff County: JAMES L. MACKEN, Judge. Affirmed.

Byron M. Johnson, Scotts Bluff County Public Defender, and W.E. Madelung for appellant.

Deborah A. Birgen, Deputy Scotts Bluff County Attorney, for appellee.

Michelle M. Dreibelbis, guardian ad litem.

HANNON, SIEVERS, and INBODY, Judges.

SIEVERS, Judge.

Teela H., a 4-year-old girl who has been in long-term foster care, experiences separation anxiety at the prospect of being removed from her foster parents to return to her natural mother. The Scotts Bluff County Court, sitting as a juvenile court, overruled the motion of the natural mother, Kathy H., to return Teela to her. Kathy appeals that ruling to this court. The trial court also adopted the Department of Social Services (DSS) case plan of July 17, 1995, which provided for continued, but limited, visitation between Kathy and Teela.

PROCEDURAL BACKGROUND

The juvenile proceedings involving this child have been the subject of a previous opinion of this court, *In re Interest of Teela H.*, 3 Neb. App. 604, 529 N.W.2d 134 (1995) (*Teela I*). We are able to take notice of the judicial action in a prior related case. See, *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990), *Wischmann v. Raikes*, 168 Neb. 728, 97 N.W.2d 551 (1959).

Teela was born to Kathy on December 29, 1991. A petition was filed in Scotts Bluff County Court on June 3, 1992, alleging that Teela lacked proper parental care, citing Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993), by reason of the fault or habits of Kathy. Teela was placed in the temporary custody of DSS, but was briefly returned to Kathy's temporary custody on a trial basis from July 14 to August 14, 1992. Since August 1992, Teela has lived with Dave C. and Nancy C., her foster parents.

The initial DSS case plan, adopted by the court on October 21, 1992, had two parts. The first part set a target date of February 1993 to establish Dave and Nancy as guardians for Teela. The second part was, in the event Kathy changed her mind about the guardianship, a rehabilitative plan establishing the following goals for Kathy: (1) to remain sober, (2) to attend two Alcoholics Anonymous (AA) meetings each month, (3) to meet with an alcohol counselor, (4) to complete a parenting class, (5) to obtain her GED, and (6) to attend individual counseling to deal with her background as an abused child. Unsupervised visitation was provided for in the plan.

Kathy moved to Cheyenne, Wyoming, although precisely when is not in the record, and visitation occurred both in Cheyenne and in Scottsbluff. On November 29, 1993, Kathy filed a motion, seeking to have the custody of Teela returned to her. On February 17, 1994, the trial court authored a letter stating its intention to overrule this motion. In July 1994, another hearing was held. The bill of exceptions from the July 1994 hearing was offered and received in evidence in the July 1995 hearing, which is the subject of the instant appeal.

We first summarize the evidence from the July 1994 hearing. That record showed that Kathy had completed her parenting classes, was attending AA meetings, was receiving family dysfunctional counseling, and was taking college-level courses at a junior college. Melody Wilson, a social worker from the Wyoming Department of Family Services, testified that she had completed a home-study report and found Kathy's home and family appropriate. Wilson recommended the reunification of Kathy and Teela. Wilson admitted, however, that the standard she was applying in her recommendation was that used in Wyoming, which was whether "eminent danger" was posed to the child by virtue of reunification.

The record from the July 1994 hearing reveals that in May 1994, approximately 1 month after weekend visitations in Cheyenne began, Teela, then age $2^1/_2$, began exhibiting behavioral problems, including being angry and kicking, spitting at, and hitting people. She became "clingy" to Nancy. Dr. James Sorrell, a psychiatrist, examined Teela and diagnosed her as suffering from severe separation anxiety. Dr. Sorrell opined that Teela was emotionally attached to Dave and Nancy and was reacting to the threatened loss of this relationship. He recommended that the weekend visits be terminated and that Kathy's visitation with Teela be supervised and occur in Scottsbluff. Kelly Case, the DSS social worker assigned to this case, testified at the July 1994 hearing that her recommendation was the completion of the guardianship with Dave and Nancy. This recommendation was based upon Teela's anxiety disorder and upon the period of time she had been in the care of Dave and Nancy, which was over 80 percent of her life. Case's recommendation was not because of any failure by Kathy to comply with the rehabilitative plan. Case testified in July 1994 that since approximately January 1994, Kathy had complied with most of the recommendations in the rehabilitative plan. In a journal entry of August 2, 1994, the trial court ordered that the unsupervised weekend visits in Cheyenne be terminated, that Kathy's visitations with Teela be held in Scottsbluff, and that the visitations " 'be supervised by the Department of Social Services as recommended by Dr. Sorrell.' " *Teela I*, 3 Neb. App. at 607, 529 N.W.2d at 138. The first appeal in this matter followed.

In *Teela I*, Kathy assigned error with respect to the letter ruling of February 17, 1994, which appeared to overrule her motion to return custody. The court in *Teela I* found that the judge's letter was not a final appealable order with regard to Kathy's motion to return Teela's custody to her, and, consequently, this court held it had no jurisdiction over her claim that the court erred in not sustaining her motion to have custody of Teela returned to her.

The court in *Teela I* also found that the county court, by granting Dr. Sorrell the authority to determine the time, manner, and extent of Kathy's visits with Teela, had delegated to a third party a matter which should have been judicially determined. Consequently, that order was reversed, and the matter remanded with directions "to determine visitation privileges if and when appropriate." *Teela I*, 3 Neb. App. at 611, 529 N.W.2d at 139.

PROCEEDINGS AFTER REMAND

After the remand in *Teela I*, Kathy filed another motion for an order returning custody of Teela to her. A hearing on that motion was held July 28, 1995. The evidence offered at that hearing included the bill of exceptions from the July 1994 hearing. Kathy's counsel stated on the record at the outset that the purpose of the July 1995 hearing was to return Teela to her mother, but if that was not accomplished, then visitation pursuant to the mandate from the Nebraska Court of Appeals in

Teela I should be established. Thus, we turn to the evidence from the July 1995 hearing.

Kathy's testimony was that she was living in the same place with the same man as she had been in July 1994. Kathy's second child was born December 28, 1994. Her new baby was being cared for by an experienced sitter. Kathy testified that this child was free of problems and not subject to any social service scrutiny in either Nebraska or Wyoming. Kathy testified that she had been going to counseling at Southeast Mental Health Center in Cheyenne, seeing Susan Kotowicz, who was working with her on "my past." Kathy testified that she had been working for 3 or 4 months with this therapist, but that there was not much more to do unless Teela was returned to her. She related that the Wyoming Department of Family Services had closed her case, as there was no danger to Teela should her custody be returned to Kathy. Kathy said she had completed all parenting classes that she could without Teela being in her home. Kathy testified that she had been sober for 3 years. On cross-examination, Kathy testified that she attended three AA meetings a week, but did not have signed documentation of her attendance.

According to Kathy, visitation with Teela went well, but she admitted problems in making the visitation due to her job, her pregnancy, her finances, and the lack of a dependable automobile. Kathy related that during her pregnancy with her second child, she experienced back pain and leg numbness which prevented her from driving and interfered with her ability to come to Scottsbluff for visitation. Kathy has been employed at the Country Buffet restaurant in Cheyenne since late May 1995, and her work schedule varied, but apparently often included weekends. Visitation with Teela was scheduled for Fridays from 1 to 4 p.m. Kathy testified that she went to visitation as much as possible, and when she did not work on Friday, she tried to go to Scottsbluff. Kathy testified that although DSS had asked for her work schedule, she had not been able to get it because of managerial problems at her employment. Kathy testified that she had missed about 10 visitations because of her job.

When asked if she wanted Teela returned to her, Kathy responded affirmatively. When asked why, she responded, "Because I love her. I want to put her in bed at night. I want to get up in the morning and make her breakfast, give her her three meals a day, provide her with the nourishment she needs through love." When asked if she had signed any releases of information for Dr. Sorrell, she testified that she signed them in her counselor's office and that the counselor said she would return them as soon as they were filled out.

When asked about her familiarity with "Teela's rages," Kathy indicated that she was not familiar with them, because the child "does not really have them with [her]," and that she had seen them only once or twice since the July 1994 court proceedings.

When asked what she had done to learn how to deal with Teela in these rages, Kathy testified that she talked to her counselor and that she had asked Dr. Sorrell, who told her it was up to her counselor. Kathy testified:

> I specifically asked him — I said, "What can I do to help Teela?" And he said, "Well, you need to work with your counselor on that." I said, "Can you send my counselor information so I know what to work on." And he said he would do that, but we have not received anything.

Case testified in the July 1995 hearing and related that she had been involved with Teela since the beginning of her case. She testified that since the July 1994 hearing, DSS has had Teela in counseling with a play therapist as well as seeing Dr. Sorrell. Additionally, a family support worker was assigned to work with Kathy on parenting skills. Case testified that visitation had been set for every Friday from 1 to 4 p.m. Since the last court hearing in July 1994, Case testified there had been 36 scheduled visits. Of these visits, DSS canceled five, each time providing an opportunity for rescheduling, of which Kathy did not avail herself. Case testified that 17 visits were canceled by Kathy and that there were 6 visits when Kathy simply did not show up. In all, visitation occurred on eight occasions.

With respect to counseling, Case testified that in December 1994, she informed Kathy that the previously executed release of information form was no longer effective and that if she started counseling again, a new form would be needed so that

Case could send information about Teela to Kathy's counselor. Case never received the authorization to allow Teela's therapist to provide information to Kathy's therapist. Case testified that the plan to enable Kathy to deal with the issue of Teela's separation anxiety was counseling, but that Kathy had not begun counseling until June 1995 and had never signed any other releases of information to allow the exchange of information to apprise Kathy's counselor of Teela's condition and treatment.

Case testified that she had asked Kathy for documentation as to why visits with Teela were missed, but the documentation had not been received. However, Kathy did introduce into evidence medical records concerning her pregnancy, a bout with a stomach virus, and a diagnostic workup for back pain. However, no physician testified or provided evidence that Kathy was unable to travel to Scottsbluff, except for a medical excuse prescribing bed rest for June 27 to 29, 1995, because of "stomach cramps." The medical records concerning her pregnancy show that on October 19, 1994, she sought an excuse "not to travel to Scottsbluff," which was refused. However, on October 11, the doctor's records state: "Excuse given for today's visitation in Scottsbluff." On December 9, the doctor's notes indicate that it was "suggested she not travel too far." We observe that the doctor's notes of July 1, 1994, nearly 6 months before the birth of her second child, reflect: "[A]sked for excuse not to travel? [A]sked for excuse not to work also."

Nancy, the foster mother, testified to Teela's pattern of having "rages" on Thursday nights preceding a visit, and if there was a visit with Kathy, there would be rage-like behavior incidents in the following days. Nancy described Teela's behavior as totally out of control, "like a seizure." Nancy testified that Teela had been seeing Dr. Sorrell once a month plus a therapist, Ellen Jensen, twice a week until the summer of 1995, when those visits were reduced.

Also in evidence is the July 20, 1995, report from Dr. Sorrell. His report states:

> I also think it quite important to note that Teela has rages following her visits with her natural mother Kathy. These rages, of course, are a protest and an attempt on Teela's part to manipulate so that she doesn't have to

> return to what she perceives as an unwanted environment. These rages also provide her with an outlet to express the anger and the frustration she feels in regard to her visits with her mother. It is my suspicion that there is very little limit setting on her visits and the rages indicate a negative reaction to the reintroduction into the structured environment that she needs in order that she may continue to develop appropriately.
>
> I do feel these general inconsistencies are [detrimental] to Teela's well-being. I see no bonding with her natural mother. Also concerning to me is the inconsistency that the mother shows in regard to her interventions that she is to be currently working on. . . . I feel that the appropriate care of Teela and Kathy's inability to appropriately care for Teela needs to be considered. I know that Teela requires much patience and emotional support that Kathy cannot provide. She does not posses[s] the skills needed to care for Teela in this firm but loving way.

After noting that he had not received information that Kathy is receiving consistent psychotherapy or working to develop the special skills Teela's care requires, Dr. Sorrell opined that "it is my strong opinion that she cannot provide an appropriate environment for Teela." Finally, Dr. Sorrell concluded that it was his recommendation that Teela remain in foster care and that it was not to the benefit of Teela to be returned to her natural mother.

JUVENILE COURT DECISION

The juvenile court entered an order on August 18, 1995, which (1) overruled the motion to return the child and (2) adopted "Plan B of the [DSS] Case Plan and Court Report of July 17, 1995." Plan B was that the mother would visit Teela once a week in Scottsbluff, during which she would "work on parenting skills, bonding, and attachment." The visits would be supervised, and Diane Crystal, a family support worker, would "encourage parenting skills, bonding, and attachment." Additional parts of Plan B were to receive therapy from a counselor in Wyoming and "[i]n counseling, [to] work on issues related to Teela's emotional problems and how Kathy is directly related to this." Kathy was also to work on how she can "understand Teela's problems and change her behavior to better meet Teela's needs." Kathy was also to remain sober and not use alcohol or drugs. Kathy now appeals that order to this court.

ASSIGNMENTS OF ERROR

Kathy assigns two errors: (1) The trial court abused its discretion by denying the return of custody despite Kathy's completion of the conditions set forth in a plan for reunification, and (2) the trial court violated Kathy's rights to due process by failing to return Teela and for not setting conditions, within Kathy's ability to perform, by which Teela's return could be accomplished.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court 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 L.P. and R.P.*, 240 Neb. 112, 480 N.W.2d 421 (1992).

DISCUSSION

Teela was born December 29, 1991. In June 1992, she was removed from Kathy's custody and has never returned, but for a 1-month trial period in the summer of 1992. Therefore, at the time of the July 1995 hearing from which this appeal emanates, Teela had spent in excess of 80 percent of her life in foster care and since August 1992, she has been at the home of Dave and Nancy. The reason for the original adjudication was very serious neglect of Teela by Kathy. Kathy agreed to the establishment of a guardianship, but by December 1993, a guardianship had not been completed. Nancy and Kathy were apparently well acquainted, and Kathy had a hand in the selection of the foster parents. Kathy encouraged Teela to call Dave and Nancy "daddy and mommy." However, in December 1993, Kathy decided that she wanted Teela returned to her and that she was no longer interested in establishment of the guardianship.

A rehabilitative plan was then established. Kathy argues that the record from the July 1994 hearing establishes her compliance with the plan. We are referred to the following testimony from Case during the July 1994 hearing:

> Q. Okay. As far as the original recommendations that were adopted by this court, do you feel that [Kathy] has completed most of them?
>
> A. Yes, I do.
>
> Q. And are your concerns about reunification at this point based on failure to comply with the plan or is this a new issue dealing with Teela's separation anxiety?
>
> A. It would be the new issue for Teela.
>
> Q. Okay. So you're satisfied with her compliance then with the plan?
>
> A. Yes.

Kathy also points to the testimony from Wilson, the social worker for the Wyoming Department of Family Services, who found Kathy's home and family appropriate, based on 23 home visits. Wilson testified at the July 1994 hearing that Kathy had participated in AA, had dysfunctional family counseling, and was involved in junior college classes. Wilson testified that her recommendation was that Teela be returned to Kathy, and explained that services, including psychiatric counseling, would be offered to Kathy and Teela to deal with any separation anxiety issues. Wilson opined that it would be more difficult for Teela to separate from her foster parents as time passed and that any such separation should be done quickly to minimize damage.

Kathy cites the rule that a child cannot and should not be suspended in foster care, or be made to await uncertain parental maturity. *In re Interest of C.N.S. and A.I.S.*, 234 Neb. 406, 451 N.W.2d 275 (1990). She asserts a corollary: When the parent has reached maturity, proven by compliance with a reunification plan, the child should not be left in the limbo of foster care, but, rather, returned to the parent. The proposition as drawn is hard to dispute as a generalized statement; but it does not answer the issues we face, given the record and the applicable law, and it may not sufficiently factor into consideration in a particular case the child's best interests.

[2-4] The best interests of Teela are what must concern us, as the law is clear that this is our guidepost. In controversies touching the custody of children, the welfare and the best interests of the child surpass considerations of strictly legal rights. *In re Application of Schwartzkopf*, 149 Neb. 460, 31 N.W.2d 294 (1948). More recently, the Nebraska Supreme Court has said the "first and primary consideration in any case involving the custody of a child is the best interest of the child." *State v. Loomis*, 195 Neb. 552, 557, 239 N.W.2d 266, 269 (1976). Moreover, the right of a parent to the custody and control of his or her child is a natural right protected by the Constitution, but such right is subject to the paramount interest which the public has in the protection of children from abuse and neglect. *In re Interest of W.*, 217 Neb. 325, 348 N.W.2d 861 (1984). Additionally, a court's duty to decide custody cases is based upon the best interests of the child, which means that the parental rights may be subjected to the rights of the child which make up its best interests. *In re Interest of Wood and Linden*, 209 Neb. 18, 306 N.W.2d 151 (1981).

The record which we are presented with now is different from the record from the July 1994 hearing alone. Admittedly, the record in July 1994 established strong evidence of compliance at that time with the rehabilitation plan, but there was evidence then that Teela was experiencing separation anxiety. The record before us encompasses not only the July 1994 hearing, but the July 1995 hearing. This record establishes that Teela's separation anxiety as diagnosed by the psychiatrist continues to manifest itself, that Kathy's exercise of visitation with Teela has been far less than it should have been, and that there is evidence of Kathy's failure to take the steps necessary, via her own counseling, as well as by cooperating with Teela's treating psychiatrist and counselors, to deal with Teela's emotional problems. Finally, there is expert opinion testimony that reunification is not in the best interests of the child. Clearly, there is evidence which supports the trial court's decision. That said, there are, nonetheless, several troubling aspects to the case upon which we briefly comment.

We are troubled by the fact that the principal obstacle to reunification appears to be that Teela suffers psychological distress when she perceives the potential of being separated from her foster parents. If there is ever to be reunification between Kathy and Teela, it is likely that Teela will suffer emotional distress (or "separation anxiety" as Dr. Sorrell labels it), at least to some extent, from the process of leaving her foster parents. Yet, to use the occurrence of such distress as justification for denying reunification means that reunification of parent and child through and after rehabilitation of parental shortcomings becomes illusory. Given that the Legislature has mandated that the juvenile code be construed "to assure every reasonable effort possible to reunite the juvenile and his or her family," Neb. Rev. Stat. § 43-246(4) (Reissue 1993), it would seem that inherent in the institutionalization of foster care is acceptance of at least some degree of emotional upset and trauma when formerly neglected or abused children are removed from loving and caring foster parents and returned to their natural parent or parents. We do not see how it could be otherwise. Typically, the point of discussion will center on "bonding," e.g., the child is bonded with the foster parent or parents, but not so with the natural parent. But using the bonding theory when applying the "best interests" standard should not be camouflage for an insidious "best resources" test.

Some courts have expressed concern over harsh results to parents of few resources if child placement decisions are based solely on the need for continuity in care. See *Matter of Guardianship of K.L.F.*, 129 N.J. 32, 45, 608 A.2d 1327, 1333 (1992) (observing that "facile use of the bonding theory can increase the risk of institutional bias militating in the direction of permanent placement and adoption of children in foster care"). The New Jersey Supreme Court in *Matter of Guardianship of J.C.*, 129 N.J. 1, 608 A.2d 1312 (1992), in a termination of parental rights case, explored the slippery ground represented by competing psychological theories about the effect of parental bonding in a thoughtful opinion which provides "food for thought" for those who try to do right by young children who, by no choice of their own, find themselves in the foster care system. The New Jersey court stated that variances in recommendations for children largely derive from different "assumptions concerning the fragility versus resiliency of the child psyche." *Id.* at 19, 608 A.2d at 1320. The court's warning in *Matter of Guardianship of J.C.* bears repeating:

> Moreover, there are the grave pitfalls that may be encountered in the application of otherwise sound psychological parenting and bonding theories. Scholars and some courts suggest that theories of parental bonding may be relied on too often to keep children in foster care rather than return them to their parents. *E.g., In re Interest of L.J.*, 220 Neb. 102, 368 N.W.2d 474, 483 (1985).

129 N.J. at 20, 608 A.2d at 1321.

The Nebraska case cited by the New Jersey Supreme Court contains the following language:

> For the State to now argue that the children have now become so "bonded" to their foster parents as to require termination of parental rights in this case is to defy legal logic. By separating a parent from that parent's children for extraordinary lengths of time, the State could justify termination of any parental rights. This cannot be, and is not, the law.
>
> We have said that a child must not be made to await uncertain parental maturity. *In re Interest of M.S.*, 218 Neb. 889, 360 N.W.2d 478 (1984). That rule is sound. However, the rule should not be used to trod upon the rights of the parent or the children.

In re Interest of L.J., JJ., and J.N.J., 220 Neb. 102, 115, 368 N.W.2d 474, 483 (1985).

We suggest that a legal system which allows removal of a neglected or abused child from its parent, placement in foster care during parental rehabilitation, and then removal from foster care and return to the natural parent has, of necessity, opted for the resilient "child psyche" concept. Therefore, in the instant case, that Teela has manifested separation anxiety, *by itself*, seems patently insufficient to deny reunification—to conclude otherwise would be to make rehabilitation and reunification a sham.

In *Matter of Guardianship of J.C., supra*, the New Jersey court remanded the case for additional evidence addressing whether the two children involved had bonded with the foster parents and, if so, whether breaking that bond would cause the children serious psychological or emotional harm. In doing so, the court found that the social workers were not qualified to express opinions concerning psychological bonding and the harmful consequences from its disruption. The New Jersey court also characterized the reports of the psychologists as useful but conclusionary and lacking supporting explanations.

[5] Here, the record is less than overwhelming. The psychiatrist, Dr. Sorrell, who diagnosed the separation anxiety and counseled strongly against reunification, did not testify. The opinions from his letter are conclusionary and without well developed rationale. But it seems clear that consideration of the psychological impact upon Teela, if separated from her foster parents, is indeed an appropriate consideration, in the mix of factors to consider, in situations such as this. See *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992) (parental rights termination case involving Indian Child Welfare Act where court looked to psychological impact on children from separation from foster parents of nearly 7 years, which would result from transfer of custody to Rosebud Sioux Tribal Court). See, also, *Nielsen v. Nielsen*, 217 Neb. 34, 348 N.W.2d 416 (1984) (holding that best interests of children, due to adverse psychological impact of visitation, required that there be no visitation with their father at penitentiary, who was serving two life sentences for murder of children's maternal grandparents); *In re Interest of R.D.J. and K.S.J.*, 215 Neb. 724, 340 N.W.2d 415 (1983) (psychological testing evaluating the progress in the development of children); *Fleharty v. Fleharty*, 202 Neb. 245, 248, 274 N.W.2d 871, 873 (1979) (court chastised parent who appears to be unaware of "possibility of permanent psychological damage"). We consider it beyond reasonable dispute that courts involved in consideration of juvenile matters can and should look to the emotional impact upon the children of proposed actions. Thus, although the psychological evidence is not well developed, we cannot ignore Dr. Sorrell's report and the opinions expressed therein. That report militates against reunification, but it does not say what can and should be done to accomplish reunification.

That Teela may have bonded with her foster parents and suffers psychological distress when she perceives a threat to that bond is ultimately traceable to the fact that it was Kathy, who in the first instance, failed to take responsibility by providing proper care for her child. Kathy compounded the problem by initially choosing guardianship for Teela, and she obviously encouraged the attachment between Teela and her foster parents by encouraging her child to place Dave and Nancy in the role of "daddy and mommy." Kathy's failure to regularly and diligently exercise visitation with Teela contributes to the lack of attachment between Kathy and Teela and to the attachment which exists between Teela and her foster parents.

Kathy's counsel asserted at oral argument that Kathy's shortcomings with respect to visitation between July 1994 and July 1995 are attributable to the failure of the Scotts Bluff County Court to reunite her with the child and her frustration over the result in *Teela I*. Although we might understand a degree of frustration at not securing reunification, we cannot embrace the proffered excuse. Being a parent requires more than a biological link to the child; it requires commitment, hard work, perseverance, love, and parenting skills. A parent who has failed to care for his or her child and lost custody to the foster care system means that such parent, in addition to rehabilitating their parental shortcomings, must persevere in their commitment to the child. Without this, courts are indeed hard pressed to make the requisite finding that reunification is in the best interests of the child.

Kathy failed to persevere with visitation after the trial court initially declined to order reunification with Teela. The record shows that between November 1994 and July 24, 1995, there were 36 visits scheduled for Kathy and Teela. Of these visits, DSS canceled 5, Kathy canceled 17, and Kathy failed to show up on 6 occasions without any notice. Thus, only eight visits were held. Granted, the record allows the conclusion that a few visits were unavoidably missed due to Kathy's pregnancy, some illness, and car trouble. Nonetheless, we cannot ignore Kathy's apparent lack of commitment to Teela. Kathy has obviously made certain choices which have far-reaching consequences: She has chosen to live in Cheyenne, making visitation difficult, and she has borne another child, increasing the demands upon her time.

In conclusion, based upon our de novo review, we hold that the trial court properly denied the motion for reunification because of the combination of sporadic visitation, Teela's emotional distress, and Kathy's failure to take the steps necessary via her counselor and Teela's counselor to work on understanding and improvement of Teela's emotional condition. Although Kathy has assigned error claiming a denial of due process because the court did not return Teela to her, that assignment is incompletely argued. Moreover, due process, although eluding precise definition, is a notion requiring that when government intervenes in its citizens' lives that there be fundamental fairness which involves, among other things, notice and an opportunity to be heard. See *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992). Our review of the record fails to uncover a denial of due process with respect to the trial court's decision to deny Kathy's request for reunification.

The second part of Kathy's due process claim is that due process was denied because the court failed to define precisely what she must do to obtain reunification. The issues involved in juvenile custody cases do not lend themselves to formulaic articulation of what must be done to accomplish reunification and to attempt such would perhaps cross into the dangerous territory represented by advisory opinions. Thus, this assignment of error is without merit.

AFFIRMED.

RODNEY BOSS, APPELLANT, V. FILLMORE COUNTY SCHOOL DISTRICT NO. 19, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

548 N.W.2d 1

Filed May 14, 1996. No. A-94-712.

1. **Schools and School Districts: Evidence: Appeal and Error.** In a proceeding in error, the task of the district court and of an appellate court is to determine whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision.
2. **Schools and School Districts: Evidence.** Evidence is sufficient as a matter of law if the school board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.
3. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Contracts: Appeal and Error.** The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
5. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning. An appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results.
6. **Contracts.** The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.
7. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter 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.
8. **Schools and School Districts.** Incompetency or neglect of duty is not measured in a vacuum or against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties.
9. **Appeal and Error.** The purpose of a proceeding in error is to remove the record from an inferior to a superior tribunal so that the latter tribunal may determine if the judgment or final order of the inferior tribunal is in accordance with law.
10. **Schools and School Districts: Employment Contracts.** Unprofessional conduct of a superintendent under Neb. Rev. Stat. § 79-12,110 (Reissue 1994) and a contract of employment includes such conduct as is, by general opinion or, when necessary, by the opinion of appropriate professionals, immoral, dishonorable, unbecoming a member in good standing in the profession, or violative of professional codes of ethics or professional standards of behavior. It is conduct which indicates an unfitness to act as a public school superintendent.
11. **Schools and School Districts.** A superintendent is entitled to periodic evaluations twice during the first year of employment with the school district and at least once annually thereafter pursuant to Neb. Rev. Stat. § 79-12,111 (Reissue 1994).

12. **Schools and School Districts: Employment Contracts.** If the ground for cancellation is a deficiency in the performance of an employee which would have reasonably been observed and disclosed in the course of a periodic evaluation, then the failure to provide such evaluations must be considered in the overall assessment of the sufficiency of the evidence to support cancellation of the contract.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Reversed and remanded with directions.

Beverly Evans Grenier, of Scudder Law Firm, P.C., for appellant.

Daniel J. Alberts, of DeMars, Gordon, Olson, Recknor & Shively, for appellee.

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

MUES, Judge.

I. INTRODUCTION

This is an appeal from a July 1994 judgment of the district court affirming a decision of the Fairmont Public Schools board of education canceling, after 1 year, a 3-year employment contract of superintendent Rodney Boss for school years 1992-93 to 1994-95.

II. STATEMENT OF CASE

Rodney Boss was hired as the superintendent for Fillmore County School District No. 19 on July 29, 1992. The Fairmont Public Schools board of education (Board) and Boss entered into a 3-year contract, with employment to commence on August 1, 1992, and terminate on June 30, 1995. By notification dated July 30, 1993, Boss was informed that the Board was considering cancellation of his contract, effective immediately. A hearing on the issue commenced August 24 at 7:36 p.m. and continued, with brief intermissions, to approximately 7:30 a.m. August 25. The record made at that hearing consists of 490 pages and 51 exhibits, with 28 witnesses testifying. At the conclusion of the hearing, the Board voted to cancel Boss' employment contract. Boss filed a petition in error in district court on September 21. By a journal entry dated July 5, 1994, the Board's decision was affirmed by the district court. Boss then sought review by this court. Additional facts will be set forth below as necessary to our decision.

III. ASSIGNMENTS OF ERROR

Boss asserts that the district court erred in affirming the Board's decision because the Board erred by (1) canceling Boss' contract for reasons beyond the scope of the notice provided Boss and for events which occurred subsequent thereto, in violation of Boss' due process rights; (2) failing to provide Boss a meaningful opportunity in which to respond, in violation of his due process rights, by virtue of the hearing officer's denial of his motion for a continuance; (3) failing to conduct periodic evaluations of Boss as required by Neb. Rev. Stat. § 79-12,111(2) (Reissue 1994); and (4) finding facts sufficient to warrant termination pursuant to Neb. Rev. Stat. § 79-12,110 (Reissue 1994).

IV. STANDARD OF REVIEW

[1,2] Because this is a proceeding in error, the task of the district court was, as is ours, to determine whether the Board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. See, *Drain v. Board of Ed. of Frontier Cty.*, 244 Neb. 551, 508 N.W.2d 255 (1993); *Nuzum v. Board of Ed. of Sch. Dist. of Arnold*, 227 Neb. 387, 417 N.W.2d 779 (1988). Evidence is sufficient as a matter of law if the Board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it. See, *Drain, supra*; *Nuzum, supra*.

V. ANALYSIS

Section 79-12,110(1) confers upon the Board the authority to cancel the contract of any certificated employee, including a superintendent, by a majority vote of its members. Thus, the Board acted within its jurisdiction. We next address whether there is sufficient evidence as a matter of law to support the Board's decision, addressed by Boss in his fourth assignment of error, because resolution of this assigned error in Boss' favor effectively makes our analysis of his first three assigned errors unnecessary.

1. FACTS SUFFICIENT TO WARRANT TERMINATION

In his fourth assignment of error, Boss alleges that the Board erred by finding facts sufficient to warrant termination. There are two distinct methods by which teaching contracts may be terminated. See, e.g., *Bickford v. Board of Ed. of Sch. Dist. #82*, 214 Neb. 642, 336 N.W.2d 73 (1983). The first is in accordance with the applicable statutes and reasons set forth therein, while the second is by virtue of the teacher's contract for employment. *Id.* Section 79-12,110 sets forth the bases upon which a school board may rely when deciding to cancel a superintendent's contract. Consistent with the bases set forth in § 79-12,110, the Board determined that the cancellation of Boss' contract was warranted based on the following grounds: (1) neglect of duty, (2) incompetency, and (3) unprofessional conduct.

Like § 79-12,110, Boss' contract of employment in this case provides that he may be discharged if he commits any act which substantially inhibits his ability to discharge his duties, including but not limited to any act which displays incompetency, neglect of duty, or unprofessional conduct. Thus, whether we view the evidence as sufficient to support a breach of contract or sufficient to support one or more of the statutory grounds, the result is the same.

[3-6] Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *State v. Cox*, 247 Neb. 729, 529 N.W.2d 795 (1995); *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994). Similarly, the construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994); *Rigel Corp. v. Cutchall*, 245 Neb. 118, 511 N.W.2d 519 (1994). In this case, the interpretation of the statutory and contractual terms "neglect of duty," "incompetency," and "unprofessional conduct" presents questions of law. Statutory language is to be given its plain and ordinary meaning. In addition, an appellate court will, if possible, try to avoid a

construction which would lead to absurd, unconscionable, or unjust results. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993); *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991); *State v. Bartlett*, 3 Neb. App. 218, 525 N.W.2d 237 (1994). Similarly, the terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. *Murphy v. City of Lincoln*, 245 Neb. 707, 515 N.W.2d 413 (1994); *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994).

We are required on appeal to determine whether Boss' actions constituted "neglect of duty," "incompetency" or "unprofessional conduct" within the meaning of § 79-12,110 and Boss' contract of employment. See, e.g., *Clarke v. Board of Education*, 215 Neb. 250, 338 N.W.2d 272 (1983).

2. Neglect of Duty and Incompetency

The first basis for canceling Boss' contract asserts that Boss neglected his duty. The second basis asserts that "Mr. Boss has demonstrated deficiencies or shortcomings in . . . skills . . . ." We interpret the second basis to be that Boss was incompetent. Both bases deal primarily with budget matters, and we will address them together.

The first finding in support of cancellation states:

> Mr. Boss has neglected his duty as superintendent of schools by failing to prepare accurate budget and finance documents, by transposing figures inaccurately, by adding figures inaccurately, by failing to follow budget preparation instructions properly, by preparing budget documents and submitting them to board members too late to permit a thorough and proper review of them, by failing to secure the maximum possible reimbursement for chapter 1-related expenditures and by failing to assure that all necessary school supplies were on hand at the beginning of the 1993-94 school year.

The second basis for cancellation is as follows:

> Mr. Boss has demonstrated deficiencies or shortcomings in the skills necessary to prepare accurat[e] budget and finance documents including, but not limited to, the

> inability to transpose figures accurately, to add figures accurately, to follow budget preparation instructions properly[,] to prepare budget documents properly and to prepare and provide budget documents to board members in a timely mann[er].

[7] In adopting § 79-12,110, the Legislature did not define "neglect of duty" or "incompetency." However, Neb. Rev. Stat. § 79-12,107(4) (Reissue 1994) defines the concept "just cause" as it relates to reasons for terminating the contract of a *permanent* certificated employee. "Just cause" includes incompetency and also embraces, inter alia, "neglect of duty." § 79-12,107(4). Incompetency, as there defined, shall "include, but not be limited to, demonstrated deficiencies or shortcomings in knowledge of subject matter or teaching or administrative skills." While neither § 79-12,110 (the statute under which the Board proceeded in this case) nor Boss' contract specifically listed "just cause" as a reason for cancellation, the statutory definition of "incompetency" found in § 79-12,107(4) is instructive. The components of a series or collection of statutes pertaining to a certain subject matter 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. *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993).

There is no statutory definition of "neglect of duty" in § 79-12,110 or § 79-12,107. However, the meaning of that phrase, within the meaning of § 79-12,110 and Boss' contract, is plain and ordinary. As to both of said grounds, the Nebraska Supreme Court has stated:

> Evidence that a particular duty was not competently performed on certain occasions, or evidence of an occasional neglect of some duty of performance, in itself, does not ordinarily establish incompetency or neglect of duty sufficient to constitute just cause for termination. Incompetency or neglect of duty [is] not measured in a vacuum nor against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties.

Sanders v. Board of Education, 200 Neb. 282, 290, 263 N.W.2d 461, 465 (1978). See, also, *Hollingsworth v. Board of Education*, 208 Neb. 350, 303 N.W.2d 506 (1981).

Accordingly, in the context of teacher termination cases, the Nebraska Supreme Court has recognized the importance of evidence regarding the performance of fellow teachers in order to determine whether one's performance has fallen below a particular standard. See, e.g., *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 364 N.W.2d 7 (1985) (termination upheld where objective formal evaluation used by principal indicated unsatisfactory performance and principal attested to teacher's performance in relation to fellow teachers); *Schulz v. Board of Education*, 210 Neb. 513, 315 N.W.2d 633 (1982) (insufficient evidence to support termination where teacher received above-average evaluations and record was silent as to performance of other teachers); *Hollingsworth, supra* (principal's evaluation of teacher suspect in absence of comparison with other teachers and where previous evaluations were favorable); *Sanders, supra* (insufficient evidence to warrant termination absent evidence regarding other teachers and expert testimony).

Moreover, the Nebraska Supreme Court has recognized the difficulty in ascribing a limited definition to statutory terms involving grounds for termination of certificated teacher employees. Instead, decisions regarding such terms focus on whether, under the facts of the individual case, the employee's actions are sufficient to constitute the specified basis for termination. See, e.g., *Clarke v. Board of Education*, 215 Neb. 250, 338 N.W.2d 272 (1983) (determining whether teacher's action was, under the facts of that case, "immoral" within meaning of pertinent statute); *Schulz*, 210 Neb. at 519, 315 N.W.2d at 637 (stating: " 'There are few, if any, objective criteria for evaluating teacher performance or for determining what constitutes just cause for terminating teaching contracts of tenured teachers. Each case must, therefore, be assessed on its own facts. . .' ").

Boss is not a tenured teacher. He is, by statutory definition, a "probationary certificated employee." See § 79-12,107(3). Despite his "probationary" status, however, Boss is entitled to the showing of specific grounds before his contract may be canceled pursuant to § 79-12,110 and by virtue of the specific language of his 3-year contract.

Based upon the foregoing principles, we examine the evidence in this case to determine its sufficiency, as a matter of law, to establish either "incompetency" or "neglect of duty" within the meaning of § 79-12,110 and the language of Boss' contractual agreement.

(a) Budget Errors

Testimony adduced at the hearing reveals that Boss has prepared six budgets during his career. When Boss began as superintendent for Fairmont Public Schools for the 1992-93 school year, 90 to 95 percent of the school budget for that year had already been completed by the former superintendent, Don Pieper.

With regard to accuracy, Pieper attested to several errors committed by Boss. These included (1) publishing an incorrect amount in the 1993-94 notice of budget hearing and budget summary, (2) inaccurately transposing a number from the 1992-93 budget document, (3) committing errors in the draft form of the 1993-94 lid computation document, (4) inaccurately representing an amount in the draft document for the 1993-94 budget, and (5) committing an error in a budget balance expenditure report submitted to the Board. There was also testimony that errors may have existed in the 1993-94 special grant fund list; however, the forms being attested to were never signed and, therefore, never adopted by Fairmont Public Schools or submitted to the Nebraska Department of Education.

With regard to the errors which were proven, we note first that several of the alleged errors were found in draft documents. According to Pieper, documents given to the Board 2 weeks prior to the budget hearing would be considered drafts subject to change. Pieper further testified as to errors contained in draft documents which were later corrected by Boss on his own accord. In fact, Pieper attested to only one error contained in the final budget documents submitted to the Board on August 23, 1993, and he described it as insignificant. Marge Melroy, an administrative assistant at the Phelps County Courthouse, testified that her office frequently identifies errors necessitating changes in budgets submitted by school superintendents and that it is not uncommon for a budget document to be republished if later amended due to a school board's failure to accept it. Similarly, Joe Reinhart, superintendent of schools at Exeter, testified that he has inaccurately transposed numbers when preparing budgets and that he, at times, has difficulty understanding budget instructions.

[8] As previously quoted, "[i]ncompetency or neglect of duty [is] not measured in a vacuum nor against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties." *Hollingsworth v. Board of Education*, 208 Neb. 350, 360-61, 303 N.W.2d 506, 512-13 (1981). Accord *Sanders v. Board of Education*, 200 Neb. 282, 263 N.W.2d 461 (1978). Many of the errors attributed to Boss by Pieper occurred in draft documents which were subject to change. These errors were discovered and corrected by Boss on his own accord. Pieper did not testify that competent superintendents never make errors in draft budget documents, and common sense suggests otherwise. Pieper described the error as it existed in the final proposed budget documents as insignificant. Reinhart testified that he has inaccurately transposed numbers and had difficulty with budget instructions. As to the published budget, Melroy's testimony suggests that such errors are not uncommon. Thus, we cannot say that Boss' errors were of such a nature as to demonstrate shortcomings unlike those occasionally exhibited by others performing similar duties.

(b) Budget Timeliness

With regard to the timeliness with which Boss submitted budget documents, final documents were given to the Board 3 days prior to the budget meeting. Minimal changes were made to these documents on the day of the meeting and presented to the Board by a memo explaining the changes and stating that their correction had no effect on the Board's ability to adopt the proposed budget. According to Boss, these changes were not substantive and had no effect on either the percentage of growth in the budget or the property tax requirements. Pieper, while not disagreeing with Boss' characterization of the nature of the changes, testified that he did not consider it reasonable to present the Board with draft budget documents on August 23, the day of the budget hearing.

Boss argues that the Board improperly relied upon this tardiness when canceling his contract because this omission occurred subsequent to his receipt of the July 30 notice that the Board was considering cancellation of his contract. In support of this argument, Boss cites *Hollingsworth, supra*. In that case, the principal recommended termination of a teacher's contract based on, among other things, the teacher's failure to control his class and inability to handle student misbehavior. According to the principal, the 27 student referrals made by this teacher to the assistant principal for disciplinary reasons were excessive when compared to the number of referrals made by other teachers. The Nebraska Supreme Court reversed the school board's decision and ordered reinstatement of the teacher after determining the evidence was insufficient to warrant termination. In doing so, the court noted that 22 of these referrals occurred subsequent to the request for resignation. Although the record failed to disclose actual knowledge by the student body of the teacher's tenuous position with the administration, the court surmised that the increase in student misbehavior was indicative of such knowledge. We believe the rationale of the *Hollingsworth* court is simply that evidence offered to illustrate an employee's deficiencies must, to be sufficient to support cancellation, causally flow from those deficiencies and not some other source. In *Hollingsworth*, the court implicitly concluded that the excessive disciplinary referrals stemmed not from Hollingsworth's inadequacy, but, more likely, from the actions of students taking advantage of Hollingsworth's tenuous relationship with the school board. Thus, while we do not agree with Boss that *Hollingsworth* stands for the proposition that events occurring subsequent to the notice of possible contract cancellation may never be taken into account by a school board when determining whether to cancel an employee's contract, *Hollingsworth* clearly recognizes that events transpiring after notice of the possible cancellation of an employee's contract must be critically evaluated as to their cause.

In this case, Boss was notified on July 30 of the possibility that his contract would be terminated. His work on the budget continued because it was in its preliminary stages at that time. On or about August 18, Boss was ordered to vacate his office and not to return to the school during business hours pending his hearing before the Board. Boss testified that he had intended to spend the week of August 16 finalizing the budget in preparation for the Board's August 23 budget meeting. It is reasonable that barring Boss from his office and support staff during this critical time might have contributed to the timing and substance of the budget numbers later used as examples of his neglect of duty and incompetency. Moreover, it is also reasonable to conclude that efforts to prepare for the upcoming August 24 through 25 cancellation hearing demanded time and energy otherwise available to devote to achieving perfection at the budget meeting scheduled to be held on August 23. Under the circumstances, we find the evidence insufficient as a matter of law to support either neglect of duty or incompetency in the timing of presentation of budget matters to the Board.

The remaining evidence as to timeliness indicates that Boss submitted draft documents to the Board on July 21, July 29, and August 9. The budget hearing originally scheduled for August 9 was apparently not held, but there is no evidence that its nonoccurrence was attributable to Boss. Aside from Boss and Pieper, the only other witness with regard to budget matters was Elizabeth Long, a first-year Board member, who candidly admitted that she possessed no experience and only limited knowledge regarding budget matters.

(c) Chapter 1 Filing

Boss admits failing to timely file an application for "Chapter 1" program improvement funds for the 1992-93 school year. Julie Johnson, the kindergarten Chapter 1 teacher at Fairmont, stated that this missed deadline cost the school between $250 and $3,000, the latter figure apparently referring to an amount for the "Hawaii trip" discussed below. After the deadline was missed, Johnson contacted the Chapter 1 program director and learned that her planned request to obtain money to attend a conference in Hawaii would have been approved. The Chapter 1 director did not testify. The record is silent as to the impact on the school of Johnson's nonattendance at this conference. The error had no effect on the school's general fund. Boss readily admits that he missed this filing deadline and makes no real effort to excuse this mistake, other than a lack of cooperation, generally, from Chapter 1 personnel and his general unfamiliarity with the Chapter 1 program.

As stated in *Sanders v. Board of Education*, 200 Neb. 282, 290, 263 N.W.2d 461, 465 (1978), "Evidence that a particular duty was not competently performed on certain occasions, or evidence of an occasional neglect of some duty of performance, in itself, does not ordinarily establish incompetency or neglect of duty sufficient to constitute just cause for termination." That Boss missed this filing deadline is undisputed. However, given the lack of any evidence that this omission impacted the Chapter 1 program at Fairmont Public Schools and the negligible effect it had on Chapter 1 funds, together with the lack of evidence that Johnson's failure to attend the Hawaii conference negatively impacted the Chapter 1 program, we conclude that, in the language of *Sanders*, this conduct was minimal rather than substantial evidence of incompetence or neglect of duty.

(d) School Supplies

Boss received no notice in the July 30 letter that he was being charged with the failure to have all necessary school supplies on hand at the beginning of the 1993–94 school year. The Board's finding in this regard is, moreover, wholly unsupported by the evidence.

(e) Conclusion Regarding Incompetency/Neglect of Duty

[9] Thus, there is no question that the evidence in this case supports a factual finding that the *draft* budget documents presented by Boss contained errors, that the figure which he published in the newspaper was incorrect, that the final budget document contained an insignificant error, and that he missed the Chapter 1 filing deadline. The issue before us is not whether there is evidence to support those factual findings, but whether those findings are sufficient, as a matter of law, to constitute

neglect of duty or incompetency under § 79-12,110 or the terms of Boss' contract. Based upon our foregoing discussion, we conclude that they are not sufficient. The purpose of a proceeding in error, such as the one before us, is to remove the record from an inferior to a superior tribunal so that the latter tribunal may determine if the judgment or final order of the inferior tribunal is in accordance with law. *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 364 N.W.2d 7 (1985). While the appellate standard of review in such cases is limited, the Nebraska Supreme Court has frequently reversed school board decisions upon finding the evidence insufficient to warrant a finding of neglect of duty or incompetence.

For example, in *Schulz v. Board of Education*, 210 Neb. 513, 315 N.W.2d 633 (1982), the court found the evidence that a teacher was described on evaluations as cold and distant toward pupils and that parents complained that children were overworked insufficient as a matter of law to warrant a finding that the teacher was "incompetent." Similarly, in *Sanders, supra*, the Board's decision to terminate a tenured teacher's contract was reversed because the evidence was found insufficient to show neglect of duty or incompetence. In that case, the teacher was accused of leaving the drill team unsupervised, allowing students to roam the halls, having disciplinary problems, and mishandling various equipment. The superintendent testified that in his opinion, the teacher's failure to supervise the drill team constituted neglect of duty. The Nebraska Supreme Court, however, categorized this conduct as minimal rather than substantial evidence of incompetence or neglect of duty. Accordingly, the decision to terminate was reversed. Cf., *Eshom, supra* (finding of incompetence upheld where teacher failed to maintain control of class, lacked teaching skills, failed to use her voice properly, demonstrated emotionality in correcting students, used incorrect English and grammar, and used inadequate variety of materials and individualized instruction); *Bickford v. Board of Ed. of Sch. Dist. #82*, 214 Neb. 642, 336 N.W.2d 73 (1983) (neglect of duty and unprofessional conduct shown where guidance counselor failed to register senior students for necessary graduation requirements, failed to contact students' parents, and lied to principal about said failures); *Kennedy v. Board of Education*, 210 Neb. 274, 314 N.W.2d 14 (1981) (just cause shown where principal failed to maintain discipline, had become ineffective in relations with staff, had failed to cooperate with the board on several occasions, and had refused to cooperate in police investigation regarding stolen school property).

We are mindful of the teachings of the Supreme Court that the question of whether a school employee's actions warrant termination must be decided on a case-by-case basis. Considering the aforementioned facts, not in a vacuum, but, rather, in relationship to what the evidence shows others charged with similar duties have done, and with respect to the impact on the school district, we find that such errors are minimal and insufficient to establish incompetency or neglect of duty under § 79-12,110 or Boss' contract.

3. Unprofessional Conduct

The third basis for Boss' dismissal states as follows:

> Mr. Boss has behaved in an unprofessional manner in violation of policy GAAB regarding his behavior toward Julie Johnson by touching her and by his comments to her. Mr. Boss has behaved in an unprofessional manner by putting his arm around some female students in a way that some teachers who observed the incidents found to be unprofessional[.] Mr. Boss's treatment of some patrons and of board membe[r] Elizabeth Long have [sic] made it difficult, if not impossible, for them to continue to work with Mr. Boss. And may have prompted some parents to file a complaint with the office of civil rights.

The term "unprofessional conduct" is undefined in § 79-12,110. Similarly, no definition of that term appears under the statute addressing "just cause." § 79-12,107(4). Faced with a similar lack of definition, the Supreme Court in *Clarke v. Board of Education*, 215 Neb. 250, 338 N.W.2d 272 (1983), concluded that conduct sufficient to constitute "immorality" must be directly related to a teacher's fitness to teach. Likewise, we conclude that "unprofessional conduct," as used in § 79-12,110 and in Boss' contract, must be conduct directly related to Boss' fitness to act as a superintendent. In *Scott v.*

State ex rel. Board of Nursing, 196 Neb. 681, 691, 244 N.W.2d 683, 690 (1976), the Nebraska Supreme Court, in defining unprofessional conduct in the context of a nursing licensure act, concluded that it was " ' "conduct which violates those standards of professional behavior which through professional experience have become established, by the consensus of the expert opinion of the members, as reasonably necessary for the protection of the public interest." ' "

"Unprofessional conduct" as applied to teachers is defined in part in 68 Am. Jur. 2d *Schools* § 161 at 470 (1993) as "conduct that violates the rules or the ethical code of a profession or that is unbecoming a member of a profession in good standing, or which indicates a teacher's unfitness to teach."

Other jurisdictions have used similar definitions with regard to teachers. In *Morris v. Clarksville-Montgomery*, 867 S.W.2d 324, 329 (Tenn. App. 1993), the court, quoting from Black's Law Dictionary 1707 (4th ed. 1951), stated:

> "UNPROFESSIONAL CONDUCT. That which is by general opinion considered to be grossly unprofessional because immoral or dishonorable. *State Board of Dental Examiners v. Savelle*, 90 Colo. 177, 8 P.2d 693, 697. That which violates ethical code of profession or such conduct which is unbecoming member of profession in good standing. *People v. Gorman*, 346 Ill. 432, 178 N.E. 880, 885. It involves breach of duty which professional ethics enjoin. *People v. Johnson*, 344 Ill. 132, 176 N.E. 278, 282."

After citing the general definition from 68 Am. Jur. 2d, *supra*, the *Morris* court concluded:

> The phrase, "unprofessional conduct" is to be construed according to its common and approved usage having regard to the context in which it is used. *Bd. of Educ. of City of L.A. v. Swan*, Cal.1953, 261 P.2d 261, 41 Cal.2d, 546 [overruled on other grounds].
>
> Unprofessional conduct means conduct indicating an unfitness to teach. *Morrison v. State Board of Education*, 1 Cal.3rd 214, 461 P.2d 375, 82 Cal.Rptr. 175 (1969).

867 S.W.2d at 330.

In *Perez v. Commission on Prof. Competence*, 149 Cal. App. 3d 1167, 1174, 197 Cal. Rptr. 390, 395 (1983), a limited definition of "unprofessional conduct" was adopted, based on the following rationale:

> We conclude unsatisfactory teacher performance said to be unprofessional conduct should be measured by the standard of fitness to teach. Absent this objective measure of performance, the livelihood of the teacher is dependent upon an abstract characterization of conduct which will shift and change from board to board, district by district and year by year. Such discretion is required to be bridled by the restraints of the standard of fitness to teach.
>
> We hold the phrase "unprofessional conduct" (as used in the pertinent statute which did not define it) is conduct such as to indicate unfitness to teach.

[10] By distilling the foregoing, we conclude that unprofessional conduct of a superintendent under § 79-12,110 and Boss' contract includes such conduct as is, by general opinion or, when necessary, by the opinion of appropriate professionals, immoral, dishonorable, unbecoming a member in good standing in the profession, or violative of professional codes of ethics or professional standards of behavior. In addition, such conduct must indicate an unfitness to act as a public school superintendent.

(a) Julie Johnson

With regard to the first allegation of unprofessional conduct by Boss, policy "GAAB" sets forth the personnel policy of Fairmont Public Schools regarding sexual harassment. It prohibits, among other things, verbal or physical conduct of a sexual nature in various specified contexts. The record is void of any evidence that Boss' actions toward Johnson, complained of at the hearing, were sexual in nature. We believe that Boss' actions and comments toward Johnson, as described by her, are more fairly characterized as arrogant, annoying, insensitive, or obnoxious—certainly not traits which would endear one to others, regardless of their sex, but at the same time, not sexual in nature. Indeed, Johnson stated that she did not view Boss' comments or actions as sexual in nature. Rather, she variously described Boss' behaviors as "strange," "inappropriate," and "bizarre," and said they made her "uncomfortable." Therefore, to the extent that the Board found Boss violated the policy against sexual harassment, such finding is unsupported by the evidence. However, we further examine this and the other findings of the Board to determine whether they are supported evidentially and, if so, whether they constitute "unprofessional conduct" within the purview of § 79-12,110 or the language of Boss' contract.

The following are examples of "inappropriate" behavior attested to by Johnson: (1) Boss "always" put his arm around her shoulders or came up behind her and "rub[bed]" her neck for a few seconds; (2) Boss "sort of chuckled," offered to be a male model, and told Johnson how big his muscles were when he was a football coach; (3) Boss once introduced Johnson to another person by saying "this is our Julie"; (4) Boss referred to Johnson as "cheap"; (5) when Johnson would go into the teachers' lounge, Boss would say "hi, Julie and how are you"; (6) while Johnson was in a store in Lincoln with Boss, Boss told a clerk that Johnson was "with me"; (7) while traveling to a conference in Lincoln, Boss reached over and started "shaking" Johnson's knee approximately five times while conversing with her; (8) while they were in Boss' office, a song came on titled "What Part of No Don't You Understand?" and Boss told Johnson that it reminded him of her; and (9) Johnson received a note in her mailbox about a conference in South Dakota with a note stating "[S]hould we go?"

With regard generally to Boss' "touching" of people, several staff members, both male and female, testified that it was Boss' manner to occasionally touch their shoulder or pat their knee during conversation. It did not seem inappropriate to them or in any way sexual in nature. A female office staff person testified that Boss' touching her bothered her. When she informed Boss of this, he stopped.

Boss explained that when he introduced Johnson by saying "this is our Julie" to a fellow administrator, he did so because that person also had a person named "Julie" on his staff. With regard to Boss' references to Johnson as "cheap," testimony adduced at trial reveals that the former superintendent, Pieper, also referred to Johnson as "cheap" because when she was hired, Johnson had taught only 1 year, had only 6 hours at that time, and her pay rate was low. It was Johnson herself who informed Boss of this previously used term and its meaning as used by Pieper. Although the term was not offensive when used by Pieper, Johnson testified that *she* began to interpret Boss' use of the term to mean that she was of loose morals. No others were called to support a similar interpretation by them of such language as used by Boss in referring to Johnson.

Johnson testified that she stopped going to the teachers' lounge before school, according to her, "[b]ecause it seemed like every time, no matter how many people were in the room — and I didn't know if this was just Mr. Boss being friendly, I didn't know how to perceive it, but he had to make, you know, hi, Julie and how are you." Johnson, however, admitted that she may have been misconstruing Boss' congeniality toward her.

With regard to the incident in the store in Lincoln, Johnson testified that a store clerk assisting Boss asked Boss to wait while the clerk asked Johnson if she needed any help. To this, Boss responded that Johnson was "with me."

The incident involving the "shaking" of Johnson's knee occurred in a car while Boss and Johnson traveled to Lincoln to attend a conference. According to Johnson, while conversing, Boss grabbed and shook her knee approximately five times. While this activity is an unusual way of getting a point across, particularly to a female colleague in a professional setting, even Johnson did not perceive it as sexual. Rather, Johnson's stated reaction to this was "[t]he first couple of times I thought, I'm not a 12 year old kid here and sort of leave me alone." The inference is that Boss was emphasizing some point to Johnson by this "shaking" maneuver and that Johnson objected to her being lectured as if she were a child. As stated above, other testimony indicates that Boss regularly touched people in various ways, including male staff members, when conversing with them. While perhaps unorthodox to some, in the absence of evidence of ignored protests by Johnson, we are hard pressed to view it as constituting conduct sufficient to cancel Boss' contract, even though Boss was apparently insensitive to the gestures' potential effect on Johnson.

Boss testified that his statement to Johnson that the song entitled "What Part of No Don't You Understand?" reminded him of her meant simply that Johnson was continuously requesting his approval of financial assistance for the Chapter 1 program, to which Boss regularly said "No." At the time the statement was made, even Johnson had no idea what was meant and did not imagine anything inappropriate about it until some time later when a friend told her that it was the title to a song wherein a female was spurning the romantic advances of a male suitor. Johnson, obviously surmising that Boss' comment was alluding to her rejection of his advances, then concluded that Boss' prior conduct toward her had been inappropriately motivated. There is no evidence that Boss made romantic advances toward Johnson or that she ever rejected or protested his comments or conduct.

Finally, regarding the South Dakota conference information to which Boss attached a note stating "[S]hould we go?" Johnson testified that after receiving this note in her mailbox, she went to Boss' office and informed him that she and another teacher would attend. Boss responded by asking who invited the other teacher. Johnson then asked Boss if he was suggesting that the two of them attend this conference together, to which Boss replied no. Several inferences might be drawn from this scenario, the most damning of which is that he was flirting with Johnson.

Johnson made no contemporaneous complaints to Boss that his actions or comments were unprofessional or inappropriate. Indeed, no complaints from Johnson surfaced until solicited in connection with the cancellation proceeding. While Johnson's subordinate status might arguably explain her silence, there is no evidence that she feared retaliation, and it is clear from the balance of the record that Johnson felt little, if any, sense of intimidation in her professional and personal dealings with Boss. Boss expressed surprise and apology over Johnson's testimony and stated that now being aware of Johnson's feelings, he would avoid any comment or act which might offend.

While we do not condone Boss' comments or actions, or minimize in any way the discomfort which they caused Johnson, Boss' conduct toward Johnson did not constitute "unprofessional conduct" within the meaning of § 79-12,110 and Boss' contract. While it may reflect insensitivity and personality traits that Johnson found juvenile and distasteful, there is no opinion evidence, lay or expert, that the conduct was immoral, dishonorable, or violated professional standards or ethics. The conduct described did not indicate unfitness to serve as an administrator of a public school. Johnson testified that it would be difficult for her to continue to work with Boss if he remained superintendent. Whether this feeling stems from the tension created by her testifying at the Board hearing or from Boss' prior conduct toward her is unclear. In any event, that Johnson expressed this sentiment is not a basis for cancellation in view of the evidential shortcomings here.

(b) Female Students

As to Boss' conduct of putting his arm around female students, Johnson was again a prime complainant on this topic. No female students or parents of students testified to any problems in this regard. According to Johnson, Boss "always" seemed to "just put his arm around [a student] — I mean, he wouldn't hug her, he would just sort of squeeze her, put his arm around her and give her a squeeze." Johnson also observed Boss, on one occasion, rubbing the back of a female student. Johnson's statement that Boss "always" did this was contradicted by her later testimony that she saw this conduct with only two students. Johnson's description of this conduct varied from "[v]ery unprofessional, totally uncalled for" to "inappropriate."

Several staff and faculty members testified that they had never witnessed inappropriate behavior of Boss toward any students. Some testified that they had observed Boss put his arm around the shoulders of female students. One such faculty member recalled being present when Boss gave a female student a "hug" which caused the witness and another faculty member present to have "eye contact." In the witness' opinion, although not sexual in nature, this conduct was "inappropriate." However, he also stated that whether *he* would ever engage in similar conduct would depend "on the situation." Interestingly, the other male faculty member witnessing the same incident described Boss' conduct in placing his arm "around the shoulder" of the female student as "not inappropriate," although "it's not something you see every day." This faculty member's recollection was that "I believe it had something to do with an injury and something to the effect, well, you're going to get better soon. It was kind of a consoling thing, that was my interpretation of it." Still a third male faculty member described an incident of Boss' placing his arm around the shoulders of a female student as inappropriate and not something he would have done. At the same time, he did not interpret it as sexual, but, rather, as a "gesture of friendship and caring."

Yet another faculty member, who testified that she had never seen Boss do anything unprofessional, acknowledged that she had seen him touching a senior girl. She explained:

> She was hurt and he's a coach, he's like a father figure, and it was nothing more than that. I really didn't feel it was sexually expressed or anything like that, it was concern. I mean it's ex[c]iting to see an administrator who really cares for the kids one-on-one that way.

As was the case with Boss' comments and actions toward Johnson, no one ever complained to Boss and told him that his "touching" of female students was unprofessional or inappropriate until he received the July 30 letter. We reiterate that, as was the case with Johnson, there is no evidence that Boss' conduct toward any of the female students was sexual in nature.

In today's litigious climate, one might suggest that Boss' conduct and the images it might convey to suspicious minds lacked prudence. On the other hand, one might say, as did one faculty member, that it is "ex[c]iting to see" such an expression of care. In any event, under the circumstances here, such conduct is not "unprofessional" under any definition. Expressions of friendship, caring, and consolation hardly demean a profession whose very function includes support and care of children as they proceed through the educational process.

(c) Elizabeth Long

In support of the third example of unprofessional conduct, Elizabeth Long, a member of the Board, testified that it was difficult for her to work with Boss. She attributed this difficulty to her *feeling* that Boss always "minimizes her concern"; however, she also stated that she had "always been well received" by Boss. Long also stated that Boss has never been rude to her. Long further testified that she had heard from several teachers that Boss had made a negative statement about her at a staff meeting. When she confronted Boss about this, he denied having made any such statement. No further evidence was adduced regarding the alleged statement. It is not the court's function to second-guess school boards; nevertheless, the Legislature clearly intended to afford teachers and administrators "some protection from . . . angry school boards." *Schulz v. Board of Education*, 210 Neb. 513, 518, 315 N.W.2d 633, 637 (1982). This evidence is not proof of unprofessional conduct, and unless Long's *feelings* were confirmed by evidence, the matter is of little significance and certainly not a basis for termination.

(d) Treatment of Parent Grievances

The last example of unprofessional conduct as stated by the Board is, inter alia, that Boss' "treatment of some patrons . . . *may* have prompted some parents to file a complaint with the Office of Civil Rights." (Emphasis supplied.)

It is important to note that the Board did not find that Boss' treatment of any patron *in fact* caused the filing by any parent of complaints with the "Office of Civil Rights" (OCR). The Board carefully restricted its finding to "may." A review of the evidence shows that such a restricted finding was judicious on the part of the Board, because the evidence is wholly insufficient to support anything more than "may."

Two parents testified at the hearing. The first was Debra Swanson and the second, Linda Bristol. Swanson, along with her husband, made the OCR filings. The mother of two school-age children, one a fifth grader with special education needs, Swanson testified as to no less than six separate complaints or "grievances" which she had leveled against the

Fairmont Public Schools during Boss' first year as superintendent. While the OCR complaints are not before us, they apparently involved at least two of the six alleged incidents. One centered on an incident of alleged physical abuse of her daughter by another student, and the other pertained to the school's Developing Capable People (DCP) program. Swanson testified that she filed these OCR complaints not because the response she had received was unfavorable to her, but, rather, out of sheer frustration in getting no response from Boss. The record defies this.

The incident involving physical abuse of Swanson's daughter was investigated by Boss on the very day it was brought to his attention by Swanson and her husband. Boss did so in spite of the fact that the principal, Kenton McLellan, was assigned to handle disciplinary problems within the schools. In response to the Swanson complaint, Boss immediately interviewed their daughter and the other girl involved. He also spoke to the teacher involved, as well as the principal. This was on a Friday. The following Monday, he delivered a memorandum to Swanson in which it was determined that both girls had denied there was any incident. Swanson testified that she had "extreme difficulty" with the way Boss conducted the interviews, and she characterized the results of his investigation as containing "numerous untruths" which were never "resolved" by Boss. She informed Boss of these things and on that same Monday advised him of "the details of our NOCR complaint."

Thus, while Swanson pretends that the OCR complaints resulted from a lack of resolution rather than from her dissatisfaction with the response she received, her actions speak louder than her words. Her decision to proceed with at least one of such complaints was obviously made over a period of 2 or 3 days, and then only upon being obviously dissatisfied with the prompt response.

When asked what Boss could or should have done to have changed Swanson's course of action regarding the filing of the OCR complaints, she was unable to give any definitive response. When asked by the Board's counsel whether Boss' handling of the matter might have affected her filing of the complaints, the most Swanson could muster was "[t]hat's very possible." On the evidence before us, no reasonable person could conclude that Boss alone was the cause of these OCR complaints being filed.

Swanson's son was also the subject of an OCR filing. Again, the nature of the filing is not apparent from the record, but the complaint to the schools involved a "class meeting" exercise which was part of the DCP program. Swanson objected to one of the class meetings because an agenda item for the meeting involved a matter relating to her son's special education program. Boss initially refused to remove the agenda item, but later did direct the teacher who was conducting the class meeting to skip that agenda item. The evidence contains letters from McLellan to Swanson pertaining to her son and his special education needs and the school's attempts to work with Swanson regarding complaints in this regard. Swanson's complaints did not fall on deaf ears, as her testimony suggests. While Swanson directed her requests to Boss and while Boss did not personally respond to all of them, McLellan did respond in apparent good faith, at times after consulting with Boss.

Without detailing the balance of Swanson's complaints and each and every one of Bristol's complaints, suffice it to say that in each instance they were addressed by Boss, McLellan, or both. These complaints ranged from Boss' flippant reaction to Bristol's phone call asking Boss to check on the status of the school bus because it was 25 minutes late to Swanson's filing of a "grievance" because her initial request to review certain telephone bills was not honored by Boss' secretarial staff. Boss and McLellan later wrote to Swanson and apologized and explained that the staff had not known that they had permission to allow the review of the telephone bills and offered Swanson the opportunity to review them during business hours, which she never did. Both Swanson and Bristol were part of a larger group of parents who voiced objections to the DCP program. This resulted in formal parent meetings and in Boss' altering of the program with recommendations from this parent group. No further problems with regard to the DCP program have been reported.

In conclusion, placing responsibility for Swanson's filing of the OCR complaints on Boss, under the circumstances of this case, borders on the absurd. That Boss mishandled the complaints of Bristol and Swanson is not proved merely by the fact that Swanson ultimately filed OCR complaints or by the fact that Swanson and Bristol rendered complaints. There was no evidence offered that any other superintendent would have handled these complaints differently or that Boss' conduct rose to the level of "unprofessional conduct."

As stated in *Schulz v. Board of Education*, 210 Neb. 513, 315 N.W.2d 633 (1982), the Legislature, by setting forth certain standards that must be met before contracts can be canceled, clearly intended to afford some protection to school personnel from disgruntled parents, as well as angry school boards. We do not believe that the complaints of two parents out of the entire school district on matters such as those addressed by Swanson and Bristol provide substantial evidence to support a finding sufficient to cancel a superintendent's contract on the grounds of unprofessional conduct.

(e) Periodic Evaluations

Boss argues that the cancellation of his contract was a nullity because he was not evaluated during his first year of employment with the school district as mandated by § 79-12,111. Boss' argument characterizes this as a deficiency in evidence which, in a jury trial setting, would mandate a directed verdict in his favor. The school district argues, alternatively, that Boss was "evaluated" at every school board meeting, thus meeting the evaluation requirement, and that even if no evaluations were made, it does not preclude the cancellation.

[11] Section 79-12,111 provides that all probationary certificated employees employed by Class I, II, III, and VI school districts shall be evaluated at least once each semester. If the probationary certificated employee is a superintendent, he or she shall be evaluated twice during the first year of employment and at least once annually thereafter. *Id*. While the record does not reflect the class of the school district involved, the district does not argue that the statute is inapplicable because the district is of an exempted class or that the statute suffers from any equal protection or special legislation

infirmity. See *Nuzum v. Board of Ed. of Sch. Dist. of Arnold*, 227 Neb. 387, 417 N.W.2d 779 (1988). "Probationary certificated employee," for purposes of § 79-12,111, means superintendents, regardless of the length of service. Neb. Rev. Stat. § 79-12,107(3). We conclude that Boss is within the ambit of § 79-12,111, and as such, as a superintendent, he was entitled to be evaluated twice during the first year of employment with the school district. The question is whether such evaluations were performed and, if not, whether that failure precludes cancellation of his contract.

The district argues that evaluations were performed, because Boss met with the Board a minimum of 15 times within a year and received direction and feedback from the Board members during these meetings. It argues that this, in effect, fulfilled the evaluation mandate of § 79-12,111. We disagree. The statute expressly provides that should the evaluation disclose deficiencies in the work performance of any probationary employee, the evaluator "shall provide the teacher or administrator at the time of the observation with a list of deficiencies, a list of suggestions for improvement and assistance in overcoming the deficiencies, and followup evaluations and assistance when deficiencies remain." As stated by Justice Caporale in *Nuzum, supra*:

> It is clear from § 79-12,111 as a whole, without the need to resort to other sources, that its purpose is to compel school system managers to engage in a specified process of evaluating all probationary certified employees, identify such skill and performance areas in which the employee needs to improve, provide suggestions for and assistance in making those improvements, and eliminate from the system those who cannot become competent.

227 Neb. at 394, 417 N.W.2d at 784.

School board meetings do not provide the "specified process" of evaluating required by § 79-12,111. We do not infer from the occurrence of the meetings that any such evaluation of Boss was performed.

We now move to what effect the failure to provide periodic evaluations to Boss has on the right to cancel his contract under either § 79-12,110 or the terms of his contract. Neither the statute nor his contract expressly prohibits cancellation for this omission. Boss argues that *Nuzum* stands for the proposition that the failure to show compliance with § 79-12,111 is fatal to the cancellation of his contract. *Nuzum*, however, is distinguishable in that *Nuzum* involved the failure of the board to renew a probationary contract of employment, whereas the school district's action in this case was one to *cancel* Boss' 3-year contract. This difference is significant in that a board may decide not to renew a probationary contract "for any reason it deems sufficient [so long as constitutionally permissible]," § 79-12,111(4), whereas the contract of a certificated employee may be *canceled* during the school year only upon those grounds shown in § 79-12,110. In the latter instance, a formal due process hearing is required, Neb. Rev. Stat. § 79-12,115 (Reissue 1994), whereas in the former, no such hearing is mandated, § 79-12,111(8) and Neb. Rev. Stat. § 79-12,116 (Reissue 1987).

Thus, while noncompliance with the periodic evaluations of § 79-12,111 may negate a school board's decision not to renew a probationary contract, it is not so clear that the failure to provide those evaluations has the same effect on a board's decision to cancel a certificated employee's contract under § 79-12,110. We find no Nebraska Supreme Court cases which have directly addressed this issue.

The school district proffers the policy argument that such a construction would, by necessity, unreasonably preclude the cancellation of a superintendent's contract even for the most egregious of conduct, such as the commission of a crime, if he or she had been denied the periodic evaluations under § 79-12,111. This unnecessarily distorts the issue. We believe if faced with this issue, our Supreme Court would construe §§ 79-12,110 and 79-12,111 in such a manner as to avoid such an absurd, unconscionable, or unjust result. See, e.g., *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). Thus, the failure to provide periodic evaluations to a superintendent should not, in every instance, preclude cancellation of a contract under § 79-12,110. On the other hand, statutory language is to be given its plain and ordinary meaning, and § 79-12,111 plainly mandates superintendent evaluations. We must attempt to harmonize these statutes and to give effect to each.

[12] We conclude that if the ground for cancellation is a deficiency in the performance of an administrator which would have reasonably been observed and disclosed in the course of such periodic evaluations, then the failure to provide such evaluations must be considered in the overall assessment of the sufficiency of the evidence to support cancellation of the contract. The stated purpose of the evaluation is to assist the administrator in overcoming deficiencies and to follow up with evaluations and assistance when deficiencies remain. To hide perceived deficiencies from an administrator by not conducting statutorily mandated evaluations and to then "spring" such deficiencies as grounds for cancellation under § 79-12,110 eviscerates the purpose of § 79-12,111.

In the context of this case, we agree with the school district that the budget matters were not something that could have reasonably been disclosed in the two periodic evaluations to which Boss was entitled during his first year as superintendent. However, we have already determined that the evidence is insufficient as a matter of law, i.e., that Boss would have been entitled to a directed verdict if this matter were tried to a jury, with regard to the charges of neglect of duty and incompetency on budget matters and Chapter 1 filings.

The charge of unprofessional conduct, however, is another matter. The failure of the district to provide Boss with periodic evaluations mandated under § 79-12,111 seriously impacts our assessment of the sufficiency of the evidence to support the charge of unprofessional conduct. The allegations with regard to Boss' conduct with Johnson, his treatment of female students, his relationship with Board member Long, and his dealings with parent grievances are the sort of potential "deficiencies" which should have reasonably been discovered and disclosed in periodic evaluations performed through the specified process anticipated by § 79-12,111. This was not done. Not only was Boss not afforded the assistance to correct deficiencies to which he was entitled, he was not even made aware that these were problems prior to the July 30 letter. Thus, for this additional reason, we conclude that the evidence, including the lack of periodic evaluations, was insufficient to cancel Boss' contract on the grounds of unprofessional conduct.

VI. CONCLUSION

If the case had been tried to a jury, Boss would have been entitled to a directed verdict with regard to claims that he neglected his duty or was incompetent to perform the duties of superintendent. As such, the evidence is insufficient as a matter of law to support cancellation of his contract on those grounds. Further, Boss, a probationary certificated employee, was statutorily entitled to two periodic evaluations during the first school year of his employment with the school district. These were not provided. Such evaluations should have disclosed, at least in theory, the deficiencies upon which the Board grounded its finding of Boss' unprofessional conduct. Boss was entitled to notification of such deficiencies and to assistance in correcting them. Whether they would have disclosed the difficulties which Johnson encountered in her relationship with Boss is unknown, since she never complained before the cancellation proceedings. In any event, he was denied the notice and the assistance to correct the deficiencies that the evaluation process is designed to uncover and remedy. The findings of the Board that Boss engaged in unprofessional conduct sufficient to cancel his contract were not supported by sufficient evidence. Thus, the decision to cancel Boss' employment contract was arbitrary and capricious. The decision of the district court affirming the Board's actions is reversed, and the matter is remanded to the district court with directions to enter a judgment in favor of Boss regarding the improper cancellation of his contract and with directions to undertake further proceedings not inconsistent with this opinion, including those necessary to address the damage, if any, sustained by Boss.

REVERSED AND REMANDED WITH DIRECTIONS.

JIM DOUGHERTY, APPELLEE, V. SWIFT-ECKRICH, INC., APPELLANT.

547 N.W.2d 653

Filed May 14, 1996. No. A-95-1119.

1. **Workers' Compensation: Appeal and Error.** With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
2. **Workers' Compensation: Final Orders: Appeal and Error.** A decree or award in a compensation case is final unless the petitioner seeking to reopen the case can bring the case within the terms of any statute to that effect.
3. **Workers' Compensation: Appeal and Error.** An appellate court may reverse, modify, or set aside a Workers' Compensation Court decision when the court acted in excess of its powers.

Appeal from the Nebraska Workers' Compensation Court. Reversed and vacated.

Theodore J. Stouffer, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Thomas F. Dowd, of Dowd, Dowd & Fahey, for appellee.

HANNON, SIEVERS, and MUES, Judges.

SIEVERS, Judge.

This case involves the power of the Nebraska Workers' Compensation Court to reopen an award and extend further benefits because the evidence upon which the court originally premised its award was not accurate. The Workers' Compensation Court modified its previous award under the guise of a "Further Award," and the review panel affirmed without a detailed opinion. The employer appeals to this court, assigning error in the modification of the award.

BACKGROUND

On February 24, 1993, the Workers' Compensation Court entered an award finding that Jim Dougherty had sustained an injury to his left arm as a result of "repetitive trauma in a work related accident that happened suddenly and violently." The court ordered the payment of medical expenses, temporary total disability benefits, and permanent partial disability benefits, the details of which are unimportant for purposes of this appeal. The court found that Dougherty was entitled to vocational rehabilitation, saying: "The Court hereby approves the plan of vocational rehabilitation that began on January 13, 1993 as set forth more particularly in Exhibit 6 for the plaintiff to obtain an associates degree as a parts and service technician that will conclude in August of 1994."

Examination of exhibit 6 reveals a "Vocational Rehabilitation Plan" at Iowa Western Community College in Council Bluffs, Iowa, which was developed by Janet Harsh, a counselor. The training course is for an associate of applied science degree in parts and service technology. Exhibit 6 contains a starting date of January 1993 and a finishing date of August 1994.

More than 19 months after the entry of the award, Dougherty filed a petition in the compensation court, using the same caption and case number as the original award, in which he requested additional temporary total disability benefits from August 1994 to December 1994, the new ending date for his associate's degree program.

The reason alleged in the petition for the extension was "Plaintiff's need for remedial course work in order to complete his associate degree program." An amended petition was thereafter filed, which asked for the same relief, but included as the reason, in addition to the need for remedial work, "the miscalculation by the vocational consultant that the program could be completed by August 1994."

The evidence reveals that although one might be able to complete the technical and parts portion of the course in less than 2 years, 2 full years was needed to obtain the rest of the coursework in order to complete the requirements of the State of Iowa for an associate's degree. Although the vocational consultant who developed the plan which was originally received into evidence as part of exhibit 6 did not testify at the hearing on the amended petition to extend the plan, her replacement counselor did testify. This counselor's testimony was that she believed the mistake was made because her predecessor had calculated the timeframe for schooling using the quarter system, when in fact Iowa Western Community

College operates on a semester system. The present counselor opined that this was the reason for the incorrect timeframe found in exhibit 6 for Dougherty's vocational rehabilitation.

By the time the matter was heard, Dougherty had actually completed his degree program and had graduated on December 22, 1994.

WORKERS' COMPENSATION COURT DECISION

A single judge of the Workers' Compensation Court entered a "Further Award" on March 2, 1995, finding that Dougherty was unable to complete the program for an associate of applied science degree in parts and service technology within the time period ending in August 1994. The court found that the extra semester was necessary due to two reasons: Dougherty's need for extra remedial work in reading and the inadvertence of the original vocational rehabilitation counselor in using the quarter system rather than the semester system, which resulted in the program being a semester too short. Consequently, the court awarded Dougherty an additional $16^1/_7$ weeks of temporary total disability benefits from August 31 to December 22, 1994. The basis for the award was stated to be that there was no neglect or inadvertence on the part of Dougherty and that "the interests of justice would further be served by allowing the extra semester for completion of the associate of applied science degree."

The employer, Swift-Eckrich, Inc., appealed this award of additional benefits to a review panel of the Workers' Compensation Court, but without success. Moreover, Swift-Eckrich was assessed a $500 attorney fee, together with interest on the unpaid amounts of compensation. Swift-Eckrich now appeals to this court.

ASSIGNMENTS OF ERROR

Summarized, Swift-Eckrich claims error in the Workers' Compensation Court's modification of the prior award because no change in Dougherty's physical condition was established to justify the change and the compensation court lacks the power to modify awards in "the interests of justice."

STANDARD OF REVIEW

[1] Findings of fact made by the Workers' Compensation Court trial judge are not to be disturbed upon appeal to the review panel unless they are clearly wrong, and if the record contains evidence which substantiates the factual conclusions reached by the trial judge, the review panel should not substitute its view of the facts for that of the trial judge. It naturally follows that we also do not substitute our view of the facts for that of the trial judge. See *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 513 N.W.2d 361 (1994). When testing the sufficiency of the evidence to support findings of fact by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence. See *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991). With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *McGowan v. Lockwood Corp.*, 245 Neb. 138, 511 N.W.2d 118 (1994).

ANALYSIS

Although the record establishes more than ample reason for the extension of the vocational rehabilitation program, because it was a semester short due to the mistake of the vocational rehabilitation counselor, the Workers' Compensation Court must have statutory authority to do what it did, irrespective of whether its action makes good sense or is "just" to Dougherty. Regardless of whether the term "modification," "amendment," or "reopening" is used, the effect is the same: The compensation court is changing the benefits which Dougherty is entitled to receive and increasing Swift-Eckrich's obligation to pay benefits. Such action runs directly contrary to the notion of finality of judgments.

[2] In *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 654, 358 N.W.2d 211, 214 (1984), the Supreme Court held:

> The Workmen's Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute. 81 Am. Jur. 2d

> *Workmen's Compensation* § 80 (1976). A decree or award in a compensation case is final unless the petitioner seeking to reopen the case can bring the case within the terms of any statute to that effect.

See, also, *Dobson-Grosz v. University of Neb. Med. Ctr.*, 1 Neb. App. 434, 499 N.W.2d 83 (1993).

In *Dobson-Grosz*, 2½ months after an award on rehearing, a dispute had developed between Dobson-Grosz and the State over the starting date for payment of benefits. Dobson-Grosz filed a motion in the compensation court, seeking an order that the payments should start November 26, 1985, the date used by the court in its award on rehearing as the date when Dobson-Grosz first contracted the herpes infection for which benefits had been awarded. The earlier the date, then the more interest Dobson-Grosz would collect. The compensation court found that the State had correctly begun paying permanent partial disability benefits as of December 9, 1990, the date of a physician's letter assessing permanency of the disability. This court considered whether the compensation court had jurisdiction to consider the motion and found that it did not. Neb. Rev. Stat. § 48-180 (Reissue 1993) authorizes the compensation court to modify or change its findings, order, award, or judgment for purposes of correcting any ambiguity, clerical error, or patent or obvious error, as long as the modification is made within 10 days of the date of the judgment at issue. Dobson-Grosz had filed for relief well beyond the 10-day limit of § 48-180. This court held that there was no procedure under the Workers' Compensation Act which authorized the compensation court "to clarify an award on rehearing when more than 10 days have elapsed from the date on which the findings were made in the rehearing." 1 Neb. App. at 436, 499 N.W.2d at 85.

In the instant case, the petition for temporary total disability benefits for the extra semester of schooling was also filed well outside the 10-day limit of § 48-180. Neb. Rev. Stat. § 48-141 (Reissue 1993) permits modification of an award because of an increase or decrease in disability. However, there is no claim that an increase in disability is the basis for the additional payment in this case, nor is there any evidence to that effect.

Obviously, finality of judgments is an important concept in our system of jurisprudence, because it enables the parties to litigation to know once and for all their rights and obligations. The Workers' Compensation Act provides certain statutory exceptions to finality, which we have recited above. This case involves a mistake in a report by a vocational rehabilitation specialist in her definition of the length of vocational rehabilitation needed by Dougherty. While it is unfortunate that the mistake was received in evidence, it is no basis for relief under the Workers' Compensation Act. It has been said that an original award cannot be modified for a mistake of fact on the part of the witnesses, but only for a mistake by the hearing officer on the evidence submitted. *Sauder v. Coast Cities Coaches, Inc.*, 156 So. 2d 162 (Fla. 1963). Here, the mistake was similar, because although the vocational rehabilitation specialist did not testify, it was her written report received in evidence which was in error.

[3] Neb. Rev. Stat. § 48-185 (Reissue 1993) provides that an appellate court may reverse, modify, or set aside a Workers' Compensation Court decision when the court acted in excess of its powers. This is the situation here. The compensation court lacked authority, under the situation presented by this record, to modify a previously entered and final award.

For these reasons, we reverse the affirmance by the review panel of the Workers' Compensation Court trial judge, we vacate the award of attorney fees and interest by the review panel against Swift-Eckrich, and we vacate the "Further Award" of March 2, 1995.

REVERSED AND VACATED.

IN RE INTEREST OF JOSHUA M. ET AL., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE, V. LONA F., APPELLANT.

548 N.W.2d 348

Filed May 21, 1996. Nos. A-94-1239, A-94-1240, A-95-761, A-95-762.

1. **Jurisdiction: Appeal and Error.** Whether a question is raised by the parties concerning jurisdiction of a lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Judgments: Jurisdiction: Appeal and Error.** Where a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the inferior court.
3. **Juvenile Courts: Appeal and Error.** An appeal to the Nebraska Court of Appeals or the Nebraska Supreme Court from a juvenile court is reviewed de novo on the record. In that review, findings of fact made by the juvenile court may be accorded weight by the appellate court because the juvenile court observed the parties and the witnesses and made findings as a result thereof.
4. **Final Orders: Appeal and Error.** A court order is appealable only if it is a final order.
5. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** A detention order entered after a hearing which continues to keep a juvenile's custody from the parent, pending an adjudication hearing to determine whether the juvenile is neglected, is final and thus appealable.
6. **Juvenile Courts: Final Orders: Appeal and Error.** Dispositional orders of a juvenile court are final, appealable orders.
7. **Constitutional Law: Parental Rights.** A parent has a liberty interest in raising her or his child, a concept which encompasses the child's custody, care, and control.
8. **Final Orders: Waiver: Appeal and Error.** Grounds for appeal from final orders not appealed from are waived.
9. **Juvenile Courts: Jurisdiction: Parental Rights.** Neb. Rev. Stat. § 43-295 (Reissue 1993) generally provides a juvenile court with continuing jurisdiction over a juvenile and empowers the court to order a change in the custody or care of any such juvenile if at any time it is made to appear to the court that it would be for the best interests of the juvenile to make such change.
10. **Juvenile Courts: Jurisdiction: Parent and Child: Appeal and Error.** The continuing jurisdiction of a juvenile court under Neb. Rev. Stat. § 43-295 (Reissue 1993) does not include the power to terminate a juvenile's relationship with his or her parent pending an appeal.
11. **Jurisdiction: Appeal and Error.** The general rule in Nebraska is against concurrent jurisdiction of trial and appellate courts.
12. ____: ____. After an appeal has been perfected to an appellate court, the trial court is without jurisdiction to hear a case involving the same matter between the same parties.

13. **Juvenile Courts: Jurisdiction: Appeal and Error.** Once an appeal is pending, the juvenile court is precluded from proceeding on matters other than expressly provided for in Neb. Rev. Stat. § 43-295 (Reissue 1993).
14. **Jurisdiction: Appeal and Error.** Where the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.
15. **____: ____.** When an appeal is dismissed because the lower court lacked jurisdiction to enter the order appealed from, an appellate court lacks jurisdiction, but may nevertheless enter an order canceling the order issued by a lower court without jurisdiction.
16. **Juvenile Courts: Parental Rights: Proof.** At a detention hearing, the State must prove by a preponderance of the evidence that the custody of a juvenile should remain in the Department of Social Services pending adjudication.
17. **Juvenile Courts: Parental Rights.** Once a juvenile has been adjudicated, the juvenile court has broad discretion as to his or her disposition.
18. **Parental Rights: Proof.** The State is not required to prove harm to a child prior to intervention.

Appeal from the Separate Juvenile Court of Douglas County: DONALD J. HAMILTON, District Judge, Retired. Judgments in Nos. A-94-1239 and A-94-1240 affirmed. Appeals in Nos. A-95-761 and A-95-762 dismissed, and causes remanded with directions.

Julie A. Frank, of Frank & Gryva, for appellant.

Margaret A. Badura, Deputy Douglas County Attorney, and Christine P. Costantakos, guardian ad litem, for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges.

MUES, Judge.

I. INTRODUCTION

These appeals involve five children: Gloria F., born May 5, 1985; Tabitha M., born August 13, 1987; T.J. M., born February 21, 1990; Amanda M., born October 27, 1991; and Joshua M., born September 6, 1993. The children's biological mother, Lona F., appeals from four separate orders regarding these children. Case No. A-94-1239 is an appeal from a preadjudication detention order entered by a separate juvenile court on behalf of Joshua. Case No. A-94-1240 involves an appeal from an order of the juvenile court removing T.J. and Amanda from Lona's home. Cases Nos. A-95-761 and A-95-762 involve appeals from two separately filed juvenile court proceedings collectively terminating Lona's parental rights to all of said children. All four matters were consolidated for appeal.

II. STATEMENT OF CASE

Lona gave birth to Gloria when Lona was age 13. Gloria's father, Walter R., was approximately 36 years old at the time. At age 15, Lona began living with Thomas M. and Barbara C. The three lived as one family, and Thomas fathered nine children between the two women, whom he referred to as his "shack jobs." Other than Gloria, Thomas is the biological father of all of the children involved herein. Lona describes her relationship with Thomas as "very abusive and . . . different." Lona required hospital treatment as the result of Thomas' abuse on at least one occasion.

The initial petition regarding Gloria, Tabitha, T.J., and Amanda was filed on March 26, 1993, at which time the court ordered that immediate custody of the children be retained in the Department of Social Services (the Department). On June 8, Thomas was charged with two counts of first degree sexual assault on a child. These charges alleged that Thomas had sexually assaulted Gloria and a second child fathered by Thomas and born to Barbara.

By order filed August 23, 1993, Gloria, Tabitha, T.J., and Amanda were adjudicated to be within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993), on the basis that Lona had failed to provide a healthy home environment. Joshua had not been born at this time. This order further retained temporary custody of the children with the Department for appropriate care and placement. By dispositional order dated October 5, 1993, the children were ordered to remain in the temporary custody of the Department and Lona was ordered to comply with a plan designed to correct the conditions leading to their adjudication. Among other things, she was ordered to avoid association with Thomas.

Lona was again ordered to refrain from any contact with Thomas by order of the court dated November 16, 1993. Following a review hearing on April 22, 1994, the court found it was not in the children's best interests to be returned to Lona's home and continued their temporary custody in the Department.

Thomas was found guilty by a jury on both counts of sexual assault on a child, and on September 23, 1994, was sentenced to 8 to 12 years' imprisonment on each count, to be served consecutively. These convictions were affirmed by this court in an unpublished opinion on October 24, 1995.

Following a review hearing on October 19, 1994, the court found that T.J. and Amanda should remain in the custody of the Department for appropriate care and placement *to include the home of Lona* and that Gloria and Tabitha should remain in foster care. At some point prior to the entering of this order, T.J. and Amanda had already been returned to Lona's home; however, their custody remained in the Department. The record does not disclose what precipitated the children's return to Lona's care.

The order of October 19, 1994, further ordered that Lona

> [n]ot engage in any contact or communication or visitation in <u>ANY FORM WHATSOEVER</u>, (including but not limited to telephon[e] or letter) with Thomas . . . and Lona [F.] shall not permit, allow, or in any manner facilitate any visitation, contact or communication in <u>ANY FORM WHATSOEVER</u> (including but not limited to telephone or letters) between Thomas . . . father . . . and [any] of the above-named minor children . . . .

On December 6, 1994, the Department filed a motion for immediate temporary custody regarding T.J. and Amanda. By order dated December 6, 1994, the court found that pending further hearing, the need for placement and detention existed for the protection of T.J. and Amanda. The court entered a separate order for immediate temporary custody regarding Joshua on December 6. The Douglas County sheriff was therefore ordered to pick up the three children.

Also on December 6, a motion to terminate parental rights was filed in the pending juvenile proceedings regarding Gloria, Tabitha, T.J., and Amanda. In the motion, it was asserted that the children had been adjudicated within § 43-247(3)(a) and that the children were within Neb. Rev. Stat. § 43-292(6) (Reissue 1993) because, among other things, Lona had knowingly and intentionally defied court orders forbidding any contact and/or communication with Thomas. This motion was subsequently amended to include that Gloria and Tabitha were also within the meaning of § 43-292(7).

A petition for adjudication and termination of parental rights regarding Joshua was also filed on December 6 in a separate proceeding pertaining only to him. This petition alleged that Joshua was within the meaning of §§ 43-247(3)(a) and 43-292(6). This petition was later amended to allege that Joshua was also within the meaning of § 43-292(2).

Following a detention hearing, the court by order dated December 16, 1994, found it would be in the best interests of Gloria, Tabitha, T.J., and Amanda to place them in the temporary custody of the Department for appropriate care and placement until further order of the court, subject to supervised visitation with Lona. A like order was entered on this same date in the proceeding regarding Joshua. Lona filed her notice to appeal both of these orders on December 23. The appeal of this order relating to Gloria, Tabitha, T.J., and Amanda is case No. A-94-1240, and the appeal of the order relative to Joshua is case No. A-94-1239. The guardian ad litem's motions for summary dismissal of cases Nos. A-94-1239 and A-94-1240 on the ground that the orders appealed from were not final, and thus nonappealable, were overruled by this court on March 21, 1995.

Despite these pending appeals, the juvenile court proceeded with termination proceedings in both of the cases below, overruling Lona's objection to jurisdiction. Lona's objection was based solely on the fact that appeals in cases Nos. A-94-1239 and A-94-1240 were then pending before this court. On June 28, 1995, the separate juvenile court adjudicated Joshua as being within § 43-247(3)(a) and, further, terminated Lona's parental rights to him. A separate order was entered on this same date terminating Lona's parental rights to her remaining four children. Lona filed a notice to appeal these termination orders on July 11. The appeal of the order terminating Lona's parental rights to Gloria, Tabitha, T.J., and Amanda is case No. A-95-762, and the appeal of the order relating to Joshua is case No. A-95-761. The State's motion to dismiss cases Nos. A-94-1239 and A-94-1240 on the ground that the issues raised therein were moot was overruled by this court without prejudice.

Additional facts will be set forth as required.

III. ASSIGNMENTS OF ERROR

Lona asserts 23 assignments of error in her combined appeals. Given our findings with regard to jurisdiction, and after consolidating four of her assigned errors into one, we need only address her assertions that the court erred in (1) finding that it had jurisdiction to terminate Lona's parental rights despite her pending appeals and (2) finding a sufficient basis for removing T.J. and Amanda from her home and detaining Joshua prior to his adjudication where no evidence of harm or evidence of a specific risk of harm to the children was shown.

IV. STANDARD OF REVIEW

[1,2] Whether a question is raised by the parties concerning jurisdiction of a lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Interest of Alex T. et al.*, 248 Neb. 899, 540 N.W.2d 310 (1995); *Jones v. State*, 248 Neb. 158, 532 N.W.2d 636 (1995). Where a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the inferior court. *Id.*

[3] An appeal to the Nebraska Court of Appeals or the Nebraska Supreme Court from a juvenile court is reviewed de novo on the record. In that review, findings of fact made by the juvenile court may be accorded weight by an appellate court because the juvenile court observed the parties and the witnesses and made findings as a result thereof. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994).

V. ANALYSIS

We first address the jurisdictional issues presented by these appeals. Specifically, we must determine whether the juvenile court had jurisdiction to hear and determine the motions to terminate Lona's parental rights when her appeals in cases Nos. A-94-1239 and A-94-1240, regarding the orders removing T.J.

and Amanda from her home and detaining Joshua, had already been perfected. If the juvenile court lacked jurisdiction, then we similarly do not have jurisdiction to entertain the appeals in cases Nos. A-95-761 and A-95-762. We must begin by determining whether Lona's appeals in cases Nos. A-94-1239 and A-94-1240 were proper.

1. Finality of December 16, 1994, Orders

By order dated December 6, 1994, the separate juvenile court ordered the immediate removal of Joshua from Lona's home for appropriate placement by the Department. By order dated December 16, 1994, the juvenile court entered a preadjudication order retaining the temporary custody of Joshua in the Department. Prior to this time, the Department had not taken any steps regarding the care of Joshua. Also by order dated December 16, 1994, the juvenile court retained temporary custody of Gloria, Tabitha, T.J., and Amanda in the Department for appropriate care and placement. As previously set forth, custody of these four children was initially placed in the Department on March 26, 1993, at which time the children were removed from Lona's home. Custody of all four children at all times relevant hereto has always remained in the Department; however, at some point prior to the December 16 order, T.J. and Amanda had been returned to Lona's home. Lona retained physical custody of T.J. and Amanda until the court's order of December 6, 1994, ordering the sheriff to remove T.J. and Amanda from Lona's home for placement by the Department. The order of December 16 effectively continued this removal of T.J. and Amanda from Lona's home.

[4] The State asserts that the December 16 orders were nonfinal, nonappealable orders. A court order is appealable only if it is a final order. Neb. Rev. Stat. § 25-2728 (Supp. 1995). This court is without jurisdiction to entertain appeals from nonfinal orders. See, e.g., *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). We will first address this issue as it relates to Joshua.

(a) Joshua

Neb. Rev. Stat. § 43-253 (Cum. Supp. 1994) applies to juveniles taken into temporary custody by an officer of the peace without a warrant or court order. See, also, Neb. Rev. Stat. §§ 43-248 and 43-250 (Reissue 1993). Neb. Rev. Stat. § 43-254 (Reissue 1993), however, provides for placement or detention "[p]ending the adjudication of *any* case, if it appears that the need for placement or further detention exists . . . ." (Emphasis supplied.) As Joshua was taken into temporary custody pursuant to a court order issued on December 6, 1994, he comes within the ambit of § 43-254. See, e.g., *Ackerman v. Nanfito*, 1 Neb. App. 601, 510 N.W.2d 333 (1993).

[5] A petition alleging that Joshua was within the meaning of § 43-247(3)(a) as well as § 43-292(6) was also filed on December 6. Following a hearing, the court, by order dated December 16, 1994, found that temporary custody of Joshua should be placed in the Department for appropriate care and placement. This order was clearly appealable. As stated by the court in *In re Interest of R.R.*, 239 Neb. 250, 252-53, 475 N.W.2d 518, 520 (1991):

> Although an ex parte temporary detention order keeping a juvenile's custody from his or her parent for a short period of time is not final, one entered under § 43-247(3)(a) and Neb. Rev. Stat. § 43-254 (Reissue 1988), after a hearing which continues to keep a juvenile's custody from the parent pending an adjudication hearing to determine whether the juvenile is neglected, is final and thus appealable. See *In re Interest of R.G.*, [*supra*].

See, also, *In re Interest of Cassandra L. & Trevor L.*, *ante* p. 333, 543 N.W.2d 199 (1996) (ex parte order of detention for unlimited duration also appealable).

As of December 16, 1994, Joshua had not been adjudicated a juvenile within the meaning of § 43-247. The remaining children at issue herein, however, were adjudicated children within the meaning of § 43-247(3)(a) prior to December 16. Therefore, a different analysis is required on the issue of finality as it pertains to them.

(b) Gloria, Tabitha, T.J., and Amanda

As in the case of Joshua, an order for temporary custody regarding T.J. and Amanda was also entered on December 6, 1994. Again, following a "detention" hearing on December 15, the court by order dated December 16, 1994, ordered that custody of T.J. and Amanda as well as Gloria and Tabitha should be placed in the Department for appropriate care and placement. Unlike Joshua, however, the December 16 order as it pertains to these four children was not a preadjudication detention order as these children were adjudicated to be within § 43-247(3)(a) on August 23, 1993. Thus, the clear rule set forth in *In re Interest of R.R., supra*, is not applicable.

[6] Although referred to as a "detention" hearing and a "detention" order, we view the December 16 postadjudication order entered in this proceeding as more akin to a dispositional order. Once a juvenile has been adjudicated to be within § 43-247, the court may enter a dispositional order as set forth in Neb. Rev. Stat. §§ 43-283 through 43-2,101 (Reissue 1993 & Cum. Supp. 1994). See, e.g., *In re Interest of C.G. and G.G.T.*, 221 Neb. 409, 377 N.W.2d 529 (1985). An order determining where a juvenile will be placed is a dispositional order because it involves a judicial determination concerning a juvenile's relationship to his or her parents made following an adjudication. See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). Dispositional orders of a juvenile court are final, appealable orders. *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987), *overruled on other grounds, State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993).

The State, however, argues that the December 16 order is a mere "change in placement" pursuant to § 43-285(3), from which an appeal is improper. The State cites no authority in support of this proposition. Contrary to the State's position, this court has previously regarded a change in placement pursuant to a juvenile court's approval of a Department plan to be a final, appealable order. See, e.g., *In re Interest of John T., ante* p. 79, 538 N.W.2d 761 (1995). In that case, the juvenile's guardian ad litem appealed from a decision transferring the juvenile from one foster home to another.

We are aware that § 43-285(3) provides that one may seek review of a placement change by a juvenile review panel in the manner set forth in § 43-287.04. However, the Nebraska Supreme Court has determined that the expedited review by a juvenile review panel, as provided for in § 43-287.04, is available only when the court's order implements a different "plan" than that proposed by the Department and there exists a belief that the court-ordered "plan" is not in the juvenile's best interests. See *In re Interest of M.J.B.*, 242 Neb. 671, 496 N.W.2d 495 (1993). Therefore, treating this as a "change in placement" and assuming that the court's order removing T.J. and Amanda from their mother's home a second time was consistent with the Department's "plan," as it was pursuant to the Department's motion for temporary custody, a review by the juvenile review panel was not available to Lona.

[7] Even if the order at issue was viewed as a "continued detention" order, our conclusion regarding its appealability is unchanged. As we stated above, initial detention orders, entered after a hearing which continues to keep a juvenile's custody from his or her parents pending adjudication, are appealable. The law recognizes that a parent has a significant interest in raising his or her children. See, *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991); *In re Interest of R.G., supra*. See, also, *In re Interest of Cassandra L. & Trevor L., ante* p. 333, 543 N.W.2d 199 (1996). "[A] parent has a liberty interest in raising her or his child, a concept which encompasses the child's custody, care, and control." *In re Interest of R.G.*, 238 Neb. at 416, 470 N.W.2d at 789. Although the December 16 order here was not an *initial* order, its effect is the same in that T.J. and Amanda were removed from Lona's care and physical custody.

[8] We recognize that grounds for appeal from final orders not appealed from are waived. See, *In re Interest of C.D.C.*, 235 Neb. 496, 455 N.W.2d 801 (1990) (where neither parent appealed from adjudication order, they may not later question existence of facts upon which juvenile court asserted jurisdiction over juvenile); *In re Interest of L.B., A.B., and A.T.*, 235 Neb. 134, 454 N.W.2d 285 (1990); *In re Interest of M.B. and J.B.*, 233 Neb. 368, 445 N.W.2d 618 (1989). Lona did not appeal from the initial orders entered in this case, which removed the four children from her care. If a subsequent order is not new, but merely a continuation of a previous order, it does not extend the time for appeal. See, e.g., *In re Interest of Zachary L., ante* p. 324, 543 N.W.2d 211 (1996).

In *In re Interest of Zachary L.*, this court found the appeal from an order to be untimely where the order appealed from imposed no new requirements from previous orders which had not been timely appealed from. Unlike the order in *In re Interest of Zachary L.*, the December 16 order here differs substantially from the previous court order of October 19, 1994, wherein the juvenile court found that regarding T.J. and Amanda, appropriate care and placement included the home of Lona. Obviously, the December 16 order removing said children from Lona's home imposed a "new requirement" that T.J. and Amanda no longer be placed in the home of Lona. Therefore, the order at issue is not a "continuation" of the previous order of detention as it pertained to T.J. and Amanda. Rather, it changed the intervening court order which had altered the previous out-of-home placement of these two children and had returned them to Lona's home. Under these circumstances, the removal affected a substantial right no less than the initial removal order which was clearly appealable under *In re Interest of R.R., supra*.

Therefore, regardless of the label given this order, it is final and appealable. Thus, the December 16, 1994, orders entered regarding all of Lona's children were final, appealable orders.

2. Jurisdiction Over Termination Proceedings

In the proceedings below, which resulted in orders terminating Lona's parental rights to all five of her children and which resulted in the appeals in cases Nos. A-95-761 and A-95-762, Lona unsuccessfully asserted the well-established premise that once an appeal has been perfected to an appellate court, the trial court is divested of its jurisdiction to hear a case involving the same matter between the same parties. See, *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995); *Swain Constr. v. Ready Mixed Concrete Co., ante* p. 316, 542 N.W.2d 706 (1996). Obviously, it was Lona's contention below that the pendency of the appeals discussed above, cases Nos. A-94-1239 and A-94-1240, deprived the juvenile court of jurisdiction in both matters to continue with termination proceedings. Having concluded that we have jurisdiction over the appeals in cases Nos. A-94-1239 and A-94-1240, which were perfected on December 23, 1994, we can now address this issue.

3. Continuing Jurisdiction

[9] The State contends that there is statutory authority for continuing jurisdiction in the juvenile court, notwithstanding the pendency of an appeal. Our research discloses no statutory provision specifically defining the extent of a separate juvenile court's jurisdiction pending appeals of its final orders. Neb. Rev. Stat. § 43-2,106 (Cum. Supp. 1994) addresses the topic with regard to appeals from orders of county courts sitting as juvenile courts; however, similar language is absent from the statutory counterpart addressing appeals from separate juvenile courts. See Neb. Rev. Stat. § 43-2,106.01 (Cum. Supp. 1994). The State directs us to § 43-295, which generally provides a juvenile court with continuing jurisdiction over a juvenile and empowers the court to "order a change in the custody or care of any such juvenile if at any time it is made to appear to the court that it would be for the best interests of the juvenile to make such change." Section 43-295 is a statutory analog to Neb. Rev. Stat. § 42-351 (Reissue 1993), which authorizes a district court, in dissolution proceedings, to exercise jurisdiction regarding minor children "to provide for such orders regarding custody, visitation, or support or other appropriate orders in aid of the appeal process." See *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986). See, also, *Nimmer v. Nimmer*, 203 Neb. 503, 279 N.W.2d 156 (1979) (decree of dissolution insofar as minor children are concerned is never final).

[10] While we agree that a juvenile court retains limited authority over children within its jurisdiction pending appeal, we do not agree that § 43-295 authorizes the action taken by the juvenile court here. In Joshua's case, it was only *after* the appeal from his detention order, case No. A-94-1239, had been perfected that the juvenile court adjudicated Joshua as a child within the meaning of § 43-247(3)(a). It then went on to terminate Lona's parental rights to Joshua. In the case of Gloria, Tabitha, T.J., and Amanda, again, after the appeal from the custody order, case No. A-94-1240, was perfected, the

juvenile court proceeded to terminate Lona's parental rights. In Joshua's case, the appeal was perfected even before the court had acquired jurisdiction over him through the adjudication process anticipated by Neb. Rev. Stat. § 43-277 et seq. (Reissue 1993 & Cum. Supp. 1994). While the juvenile court had clearly acquired jurisdiction over the remaining four children prior to the filing of the motion to terminate Lona's parental rights to those children, Lona's appeal from the December 16 order was perfected before the order of termination. We find the continuing jurisdiction of a juvenile court under § 43-295 does not include the power to terminate a juvenile's relationship with his or her parent pending an appeal, which is the situation presented with all of these children.

In support of its argument that the juvenile court's continuing jurisdiction extends to termination proceedings, the State cites *In Interest of B.L.*, 470 N.W.2d 343 (Iowa 1991). In that case, the Iowa Supreme Court found that a "request for a status report and review presents a collateral issue not directly affecting the issue on appeal" and that notwithstanding a pending appeal, the juvenile court "had jurisdiction to monitor the child's well-being as requested." *Id.* at 347. While we agree that the language of § 43-295 seems to provide the juvenile court with jurisdiction over such matters addressed in *In Interest of B.L.*, that is, the juvenile's well-being and best interests, the juvenile court in these proceedings did not merely review the children's placement or monitor the children's well-being, it proceeded to terminate Lona's parental rights. We decline to hold that a termination proceeding comes within the ambit of § 43-295. As the children were already placed outside of Lona's home in appropriate care as a result of the juvenile court's December 6 and 16 orders, we fail to see the urgency to proceed to terminate Lona's parental rights during the pendency of her appeals.

4. Collateral and Independent Proceedings

The State further argues that an appeal from the December 16 orders does not preclude the juvenile court from proceeding in termination matters as the latter are collateral and independent from the former. According to the State, the sole issue raised on appeal, a change in placement regarding T.J. and

Amanda and the detention of Joshua, is separate and distinct from the issues raised by the motion to terminate Lona's parental rights in all of the children involved.

In support of this argument, the State cites *United Mineral Products Co. v. Nebraska Railroads*, 177 Neb. 898, 131 N.W.2d 604 (1964). That case involved a supersedeas bond proceeding evolving out of a previous order of the Nebraska State Railway Commission reducing railroad joint line rates from July 1 through September 30, 1962. This rate-fixing order was subsequently appealed. A ratepayer argued in *United Mineral Products Co.* that as long as the appeal from the July to September rate-fixing order was pending, the commission was without authority to fix new rates, even outside of this 3-month period. Therefore, according to the ratepayer, the lower rate fixed by the commission stayed in effect until the appeal was decided, a period beyond September 1962. The Supreme Court rejected this argument, acknowledging that while an appeal from the July to September order prevented the commission from further rendering a decision affecting rates during this 3-month period, the commission was not without authority to adjust rates outside of this 3-month period. In so holding, the court stated that an appeal proceeding divests a lower court of jurisdiction only as to matters under review, not from matters which are collateral and independent from the proceeding on appeal.

The State contends here that the juvenile court, like the commission in *United Mineral Products Co.*, was not precluded from proceeding with the termination proceedings by Lona's pending appeals because such former appeals divested the juvenile court of jurisdiction only to those specific matters under review, i.e., the detention and removal orders. Because the termination proceedings were "**collateral** or **independent** matters," the State asserts that they were not precluded from determination by the juvenile court. Brief for appellee in case No. A-95-762 at 24.

We do not agree that the termination proceedings were matters collateral and independent from the orders of detention and removal. Shipping rates for a 3-month period in *United Mineral Products Co., supra*, were understandably deemed independent from rates for an entirely different period of time. However, the termination proceedings on the one hand and the detention and removal proceedings on the other are not as readily separable. The factual basis for the orders which were the subject of Lona's appeals in cases No. A-94-1239 and A-94-1240 were inextricably intertwined with, and procedural precursors to, the subsequent juvenile court process of terminating Lona's parental rights. To deem the termination proceedings here as independent from the very juvenile process that led to such proceedings is to ignore reality.

The State also cites *In re Kristin B.*, 187 Cal. App. 3d 596, 232 Cal. Rptr. 36 (1986), in support of its argument that a termination proceeding is separate and independent from the court's order dated December 16. In reaching its conclusion that a termination proceeding is separate and distinct from a juvenile dependency proceeding, the court in *In re Kristin B.* relied heavily upon *In re Shannon W.*, 69 Cal. App. 3d 956, 138 Cal. Rptr. 432 (1977). *In re Shannon W.* makes it clear that California law is substantially different from that found in Nebraska regarding this subject. In California, legislation enacted in 1961 removed "proceedings to declare a minor free from the custody and control of the parents" from the juvenile court and placed them in the civil code. *Id.* at 961, 138 Cal. Rptr. at 435. The court noted in *In re Shannon W.* that even prior to 1961, the difference between termination proceedings and "the ordinary business of the juvenile court" was well recognized. *Id.* at 962, 138 Cal. Rptr. at 435. Termination proceedings in California are viewed as being used to facilitate adoption, making their nature and purpose distinct from "ordinary" juvenile court proceedings. Therefore, the appellant's argument in *In re Shannon W.* that once the children had come within the jurisdiction of the juvenile court that no other department or superior court had jurisdiction to act, was rejected. California law being substantially different from Nebraska's regarding juveniles, decisions by that state's court interpreting such law are hardly relevant to resolving the present issue.

[11-13] The general rule in Nebraska is against concurrent jurisdiction of trial and appellate courts. *Swain Constr. v. Ready*

Mixed Concrete Co., *ante* p. 316, 542 N.W.2d 706 (1996). Accordingly, the general rule is that after an appeal has been perfected to an appellate court, the trial court is without jurisdiction to hear a case involving the same matter between the same parties. *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995); *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994); *Swain Constr.*, *supra*. We conclude that this rule is applicable here. Once an appeal is pending, the juvenile court is precluded from proceeding on matters other than expressly provided for in § 43-295. As already discussed, a termination proceeding is not one of them. Therefore, because appeals were pending before this court in cases Nos. A-94-1239 and A-94-1240, the juvenile court was divested of jurisdiction to proceed with termination proceedings. Any other conclusion would encourage potentially conflicting contemporaneous proceedings and would wreak havoc on the orderly processing of juvenile matters.

[14,15] Where the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction. *WBE Co.*, *supra*; *Garber v. State*, 241 Neb. 523, 489 N.W.2d 550 (1992). As the juvenile court lacked jurisdiction to proceed to terminate Lona's parental rights, we summarily dismiss the appeals from those orders, cases Nos. A-95-761 and A-95-762, for lack of jurisdiction. See Neb. Ct. R. of Prac. 7A(2) (rev. 1996). When an appeal is dismissed because the lower court lacked jurisdiction to enter the order appealed from, an appellate court lacks jurisdiction, but may nevertheless enter an order canceling the order issued by a lower court without jurisdiction. *WBE Co.*, *supra*; *In re Interest of Cassandra L. & Trevor L.*, *ante* p. 333, 543 N.W.2d 199 (1996). We therefore order the juvenile court to cancel the orders terminating Lona's parental rights. See, *id.*; *Swain Constr.*, *supra*. The State's motion to dismiss cases Nos. A-94-1239 and A-94-1240, based on the argument that the termination of Lona's parental rights rendered the appeals moot, is thus not well taken and is denied. We therefore do not address Lona's assignments of error with regard to the termination proceedings. We will, however, address her assignments of error as they pertain to the juvenile court's orders of December 16 in both cases.

5. Detention Orders

(a) Evidence Adduced at Hearing

The December 15, 1994, hearing combined the State's motions in Joshua's case and the separate case involving the other children. At the hearing, the juvenile court took judicial notice of its previous orders entered in the case involving Gloria, Tabitha, T.J., and Amanda on October 5 and November 16, 1993, and October 19, 1994, forbidding Lona from having any contact with Thomas. The court also received a certified copy of Thomas' convictions and sentences for two counts of first degree sexual assault on a child.

At the hearing, Lona admitted violating the court's orders by maintaining contact with Thomas, even after the October 1994 order. She admitted sending letters to him and receiving the same. She further admitted having phone contact with him. She also admitted reading letters from him to T.J. While she admitted that Thomas was at her house while T.J. was present in September 1994, she denied any preexisting knowledge that Thomas would be present. She testified that when she arrived home, Thomas had been arrested and taken away. She also admitted attempting to get a fake identification card in order to visit him in prison. She stated that it has been difficult for her to separate from him during the course of these proceedings; however, she states that this is because he is abusive and threatening. She also attested to her belief that he has done "something" to Tabitha. Despite knowledge of this and Thomas' conviction for first degree sexual assault on Gloria, however, Lona stated that she did not feel any need to protect her children from communicating with him, which we construe to mean she saw no need to sever the relationship between the children and Thomas.

Lisa Mathouser, supervisor of visitations between Lona and Gloria and Tabitha, testified that Gloria's father, Walter, has been present during visits with Lona and the children. She further opined that in her opinion, the children could be "better" supervised by Lona while in her care.

Mary Harris, ongoing protective service worker for the Department assigned to Lona's case, attested to her concern for the children by virtue of Walter's presence in the home. At approximately age 35, Walter began having sexual relations with Lona, who was then age 12. She also attested to Joshua's severe diaper rash when he was removed from Lona's care. Evidence was also adduced that Amanda and Joshua suffered from diarrhea.

Also introduced into evidence was a prison visitor's form, dated October 11, 1994, indicating that Lona attempted to visit Thomas in prison with all five children. The record establishes that Lona did visit him on October 15, but that visitation by the children was denied. Letters between Lona and Thomas were also introduced into evidence. They were dated November 2, 5, 8, and 11, 1994. Among other topics, the letters discussed Lona's desire to be with Thomas, her desire for increased contact and visits, and her plans to become his wife.

Based on Lona's failure to abide by court orders and evidence of serious diarrhea and rashes suffered by Amanda and Joshua, the court "continue[d] the detention" of the three children.

Lona argues that this evidence is insufficient to support the juvenile court's decision to detain Joshua and to remove T.J. and Amanda from her home as no evidence of harm or evidence of a specific risk of harm to the children was shown.

(b) Sufficiency of Evidence

[16,17] At a detention hearing, the State must prove by a preponderance of the evidence that the custody of a juvenile should remain in the Department pending adjudication. *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991); *In re Interest of Cherita W., ante* p. 287, 541 N.W.2d 677 (1996). While this standard is clearly applicable to Joshua as he had not yet been adjudicated, as previously pointed out, T.J. and Amanda had already been adjudicated to be within § 43-247(3)(a). Once a juvenile has been adjudicated, the juvenile court had broad discretion as to his or her disposition. *In re Interest of P.L., S.L., and A.L.*, 236 Neb. 581, 462 N.W.2d 432 (1990). The Nebraska Supreme Court has stated:

> [O]nce there has been the adjudication that a child is a juvenile within the meaning of the act, the foremost purpose or objective of the Nebraska Juvenile Code is promotion and protection of a juvenile's best interests,

> with preservation of the juvenile's familial relationship with his or her parent(s) where continuation of such parental relationship is proper under the law.

In re Interest of J.S., A.C., and C.S., 227 Neb. 251, 263, 417 N.W.2d 147, 156 (1987). Even applying a preponderance of the evidence standard as espoused by Lona to the three children, we find the evidence sufficient to support the court's findings.

At the outset, we note that Lona's contention that because Joshua was not named in the court's previous orders, which pertain only to Gloria, Tabitha, T.J., and Amanda, her failure to comply with said orders is irrelevant in ascertaining whether the detention of Joshua is proper. The fact that Lona engaged in conduct violative of the court's orders is not determinative. Rather, the determinative factor is whether Lona engaged in conduct potentially harmful to Joshua or contrary to his best interests.

[18] We likewise reject Lona's argument that absent a showing of harm to the children, the court's order removing T.J. and Amanda and detaining Joshua was not supported by the evidence. The State is not required to prove harm to a child prior to intervention. *In re Interest of R.G., supra.*

In *In re Interest of B.B. et al.*, 239 Neb. 952, 479 N.W.2d 787 (1992), the Nebraska Supreme Court upheld the termination of parental rights based upon evidence of the mother's failure to protect her children from both her husband and another individual, both of whom she had accused of physically and/or sexually abusing her children. The court noted that although the mother had accused her husband of abusing the children, she continued to reside with him intermittently. A psychologist testified in *In re Interest of B.B. et al.* of the mother's lack of insight and motivation to protect her children from further abuse. The court stated:

> 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.

Id. at 956, 479 N.W.2d at 791.

Although no psychologist testified in this case that Lona lacks the insight and motivation to protect her children, we believe such is established by a preponderance of the evidence. In addition to Thomas' convictions of sexually assaulting Gloria and another child, Lona testified to her belief that Thomas may have also done "something" to Tabitha. Despite this knowledge, Lona testified that she did not feel any need to protect her children from communications with Thomas. As late as October 1994, she attempted to bring all of her children with her to visit him in prison. Also, through at least November 1994, she maintained phone and letter contact with him. According to these letters, she had every intention of becoming his wife.

Lona's argument that she maintained contact with Thomas out of fear is contradicted by the letters which make it clear that she was desiring increased contact with him and expressing frustration because he did not want to see her more. We also note that unlike *In re Interest of B.B., supra*, which required clear and convincing evidence to terminate parental rights, in this case, the State needed to show only by a preponderance of the evidence that these children should have remained in the Department's custody.

Contrary to Lona's argument, the State is not required to establish that her children were in danger of actual harm by virtue of her continued contact with Thomas. In *In re Interest of W.C.O.*, 220 Neb. 417, 370 N.W.2d 151 (1985), the Supreme Court upheld the adjudication of a child by reason of the faults and habits of his father, where the father had been charged with first degree sexual assault on another child. The father argued in *In re Interest of W.C.O.* that the adjudication was improper because there was no evidence that the child at issue had been affected by the alleged sexual conduct. The court rejected this argument, stating:

> 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.

Id. at 419, 370 N.W.2d at 153. The court further noted that even if the evidence were insufficient to establish that the child was in physical danger, it was sufficient to establish that the child was likely to be raised in an "immoral atmosphere." *Id.* at 421, 370 N.W.2d at 154. See, also, *In re Interest of M.B. and A.B.*, 239 Neb. 1028, 480 N.W.2d 160 (1992) (adjudication upheld where father had been convicted of committing sex crimes against other children and mother continued to leave daughters in his care; state not required to allege that daughters had been subjected to sexual abuse); *In re Interest of C.P.*, 235 Neb. 276, 455 N.W.2d 138 (1990) (termination of parental rights upheld where mother witnessed abuse and was victim of it, yet allowed child to be placed in abuser's care and custody).

Finally, Lona challenges the court's order by arguing that the State failed to show that reasonable efforts had been made to prevent the need for the children's removal, as required by § 43-254. However, as the State points out, § 43-254 applies only when a juvenile is taken into temporary custody without a warrant or court order. Such is not the case here as the three children were removed pursuant to a court order. Moreover, as to T.J. and Amanda, there is overwhelming evidence of spurned efforts to prevent their continued removal from Lona's home. Lona's argument is without merit.

Thus, we find the evidence sufficient to support the court's order to detain Joshua pending adjudication and to remove T.J. and Amanda from Lona's home.

VI. CONCLUSION

We therefore affirm the final, appealable orders of the juvenile court detaining Joshua and removing T.J. and Amanda from Lona's home in cases Nos. A-94-1239 and A-94-1240, as they are supported by the evidence. The State is not required to prove actual harm to the children prior to intervention. In cases Nos. A-95-761 and A-95-762, we dismiss the appeals for lack of jurisdiction over the orders appealed from. A termination proceeding is beyond the continuing jurisdiction of the juvenile court as provided for in § 43-295 and not independent and collateral from the orders of detention and removal. We direct the juvenile court to cancel its orders terminating Lona's parental rights, because it lacked jurisdiction to enter them.

JUDGMENTS IN NOS. A-94-1239 AND A-94-1240 AFFIRMED.

APPEALS IN NOS. A-95-761 AND A-95-762 DISMISSED, AND CAUSES REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. BRADLEY R. TUNENDER, APPELLANT.

548 N.W.2d 340

Filed May 21, 1996. No. A-95-373.

1. **Judgments: Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
2. **Constitutional Law: Sentences: Prior Convictions: Pleas: Appeal and Error.** A sentencing court's determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court's determination is clearly erroneous.
3. **Constitutional Law: Sentences: Prior Convictions: Habitual Criminals.** Criminal defendants have the right to challenge the use of constitutionally invalid convictions for sentence enhancement in the context of a habitual criminal proceeding.
4. **Jurisdiction: Appeal and Error.** Jurisdiction is a prerequisite for an appellate court's consideration of an appeal, and jurisdiction cannot be acquired unless the appellant has satisfied the requirements for appellate jurisdiction.
5. **Final Orders: Appeal and Error: Time.** It is fundamental that for a party to preserve the right to appeal from a final order, that party must file a notice of appeal within 30 days of the order appealed from.
6. **Jurisdiction: Time: Appeal and Error.** Timeliness of an appeal is jurisdictional.
7. **Judgments: Records: Words and Phrases.** Rendition of judgment occurs when the court makes an oral pronouncement and accompanies that pronouncement with a notation on the trial docket. Failing a notation on the trial docket, a judgment is rendered when some written notation of the judgment is filed in the records of the court.

8. **Judgments: Words and Phrases.** Entry of a judgment is the act of the clerk in spreading on the court's journal both the proceedings had and the relief granted or denied.
9. **Records: Final Orders: Judgments: Appeal and Error.** A transcript on appeal which does not contain a final order or judgment presents nothing for review. To obtain a review by an appellate court, the transcript on appeal must contain the judgment, decree, or final order sought to be reversed, vacated, or modified.
10. **Sentences: Prior Convictions: Right to Counsel: Proof.** To prove a prior conviction for enhancement purposes, the State need only show that at the time of the prior conviction the defendant had, or waived, counsel.

Appeal from the District Court for Holt County: WILLIAM CASSEL, Judge. Affirmed.

John Jedlicka, Holt County Public Defender, for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

MUES, Judge.

Bradley R. Tunender appeals a March 9, 1995, order of the district court finding that Tunender was a habitual criminal as defined in Neb. Rev. Stat. § 29-2221 (Cum. Supp. 1994) and enhancing Tunender's sentence upon his current conviction for the crime of assault by a confined person. Tunender alleges that the district court denied him an opportunity to assert *Boykin*-based challenges to the prior plea-based convictions relied upon in finding him a habitual criminal and thus used for enhancement of his sentence. Because Tunender appeals from the enhancement and sentencing hearing and did not appeal from the denial of his petitions for separate proceedings, we affirm.

BACKGROUND

On July 21, 1994, an information was filed charging Tunender with violation of Neb. Rev. Stat. § 28-932 (Reissue 1995) and further alleging that Tunender had been twice convicted of a crime, sentenced, and committed to prison for terms of not less than 1 year each, referencing two Holt County convictions, the first being for burglary in 1988 and the second being for burglary and theft in 1991. On October 31, 1994, pursuant to a plea bargain arrangement, Tunender was allowed to withdraw his prior plea of not guilty and to enter a plea of guilty, which plea was accepted, and he was adjudged guilty as charged. The enhancement hearing and sentencing were scheduled for March 9, 1995.

At some point prior to March 9, 1995, the exact date undisclosed by the record, Tunender filed "petitions for separate proceedings" in Holt County District Court case No. 18731, State of Nebraska v. Bradley Ray Tunender, and case No. 19256, State of Nebraska v. Bradley R. Tunender. These case numbers correspond, respectively, to the criminal proceedings resulting in the 1988 and 1991 convictions which Tunender sought to invalidate.

On March 9, 1995, two hearings were held in Holt County District Court. The first was on Tunender's petitions for separate proceedings, variably referred to as "petitions for separate relief." Tunender asked that the evidence offered at the hearing on these petitions be "considered" in two criminal proceedings then pending in Holt County District Court in which Tunender had been charged as a habitual criminal, including the matter now being appealed from. The district court, when hearing the petitions for separate relief, carefully noted: "We are not, of course, proceeding in an enhancement proceeding in either of those cases at this point in time. We would still get to that if I fail to grant the relief that [Tunender] is seeking in the petitions for separate relief." While our record does not contain the petitions which instituted the separate proceedings, the bill of exceptions includes the hearing held on the petitions. Arguments of counsel at the hearing disclose that the basis of Tunender's separate proceedings was that the 1988 and 1991 guilty-plea convictions from Holt County District Court were invalid under *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981); and *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). The specific grounds upon which Tunender's counsel attacked the prior convictions were the failure of the record to disclose that the *Boykin-Tweedy-Irish* rights were again given to Tunender at the hearings where he entered his pleas of guilty and that the record failed to show he had affirmatively waived each of the rights recognized in the *Boykin–Tweedy–Irish* trilogy.

Tunender offered evidence in support of his petitions, consisting primarily of various journal entries from each of the prior criminal proceedings. The State responded by offering transcripts from the arraignment and sentencing hearings in each of the past criminal proceedings. The district court denied and dismissed the petitions for separate relief in each of the cases. In doing so, the court stated:

> Insofar as the findings are concerned, I would determine that if I got to that point, both of these records clearly show that the defendant was advised of each of the rights which is raised by the petition for separate relief. As far as being advised of those rights, what they consist of, I find the record is absolutely clear that the court did so advise the defendant. The issue which is more troublesome is whether or not the defendant voluntarily and intelligently waived those rights. This court does not find, in the records [received as exhibits] that the defendant at any point expressly stated that he understood that by making the plea of guilty he was waiving those rights. Were it not for LeGrand v. State [3 Neb. App. 300, 527 N.W.2d 203 (1995)], this court would have to give serious consideration to the petition for separate relief, but because of LeGrand v. State, I'm not going to reach that point, and simply deny and dismiss the petitions for separate relief in each of the cases.

No written orders or trial docket notes dismissing Tunender's petitions for separate relief are included in the record on this appeal, apparently because, if entered, such entries were made not in the criminal proceedings now being appealed (case No. 19849), but, rather, in the "separate proceedings" filed in district court (case No. 18731 and case No. 19256). Moreover, while the substance of the exhibits offered by Tunender in support of his petitions for separate relief is before this court, the exhibits are here not in the form offered, but, rather, are included in multipage exhibits offered by the State in the enhancement proceedings held immediately following the court's oral dismissal of the petitions for separate relief.

The evidence offered at the enhancement hearing disclosed that at the time of Tunender's convictions in 1988 and 1991 he was represented by counsel. In the enhancement proceedings, Tunender's counsel again attempted to challenge the convictions' use for enhancement on *Boykin* grounds, arguing that if the Court of Appeals' decision in *LeGrand v. State*, 3 Neb. App. 300, 527 N.W.2d 203 (1995), barred a *Boykin* challenge in separate proceedings,

> the only funnel left for one to assert your "Boykin Rights" and the federal rights that the Supreme Court of the United States has held are crucial is at this enhancement hearing. Otherwise . . . there is no way to assert the "Boykin Rights" which the Supreme Court has held are some of the most crucial and fundamental rights that we hold . . . .

The district court, while recognizing that the Nebraska Supreme Court "is the last word on those subjects," concluded that *LeGrand v. State* was "binding precedent" and rejected Tunender's argument that he should be allowed to raise his *Boykin*-based attacks at the enhancement proceedings. Concluding that Tunender had been twice convicted of a crime and twice sentenced and committed to prison for terms of not less than 1 year, the district court determined that he be deemed a habitual criminal for purposes of punishment. The court then proceeded to sentence Tunender on the assault charge (as well as in two other pending criminal proceedings which are not involved in this appeal), as enhanced under § 29-2221, to imprisonment for not less than 10 nor more than 20 years.

Tunender timely filed his notice of appeal from the district court's "judgement and [o]rder on sentencing" from his conviction for the crime of assault by a confined person.

ASSIGNMENT OF ERROR

Tunender's sole assignment of error is that the district court denied him an opportunity to challenge his past convictions used for enhancement purposes in either a special proceeding or during the enhancement hearing.

STANDARD OF REVIEW

[1] Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial

court in a judgment under review. *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996).

[2] A sentencing court's determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court's determination is clearly erroneous. *State v. Reimers*, 242 Neb. 704, 496 N.W.2d 518 (1993).

DISCUSSION

Tunender contends that his 1988 and 1991 guilty-plea convictions were invalid under *Boykin v. Alabama, supra*; *State v. Tweedy, supra*; and *State v. Irish, supra*, and that the district court denied him the "opportunity" to challenge these convictions. As explained in *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992), the U.S. Supreme Court delineated the requirements for a valid guilty-plea conviction in *Boykin* and further clarified the guilty-plea requirements in *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). "Nebraska has adopted the *Boykin* requirements and added to them [by the opinions in *Irish* and *Tweedy*]." *State v. Wiltshire*, 241 Neb. at 823, 491 N.W.2d at 328.

[3] The Nebraska Supreme Court has long recognized the right of criminal defendants to challenge the use of constitutionally invalid convictions for sentence enhancement and in *State v. McGhee*, 184 Neb. 352, 167 N.W.2d 765 (1969), specifically allowed such challenge in the context of a habitual criminal proceeding. See, also, *State v. Wiltshire, supra*; *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983) (following *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), and *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980)).

Tunender does not challenge his prior convictions on the basis that they were uncounseled, but, rather, on the basis that they are unconstitutional because of failure to comply with the *Boykin-Tweedy-Irish* trilogy, and specifically that the record failed to affirmatively disclose that Tunender made a voluntary and intelligent waiver of his *Boykin* rights as expanded by *Irish*.

The procedural limitations on a defendant's ability to challenge prior convictions on *Boykin-Tweedy-Irish* grounds (intelligent and voluntary plea) were clarified in *State v. Wiltshire, supra*. In *Wiltshire*, the Supreme Court recognized that, like an uncounseled guilty plea, an un-*Boykin*ized plea is also constitutionally invalid and that a proffered enhancement conviction based on an un-*Boykin*ized plea is constitutionally challengeable. Recognizing the clear right to challenge invalid convictions, including one based upon an un-*Boykin*ized plea, the court set about the task of clarifying the proper method for leveling the challenge. In so doing, it recognized that there are different "tiers" of challenges:

> Thus, the first tier of the *Oliver* [*State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989)] analysis deals with challenges raised *at the enhancement hearing*. We have stated, "Challenges to prior plea-based convictions for enhancement proceedings may only be made for the failure of the record to disclose whether the defendant had or waived counsel at the time the pleas were entered." [Citations omitted.] In other words, at the enhancement proceeding only those objections dealing with uncounseled pleas may be raised. . . .
>
> . . . .
>
> Enhancement evidence challenges that do not deal with lack of counsel, including *Boykin*-based challenges, fall in the second tier of the *Oliver* analysis: "[S]uch an issue may only be raised in a direct appeal or in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid." 230 Neb. at 870, 434 N.W.2d at 298.

(Emphasis in original.) 241 Neb. at 826–27, 491 N.W.2d at 330.

Tunender's *Boykin*-based challenges to his 1988 and 1991 Holt County plea-based convictions were clearly of the "second tier" type recognized in *Wiltshire*. While the pleadings instituting the separate proceedings are not before us, the bill of exceptions from the March 9, 1995, hearing on the separate proceedings leads us to surmise that they took the form of two separate petitions, one filed in each of the old district court criminal proceedings which resulted in the convictions Tunender sought to invalidate. Specifically, at the March 9 hearing, the district court announced that the court was taking up "the petitions for separate proceedings" in case No. 18731 and case No. 19256. Case No. 18731 was the criminal case in which Tunender pled guilty and was sentenced in 1988. Case No. 19256 was the criminal proceeding in which Tunender pled guilty and was sentenced in 1991.

The separate proceedings utilized by Tunender were consistent with *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992), and the Supreme Court predecessors to *Wiltshire*. See, e.g., *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989); *State v. Crane*, 240 Neb. 32, 480 N.W.2d 401 (1992); *State v. Tejral*, 240 Neb. 329, 482 N.W.2d 6 (1992). Moreover, although an issue not yet decided as of March 9, 1995, the venue of Tunender's separate proceedings, the Holt County District Court, was also correct. In *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995), a decision which we will address in more detail later in this opinion, the Supreme Court clarified that the separate proceedings envisioned by *Wiltshire* to challenge a prior plea-based conviction on *Boykin* grounds "must be brought in the court which rendered the judgment, otherwise the records of one court would be under the control of other courts of coordinate jurisdiction." 249 Neb. at 7, 541 N.W.2d at 385.

The district court's rejection of Tunender's petitions in the separate proceedings was based on this court's decision in *LeGrand v. State*, 3 Neb. App. 300, 527 N.W.2d 203 (1995). In *LeGrand v. State*, we concluded that based on two then-recent U.S. Supreme Court decisions, Nebraska was no longer compelled to allow "separate proceeding" attacks in enhancement proceedings as required by *State v. Wiltshire, supra*, and its predecessors. We concluded that it was impermissible to attack the validity of a prior conviction in an enhancement proceeding on any grounds, with the exception that challenges are allowed to prior plea-based convictions offered for enhancement purposes when based on the transcript's failure to disclose whether the defendant had or waived counsel at the time the pleas were entered and when the defendant was sentenced to imprisonment for any period of time as a result of the pleas. Our holding in *LeGrand v. State* supported the district court's decision to deny and dismiss Tunender's petitions in his separate proceedings.

On December 22, 1995, the Nebraska Supreme Court rejected *LeGrand v. State* in *State v. LeGrand, supra*, and emphatically reaffirmed *State v. Oliver, supra*, and *State v. Wiltshire, supra*, concluding that "there exists no federal mandate to overrule separate state proceedings to collaterally attack prior state convictions on grounds other than right to counsel or waiver of counsel." 249 Neb. at 9, 541 N.W.2d at 386. The court went on to state:

> A defendant cannot collaterally attack a prior conviction in an enhancement proceeding. *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989). Therefore, objections to the validity of a prior conviction offered for the purpose of sentence enhancement, beyond the issue of whether the defendant had counsel or waived the right to counsel, constitute a collateral attack on the judgment, and must be raised either by a direct appeal from the prior conviction or in separate proceedings commenced expressly for the purpose of setting aside the prior conviction. *Id.* See, also, *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992).

249 Neb. at 8, 541 N.W.2d at 385.

Thus, the first question presented is what, if any, effect does *State v. LeGrand, supra*, have on this appeal?

Separate Proceedings.

At first blush, it might appear that *State v. LeGrand* mandates a reversal and remand with directions to the district court to address the substance of Tunender's separate proceedings for compliance with *Boykin-Tweedy-Irish*. As stated above, the court never reached the merits of this challenge in reliance upon *LeGrand v. State*. However, upon closer scrutiny, we conclude that we have no jurisdiction to address the district court's orders dismissing Tunender's petitions for separate proceedings.

[4] Jurisdiction is a prerequisite for this court's consideration of an appeal, and jurisdiction cannot be acquired unless " 'the appellant has satisfied the requirements for appellate jurisdiction.' " *Metrejean v. Gunter*, 240 Neb. 166, 167, 481 N.W.2d 176, 177 (1992) (quoting *In re Interest of B.M.H.*, 233 Neb. 524, 446 N.W.2d 222 (1989)).

[5,6] Tunender did not appeal from the district court orders denying and dismissing his petitions for separate proceedings. The present appeal is from the judgment and order of the court stemming from the enhancement and sentencing hearing in the *separate* criminal proceeding wherein Tunender was charged with assault by a confined person and being a habitual criminal. It is fundamental that for a party to preserve the right to appeal from a final order, that party must file a notice of appeal within 30 days of the order appealed from. Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1994). While Tunender timely appealed from the court's sentencing order of March 9, 1995, in the criminal proceeding, he did not appeal from the district court's orders dismissing his petitions in the separate proceedings. Timeliness of an appeal is jurisdictional. *State v. McCormick and Hall*, 246 Neb. 271, 518 N.W.2d 133 (1994).

[7,8] The record before us contains the court's written judgment and order entered in the criminal proceeding finding that enhancement was proper and sentencing Tunender. As stated above, the record also contains the court's oral pronouncement dismissing Tunender's separate proceedings. Rendition of judgment occurs when the court makes an oral pronouncement and accompanies that pronouncement with a notation on the trial docket. Failing a notation on the trial docket, a judgment is rendered when some written notation of the judgment is filed in the records of the court. *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994). Entry of a judgment is the act of the clerk in spreading on the court's journal both the proceedings had and the relief granted or denied. *Tri-County Landfill v. Board of Cty. Comrs.*, 247 Neb. 350, 526 N.W.2d 668 (1995). We have no trial docket, written court orders, or court journals pertaining to the separate proceedings. Thus, the record is not clear that a final order or judgment of dismissal was ever rendered or entered in the separate proceedings. What is clear is that no such final order or judgment is in our record.

[9] A transcript on appeal which does not contain a final order or judgment presents nothing for review. *Hoffman v. Reinke Mfg. Co.*, 227 Neb. 66, 416 N.W.2d 216 (1987). To obtain a review by this court, the transcript on appeal must

contain the judgment, decree, or final order sought to be reversed, vacated, or modified. *Id.*

Because of the Supreme Court's decision in *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995), it now turns out that Tunender's petitions for separate relief should not have been summarily dismissed. While it is true that Tunender's sentence would not have been enhanced had the separate proceedings been successful, an issue we do not decide, we are not at liberty to reverse an order not appealed from. This is unlike the situation in *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992). Like Tunender, Wiltshire levied a two-pronged attack, one at his enhancement hearing and one by separate proceedings, but Wiltshire, unlike Tunender, appealed *both* orders.

The procedure in Nebraska for challenging prior plea-based convictions for enhancement proceedings has gradually developed on a case-by-case basis. After *State v. LeGrand*, there can be no legitimate question about the right of a criminal defendant to attack prior plea-based state convictions on grounds in addition to whether the defendant had counsel or had waived the right to counsel. Neither can the procedural viability of separate proceedings in which to assert such "noncounsel" challenges be questioned. However, the Supreme Court has consistently stated the necessity and importance of keeping such challenges *separate* from the criminal enhancement and sentencing hearing proceedings, because they are collateral attacks on prior judgments. See, *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989); *State v. Crane*, 240 Neb. 32, 480 N.W.2d 401 (1992); *State v. Tejral*, 240 Neb. 329, 482 N.W.2d 6 (1992); *State v. Wiltshire, supra*; *State v. LeGrand, supra*.

Tunender properly utilized separate proceedings to level his challenge, and the district court assiduously maintained those proceedings separate and distinct from the enhancement and sentencing hearing. On appeal, we are no less compelled to treat them as separate. To view them as but really only "one" for purposes of this appeal would not only ignore fundamental precepts of appellate practice, but it would blur the otherwise bright boundary line between these proceedings which the Supreme Court has carefully drawn, repeatedly enforced, and recently reaffirmed. No appeal having been taken from the dismissal of Tunender's petitions for separate proceedings, we lack the necessary jurisdiction to further address the district court's refusal to consider the challenges made in them.

Enhancement Hearing.

Tunender also argues that since he was denied the right to present his *Boykin* challenges at the separate proceedings, the district court erred in not entertaining them at the enhancement hearing held in the criminal proceeding. Since Tunender timely appealed from the enhanced sentence in the criminal proceeding, we have appellate jurisdiction over this aspect of his assignment of error.

The district court's stated reason for rejecting this argument was, again, in reliance upon *LeGrand v. State*, 3 Neb. App. 300, 527 N.W.2d 203 (1995), which, as stated above, concluded that allowing such challenges was no longer constitutionally mandated at any "tier." While *State v. LeGrand* found that our conclusion was incorrect, the result reached by the district court—rejecting such challenge at the enhancement hearing—was correct for other reasons.

[10] Long before our decision in *LeGrand v. State, supra*, it was the rule in this state that to prove a prior conviction for enhancement purposes, the State need only show that at the time of the prior conviction the defendant had, or waived, counsel. *State v. Oliver, supra*; *State v. Wiltshire, supra* (concluding that enhancement evidence challenges that do not deal with lack of counsel, including *Boykin*-based challenges, rise to level of collateral attack on prior convictions, fall in second tier of *Oliver* analysis, and may only be raised in direct appeal or in separate proceeding). *State v. LeGrand, supra*, reaffirmed the rule that a defendant cannot collaterally attack a prior conviction in an enhancement proceeding.

Tunender's challenges are *Boykin*-based and are beyond the issue of whether he had or waived counsel in the prior convictions. Thus, they are within the second tier of *Oliver*, are collateral attacks on prior convictions, and were impermissible in the enhancement proceeding. The district court correctly, albeit on incorrect grounds, rejected Tunender's *Boykin*-based challenges in the enhancement proceeding.

CONCLUSION

Because Tunender did not appeal the dismissal of his petitions in the separate proceedings, we are without authority to address the district court's denial and dismissal of those petitions. The district court did not err in rejecting Tunender's *Boykin*-based challenges at the enhancement proceeding.

AFFIRMED.

MARSHA J. BLANCHARD, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY A. REARDON, DECEASED, APPELLANT, v. CITY OF RALSTON, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

549 N.W.2d 652

Filed May 28, 1996. No. A-94-1142.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly erroneous.
2. ____: ____. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Municipal Corporations: Nuisances: Liability: Property: Due Process.** In order for a city to properly exercise its police power in the destruction of a nuisance so as to avoid liability for taking an owner's property, the city must first provide the owner with sufficient due process.
4. **Due Process.** The determination of whether the procedures afforded an individual comport with the constitutional requirements for procedural due process presents a question of law.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed and remanded for further proceedings.

Mandy L. Strigenz, of E. Terry Sibbernsen, P.C., for appellant.

Eugene P. Welch and Francie C. Riedmann, of Gross & Welch, P.C., for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges.

MUES, Judge.

Marsha J. Blanchard appeals the decision of the district court for Douglas County which denied her claim for damages under the theory of inverse condemnation against the City of Ralston.

STATEMENT OF FACTS

On August 11, 1987, Mary A. Reardon, the owner of a house located at 4903 South 77th Avenue in Ralston, Nebraska, passed away. Reardon's husband had predeceased her, and the couple had one child, Marsha J. Blanchard. Blanchard, who was named personal representative of Reardon's estate, was to receive the house under Reardon's last will and testament. In February 1988, Blanchard, who was separated from her husband, moved into the house with her four children. In June 1990, the children went to live with their father in Valley, Nebraska. Blanchard remained in the house until October 1990, when she left to join her husband and children in Valley.

Due to Blanchard's financial difficulties, the electricity in the house had been shut off in the spring of 1990. At the time Blanchard moved out of the house in October, she had received a final notice that the water in her house would also be shut off. Blanchard and her husband returned to the house periodically during the fall of 1990. Blanchard's husband returned to the house in December after Blanchard was contacted by the Ralston Police Department concerning complaints about animal noises at the house. These complaints were responded to and resolved.

City's Investigation and Actions.

The events salient to this appeal began on February 28, 1991, when Ralston police Lt. William White received a complaint that a hissing sound was coming from the house. In his investigation of the house, Lieutenant White discovered a water leak in the basement and standing water in the basement area. Upon entering the house, Lieutenant White found mold covering the walls and carpet, dirty dishes in the kitchen, and old furniture and other items thrown in disarray. In Lieutenant White's opinion, the house was a " 'health nuisance.' " Lieutenant White's report indicated that the house was "[c]urrently titled to REARDON, MARY A. and is in probate at this time."

The information regarding the house was relayed to Mayor Julie Haney of Ralston. On March 8, 1991, Mayor Haney sent a letter to the Douglas County Health Department requesting someone to assist the Ralston building inspector on an inspection of the house. Mayor Haney also contacted the city building inspector, Boyd and Associates, and an appraisal firm, Hyatt and Associates. On April 25, the acting building inspector, William Churchill; Lieutenant White; and a Douglas County health inspector, Obert Lund, entered the house to make an inspection.

In a letter to Mayor Haney dated April 30, 1991, Lund noted that the house was full of moisture, with mold and mildew covering the ceilings and walls. In addition, Lund stated the carpets were covered with feces, fungi, and garbage. Lund also found that there was a strong odor inside the house which permeated into the surrounding neighborhood. In the letter, Lund expressed his opinion that "[t]his structure constitutes a public health hazard and action must be taken as soon as possible to abate the problem."

At trial, Lund testified that he was concerned that the house was not secured because the front door was broken. Lund also testified that he was worried that the increase in temperature which was expected in the upcoming months would produce additional growth in the fungi. Indeed, Lund had again inspected the house on May 16, 1991, and found that conditions had further deteriorated. Lund testified at trial that the house posed possible health hazards such as E. coli bacteria in the feces, viruses in the water such as Legionnaires' disease, and airborne spores that could be breathed into the lungs or picked up through the skin. However, before the city council on May 16, Lund stated that the condition of the house could result in "various type illnesses which, since I'm not a doctor, I'm not qualified to go into that area, but generally speaking, we are talking about spores and bacteria and viruses that if ingested into the lungs could make people ill."

Churchill, the building inspector, testified at trial that 50 percent of the walls were covered with mold, the upstairs carpeting was "squishy," and there was standing water in the basement. Churchill also testified that it was his opinion that the south and west walls in the basement were at the point of failure. The south wall had cracks running across it that were at some points more than half an inch wide, and the wall itself had moved inward 3 or 4 inches. The joists were saturated with moisture and were white with fungus, and Churchill did not believe that they were structurally sound. In a letter to Mayor Haney dated April 26, 1991, Churchill concluded that the building was unsafe as defined by Ralston Mun. Code § 9-401 and further opined that it should be demolished and removed pursuant to Ralston Mun. Code § 9-405.

Mayor Haney also inspected the house sometime in April 1991. Based on what she saw, the reports of Churchill and Lund, her concerns for the neighbors, and the fact that the weather was warming up, Mayor Haney determined that an emergency situation existed and that the house should be demolished. Mayor Haney testified at trial that she came to this conclusion sometime after April 26, 1991. On May 1, Ralston City Attorney Patrick Heng informed Mayor Haney that he had given permission to a neighbor to remove a birdbath from the property so that it would not be " 'bulldozed.' " A Ralston City Council meeting was held on May 7 at which the procedure for the demolition of the house was discussed. The procedure consisted of (1) posting notice on the house, (2) waiting 3 days, and (3) demolishing the house. Heng then prepared a notice that was posted at the premises on May 8. The notice stated:

> TO: OWNER, OCCUPANT OR INTERESTED PARTIES OF THESE PREMISES
>
> You are hereby notified that this house has been determined to be an unsafe building and a nuisance after inspection by the Ralston Police Department. The causes for this decision are the odor and health hazard present in this house.
>
> You must remedy this condition or demolish the building within three (3) days from the date of posting of this Notice or the Municipality will proceed to do so. Appeal of this determination may be made to the Governing Body, acting as the Board of Appeals, by filing with the Municipal Clerk within ten (10) days from the date of posting of this Notice a request for a hearing.

Notice to Blanchard.

Blanchard was not served personally with the above notice. Moreover, she had not been contacted in February 1991 when the water leak was first discovered. Blanchard testified that the first contact she received concerning the house after the December 1990 animal complaint was when Lieutenant White called her husband's place of work and left a message to call "Connie" at city hall. Blanchard testified at trial: "I'm not sure about the exact date. It would have been late March, early April, sometime [in] that time span." However, evidence contained in a summary of events compiled by a city official indicates that the call was made on April 25, 1991, and Lieutenant White confirmed in his deposition that he contacted Blanchard's husband on that date.

The evidence shows that Blanchard phoned city hall on April 29, 1991, and spoke with Connie Kompare, the administrative assistant to the mayor. Blanchard testified that Kompare told her that there had been some water damage to the house and that there was going to be a "meeting" to discuss condemning the house. Blanchard stated that Kompare did not inform her of when the meeting would be held. Further, Blanchard testified that she provided Kompare with her address at that time. Kompare told Blanchard that Blanchard would need to contact the city attorney, Heng, for more information. Other evidence indicates that Kompare told Blanchard during that conversation that the house was in the process of condemnation and would be demolished, that Blanchard provided Kompare with a mobile phone number, and that this number was then provided to Heng.

Despite several attempts to reach Heng by phone, Blanchard does not recall ever making contact with Heng. However, Heng testified that Blanchard had phoned him sometime prior to the posting of the notice on May 8, 1991. Heng estimated the date of the call to have been 2 to 3 weeks before the house was demolished. Heng testified that in this conversation Blanchard told him where she was living, but Heng did not recall writing down her address. During this conversation, Blanchard informed Heng that she had an interest in the house. It is undisputed that except for the May 8 posted notice no further attempt was made by the city to contact Blanchard after that conversation.

Regarding general efforts to notify the owner of the house, Heng testified that attempts were made to determine who the owner was so that proper notice could be given. Heng had received the report of Lieutenant White which indicated that the house was "[c]urrently titled to REARDON, MARY A. and is in probate at this time." A title search on the property disclosed that title was held by the Land Reutilization Authority of Douglas County, which had obtained the property through a foreclosure proceeding. Heng's attempts to determine if the property was indeed in probate consisted of sending a colleague to check potential probate filings regarding Reardon's estate. When this occurred is not clear. The colleague reported to Heng that nothing was found "under [Reardon's] name" which would indicate that such a file was opened. Apparently, no follow up occurred. The record shows, however, that the city filed a sewer use and garbage removal lien on the subject property on March 13, 1991, directed to "Marsha Blanchard, personal representative of the estate of Mary Reardon." While Heng testified that he realized by May 8 what Blanchard's relationship to the property was, Blanchard was not provided with written notice of the condemnation and demolition because Heng did not have her address. Such notice was, however, provided to the Land Reutilization Authority as well as the county assessor's office.

Blanchard was informed on May 12, 1991, of the city's formal action to demolish the house when personal friends Richard Medina and Carolyn Harrington from Ralston drove to Valley to tell her that a notice had been posted on the door. On May 13, Blanchard and Medina entered the house in order to retrieve some personal property and at that time removed only one box of personal papers from the front closet. Medina also testified that he went back to the house the following day to clean it up after receiving permission from the city. However, Medina was stopped by the Ralston police from removing any trash from the premises because the contents of the house, along with the house, were then owned by "Douglas County."

Hearing and Demolition.

On May 14, 1991, Blanchard contacted an attorney, Carl Klekers. On May 15, Klekers prepared and Blanchard and Medina filed a notice of appeal and request for hearing on the condemnation of the house. A hearing was set for May 16 at noon. The house was scheduled to be demolished at 1 p.m. The scheduled time for the demolition had previously been set by Mayor Haney.

At the May 16, 1991, hearing, Barry Boyd, the acting building inspector, testified concerning the condition of the house. Boyd had inspected the house that morning. Lund testified about the health conditions described above. In addition, Kompare, from the mayor's office, testified that the house had been appraised at $55,000, that the land was valued at $15,000, and that the cost of repair was approximately $31,500. Several citizens of Ralston testified about their concerns regarding the house. Medina testified, on behalf of Blanchard, that he was willing to attempt to repair the house and that he felt the cost of repair would be approximately $20,000. Medina requested a 2-week delay to enable him to go into the house and clean it out and make further inspection of what was needed to repair the house. Blanchard did not testify. The city council denied Medina's request and further voted to declare an emergency situation and to deny Blanchard's appeal.

Mayor Haney testified that following the hearing, a contract was signed with a demolition crew to destroy the house. However, Darrell Fager, who was contracted with to demolish the house, testified that it was his recollection that he had received a signed contract sometime in the late morning of May 16, 1991. Although the city's summary of events indicates that the demolition began at 1:15 p.m., Klekers testified that on May 16, at approximately 10 a.m., he drove past the house and observed a wrecking crew already removing the driveway. In addition, the city's summary shows that at 8:30 a.m. a trenching service was removing the water service to the house at the city's direction. Immediately following the hearing, Klekers again drove by the house and observed that the crew had already demolished the garage and the connecting vestibule from the garage to the house and had started on the house itself. The city's summary shows that the house was demolished by 2:45 p.m.

Blanchard's Lawsuit.

On April 6, 1993, Blanchard filed a petition in the district court for Douglas County. Blanchard alleged that the actions of the city constituted a taking entitling her to damages under the theory of inverse condemnation pursuant to Neb. Rev. Stat. § 76-701 et seq. (Reissue 1990) and Neb. Const. art. I, § 21. In addition, Blanchard alleged that the city's actions were in violation of Ralston Mun. Code §§ 9-401 through 9-406 in that Blanchard was not given proper notice or a reasonable time in which to repair. As a result of the taking, Blanchard alleged that she was damaged in the sum of $70,000.

A trial on the matter was held on March 28, 29, and 30 and May 17, 1994. In an order dated July 8, 1994, the district court found that due to the condition of the house "an immediate danger i.e. an emergency, existed." While the court found that the notice afforded Blanchard was "less than perfect," it found that Blanchard received actual notice in March or April 1991. The court further determined that the city had the authority pursuant to its police power to order the removal of a dangerous building which had become a nuisance, without payment of compensation or acquiring the property through eminent domain. The court then dismissed Blanchard's petition. Blanchard timely appeals from this decision.

ASSIGNMENTS OF ERROR

On appeal, Blanchard alleges that the district court erred by (1) finding that an emergency condition existed with regard to her house sufficient to deprive her of due process, (2) finding that Blanchard was afforded due process, and (3) not compensating Blanchard for the value of her property.

STANDARD OF REVIEW

[1] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly erroneous. *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996); *Lee Sapp*

Leasing v. Catholic Archbishop of Omaha, 248 Neb. 829, 540 N.W.2d 101 (1995).

[2] However, when reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Lee Sapp Leasing, supra*; *Eggers v. Rittscher*, 247 Neb. 648, 529 N.W.2d 741 (1995); *Dolan v. Svitak*, 247 Neb. 410, 527 N.W.2d 621 (1995).

ANALYSIS

In her petition, Blanchard alleges a theory of recovery for inverse condemnation pursuant to § 76-701 et seq. and Neb. Const. art. I, § 21. Section 76-705 provides:

> If any condemner shall have taken or damaged property for public use without instituting condemnation proceedings, the condemnee, in addition to any other available remedy, may file a petition with the county judge of the county where the property or some part thereof is situated to have the damages ascertained and determined.

In addition, article I, § 21, states that "[t]he property of no person shall be taken or damaged for public use without just compensation therefor." In *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 684, 515 N.W.2d 401, 405 (1994), inverse condemnation was described as "a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings."

There is no dispute in this case that the city demolished the house without instituting condemnation proceedings and without compensation. However, the city argues, as the trial court found, that this situation is nevertheless *not* a taking entitling Blanchard to compensation. The city maintains that it had the authority pursuant to its police power to remove a dangerous building which constituted a nuisance. While Blanchard does not seem to contest the fact that the city had this power, Blanchard asserts that the city did not properly exercise the power because it failed to provide her adequate due process. The city counters by arguing that because an emergency existed in this situation, the city was not required to afford Blanchard any due process in connection with the removal of the building, and if any due process was required, it was given. The issue in this case is therefore whether the city properly exercised its police power in the destruction of Blanchard's house.

The Nebraska Supreme Court has recognized the authority of a city of a metropolitan class to remove or order the removal of a dangerous building which has become a nuisance because of its condition. See, e.g., *Hroch v. City of Omaha*, 226 Neb. 589, 413 N.W.2d 287 (1987); *Goldsberry v. City of Omaha*, 181 Neb. 823, 151 N.W.2d 329 (1967). Although Ralston is not a city of the metropolitan class, Neb. Rev. Stat. § 18–1720 (Reissue 1991) also provides that all cities and villages have the power "by ordinance to define, regulate, suppress and prevent nuisances, and to declare what shall constitute a nuisance, and to abate and remove the same." Ralston provides such definitions and procedures in Ralston Mun. Code § 9–401 et seq.

Furthermore, courts generally hold that a city is not liable for a taking if it destroys or damages private property while *properly* exercising its police power in abating a nuisance or public health hazard. See, *City of Minot v. Freelander*, 426 N.W.2d 556 (N.D. 1988) (homeowner was not entitled to compensation under Fifth Amendment when house was demolished to abate public and private nuisance); *Powell v. City of Clearwater*, 389 N.W.2d 206 (Minn. App. 1986) (city had power to destroy building without paying damages after owner failed to correct hazardous conditions on premises); *Starzenski v. City of Elkhart*, 659 N.E.2d 1132 (Ind. App. 1996) (owner not entitled to compensation for items destroyed by city when city removed excessive trash and debris from home to abate nuisance); *Brown v. State*, 21 Cal. App. 4th 1500, 26 Cal. Rptr. 2d 687 (1993) (state's actions in cleaning up hazardous waste were legitimate exercise of police power and did not constitute inverse condemnation).

[3] However, in order for a city to *properly* exercise its police power in the destruction of a nuisance so as to avoid liability for taking an owner's property, the city must first provide the owner with sufficient due process. See, *Inman v Town of New*

Hartford, 116 A.D.2d 998, 498 N.Y.S.2d 618 (1986); *City of Pittsburgh v. Pivirotto*, 93 Pa. Commw. 563, 502 A.2d 747 (1985), *aff'd* 515 Pa. 246, 528 A.2d 125 (1987); 7A Eugene McQuillan, The Law of Municipal Corporations § 24.561 (3d rev. ed. 1989). Sufficient due process in this situation was addressed in *City of Pittsburgh v. Pivirotto*, 93 Pa. Commw. at 564, 502 A.2d at 748, where the court stated that "[a]s a general proposition, a municipality must, before destroying a building, give an owner sufficient notice, a hearing and ample opportunity to demolish the building himself or to do what suffices to make it safe and healthful for use and occupancy." Citing 7 Eugene McQuillan, The Law of Municipal Corporations § 24.561 (3d rev. ed. 1981), and *Pittsburgh v. Kronzek*, 2 Pa. Commw. 660, 280 A.2d 488 (1971). Moreover, Neb. Rev. Stat. § 18-1722 (Reissue 1991) provides in part:

> If any owner of any building or structure fails, neglects, or refuses to comply with *notice by or on behalf of any city or village to repair, rehabilitate, or demolish and remove a building or structure which is an unsafe building or structure and a public nuisance*, the city or village may proceed with the work specified in the notice to the property owner.

(Emphasis supplied.)

Also, Ralston Mun. Code § 9-403 provides in part:

> Whenever the building inspector, the fire official, the health official, or the Governing Body shall be of the opinion that any building or structure in the Municipality is an unsafe building, he shall file a written statement to this effect with the Municipal Clerk. The Clerk shall thereupon cause the property to be posted accordingly, and shall file a copy of such determination in the office of the County Register of Deeds, and shall *serve written notice upon the owner thereof*, and upon the occupant thereof, if any, by certified mail or by personal service. Such notice shall state that the building has been declared to be in an unsafe condition; and that such dangerous condition must be removed or remedied by repairing or altering the building or by demolishing it; and that the condition must

> be remedied within sixty (60) days from the date of receipt.

(Emphasis supplied.)

Notwithstanding the general proposition that a city must give an owner sufficient notice, an opportunity to be heard, and an opportunity to repair or demolish in order to properly exercise its police power in the destruction of a nuisance, courts have recognized situations where the city can summarily destroy property without liability for a taking. See, e.g., *Turpen v. City of St. Francisville*, 145 Ill. App. 3d 891, 495 N.E.2d 1351 (1986); *City of Chicago v. Garrett*, 136 Ill. App. 3d 529, 483 N.E.2d 409 (1985); *Leppo v. City of Petaluma*, 20 Cal. App. 3d 711, 97 Cal. Rptr. 840 (1971). In those situations where courts have allowed a city to summarily destroy nuisances without compensating the owner, the courts have generally found that an "emergency" exists such that the process due is not as encompassing as that necessary in the absence of such "emergency."

For example, in *Leppo v. City of Petaluma*, the city notified the owners of its finding that their building was unsafe due to widening cracks in the walls. The city also informed the owners of its intention to demolish the building and gave the owners a certain amount of time in which to destroy the building themselves. The city, however, did not give the owners a hearing on the question of immediate need for demolition. The court nevertheless found that if the city could establish by a preponderance of the evidence that an emergency actually existed, the city could dispense with a due process hearing and demolish the building summarily. Also, in *Turpen v. City of St. Francisville*, the court found that because the building in question was leaning toward the sidewalk, threatening to fall into the street, and was in a weakened condition, there existed such an emergency that the city was not required to adhere strictly to the notice requirements of the municipal code.

The Ralston Municipal Code provides for this specific situation in § 9-405, which provides:

> UNSAFE BUILDINGS; EMERGENCY. Where any unsafe building or structure poses an immediate danger to the health, safety, or general welfare of any person or

> persons, *and the owner fails to remedy the situation in a reasonable time after notice by the Building Inspector to do so*, the Municipality may summarily repair or demolish and remove such building or structure.

(Emphasis supplied.)

We must therefore determine whether Blanchard was afforded the appropriate due process under the circumstances presented here. This determination to a certain extent depends on whether the trial court was clearly erroneous in its factual finding that an emergency existed in this situation. If no emergency existed, then Blanchard was entitled under the Ralston Municipal Code to be served with written notice of the condition of the house and given 60 days in which to repair or demolish the house. It is clear from the record, and the city does not dispute, that Blanchard was not provided with written notice or 60 days in which to repair or demolish the house. It is the city's assertion, however, that because of the condition of the house, an emergency existed, and therefore no process was due or the due process afforded was adequate.

The trial court found in its order that there was no question that an "immediate danger i.e. an emergency" existed. Based on the circumstances of this situation, however, we are not so readily inclined to reach such a conclusion. While no one appears to dispute that this house was in a deplorable condition, the actions of the city call into question its claim of necessity for immediate action.

The record indicates that the city knew in late February 1991 that this house had experienced a water leak and that the Ralston Police Department had designated it as a " 'health nuisance.' " However, despite the fact that the city placed a lien against the property in the name of "Marsha Blanchard" in March, the city made no attempt to contact Blanchard until the end of April. In addition, the building inspector and health inspector did not inspect the house until April 25, even though Mayor Haney had sent a letter requesting the health inspector's assistance on March 8. According to Mayor Haney, she then declared the house an "emergency" sometime after April 26. In fact, the evidence reveals that on May 1, Heng told the mayor that he had let a neighbor remove a birdbath from the premises so that it would not get " 'bulldozed.' " The city nevertheless did not take further action until May 7 when the "emergency" situation was discussed at a city council meeting. Then on May 8, a notice was posted on the house which, interestingly, gave the owner only 3 days to remedy the problem, but 10 days to appeal the decision to demolish.

The city's delayed action after becoming aware of the situation and even after declaring the situation to be an "emergency" calls into question its claim of "immediate danger." However, under our standard of review we cannot overturn a factual finding of the lower court unless it is clearly erroneous. Because there is evidence to support the court's finding that an immediate danger existed, we do not find that it is clearly erroneous.

[4] However, even assuming a danger of some immediacy, there remains the question of whether Blanchard was afforded procedural due process under the circumstances. The determination of whether the procedures afforded an individual comport with the constitutional requirements for procedural due process presents a question of law. *Billups v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 238 Neb. 39, 469 N.W.2d 120 (1991); *Jordan v. Ben. Rev. Bd. of U.S. Dept. of Labor*, 876 F.2d 1455 (11th Cir. 1989). With questions of law, this court is required to reach a conclusion independent of the lower court's ruling. *Lee Sapp Leasing v. Catholic Archbishop of Omaha*, 248 Neb. 829, 540 N.W.2d 101 (1995); *Eggers v. Rittscher*, 247 Neb. 648, 529 N.W.2d 741 (1995); *Dolan v. Svitak*, 247 Neb. 410, 527 N.W.2d 621 (1995).

As the trial court noted, the notice given Blanchard was "less than perfect." Although the trial court found that Blanchard had actual notice of problems with the house in March or April 1991, the evidence indicates that Blanchard was in fact first contacted on April 25, and then only by a phone message left at her husband's place of employment. The city then decided on May 7 to demolish the house. Notice was then posted on the house on May 8, giving the owner 3 days in which to repair or demolish the house before the city demolished the house and 10 days in which to appeal the decision to demolish it. This notice was not, however, served on Blanchard by certified mail or personal service. Even though the evidence shows that by early May, Heng knew of Blanchard's interest in the property, knew the approximate area in which she was living (although he had failed to write down her address), and had the ability to contact her through her husband's cellular phone, no attempt was made to contact Blanchard regarding the demolition.

The city, relying on *Hroch v. City of Omaha*, 226 Neb. 589, 413 N.W.2d 287 (1987), asserts that Blanchard was nonetheless afforded the requisite due process because she was given notice and an opportunity to be heard. *Hroch* provides:

> " ' "The due process clause does not guarantee to a citizen of a State any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defence, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it." . . .' "

Id. at 591, 413 N.W.2d at 288, quoting *Webber v. City of Scottsbluff*, 155 Neb. 48, 50 N.W.2d 533 (1951).

In addition, in *Howard v. City of Lincoln*, 243 Neb. 5, 12, 497 N.W.2d 53, 58 (1993), the Nebraska Supreme Court held that when there has been a deprivation of a significant property interest, due process requires notice and an opportunity to be heard that is " ' "appropriate to the nature of the case." ' " Quoting *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). However, in *In re Interest of L.V.*, 240 Neb. 404, 413, 482 N.W.2d 250, 257 (1992), the court also stated:

> Since due process is applicable and adaptable to various situations and, therefore, necessarily and inherently flexible, adaptability and flexibility of due process should not be mistaken for, or equated with, an absence of minimal procedural protection against a governmental attempt to restrict or eliminate personal rights guaranteed by the Constitutions.

It is the city's position that although no notice was mailed to Blanchard as required by Ralston Mun. Code § 9-403, Blanchard nevertheless had actual knowledge of the city's intention to demolish the house by May 12, 1991, when Medina and Harrington informed her that a notice had been posted on the house. Moreover, the city asserts that Blanchard then also had the opportunity to be heard at a hearing before the city council. The city maintains that this notice and hearing were reasonable and adequate for this situation.

Indeed, Blanchard was given the opportunity to appear before the city council and dispute the fact that the house was an unsafe building which posed an emergency situation. However, the evidence shows that Blanchard was not given notice which was reasonably calculated to inform her about the issues involved in the proceeding and thus was necessarily denied a reasonable opportunity to refute or defend against all of the charges and accusations. The record indicates that not until the hearing on May 16, 1991, 1 hour before demolition was set to begin, was Blanchard informed about the overall condition of her home, including what specific health hazards the house posed or what structural problems existed. Prior to that, Blanchard was only informed that the house had been determined to be a nuisance and an unsafe building due to "odor and health hazard." Without being provided the necessary information concerning the issues involved in the condemnation of the house, Blanchard had no opportunity to refute or defend against the accusations, or to present evidence that she could reasonably cure the defects.

Furthermore, due process in this situation requires notice, an opportunity to be heard, and an opportunity to repair or demolish the building. See, e.g., *Inman v Town of New Hartford*, 116 A.D.2d 998, 498 N.Y.S.2d 618 (1986); *City of Pittsburgh v. Pivirotto*, 93 Pa. Commw. 563, 502 A.2d 747 (1985), *aff'd* 515 Pa. 246, 528 A.2d 125 (1987); 7A Eugene McQuillan, The Law of Municipal Corporations § 24.561 (3d rev. ed. 1989). While Blanchard was given some notice and an opportunity to appear before the council, she was only given notice of the demolition 4 days before it was to take place, and then she was not properly notified of what needed to be repaired.

As previously stated, § 9-405 of the Ralston Municipal Code provides that the city can summarily repair or demolish a building if "the owner fails to remedy the situation in a *reasonable time* after notice by the Building Inspector to do so." (Emphasis supplied.) Although the condition of the house was not such as to entitle Blanchard to a full 60 days in which to remedy the situation under Ralston Mun. Code § 9-403, the time afforded Blanchard in which to remedy the situation was not reasonable under the circumstances.

Even though we cannot conclude that the lower court's finding of an "immediate danger" was clearly erroneous, we nonetheless find as a matter of law that the process afforded Blanchard in this situation was less than that which she was due. The facts of this case show that while an "immediate danger" was found to exist, the city waited approximately 3 weeks before taking action to abate the danger. Furthermore, the city was less than diligent in its search for Blanchard, despite the city council and mayor's concerns for providing the proper notice to anyone with an interest. Even when the city did locate Blanchard, it made no real efforts to inform Blanchard of its decision to demolish the house and did not provide her with the necessary information to attempt to abate the problems. The city's understandable frustration at the neglect of the property does not excuse it from its due process obligations. We find that the situation was not such as to justify denying Blanchard minimal procedural protections beyond those which she was afforded here.

Under these circumstances, we find as a matter of law that Blanchard was not afforded due process. Therefore, the use of police power was not proper, the city's actions constitute a taking for purposes of inverse condemnation, and Blanchard is entitled to a determination of damages. As one commentator noted:

> While the right exists in the exercise of the police power to destroy property which is a menace to public health or safety, public necessity is the limit of the right and the property cannot be destroyed if the conditions which make it a menace can be abated in any other recognized way. Destruction of property is a drastic remedy, and it must necessarily be a remedy of last resort.

7A McQuillan, *supra*, § 24.561 at 183.

CONCLUSION

Because the city did not afford Blanchard adequate due process, the city's actions in summarily destroying the property were not proper under its police power, and as a result a taking occurred for purposes of inverse condemnation. We therefore reverse the judgment and remand the cause to the district court to determine damages.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ROBERT HROCH, DOING BUSINESS AS ASSOCIATED WRECKING CO., APPELLANT, V. FARMLAND INDUSTRIES, INC., A KANSAS CORPORATION, APPELLEE.

548 N.W.2d 367

Filed May 28, 1996. No. A-95-332.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Breach of Contract: Limitations of Actions.** The cause of action for a breach of contract accrues, and the statute of limitations begins to run, when the breach occurs.
4. **Breach of Contract: Damages: Intent.** A claim for damages based on intentional interference with contractual relations accrues when the subject contract is breached, regardless of when the defendant supposedly induced the breach.
5. **Limitations of Actions: Torts.** Actions for tortious business interference must be filed within 4 years under Neb. Rev. Stat. § 25-207 (Reissue 1995).

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Affirmed.

David Clark for appellant.

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

HANNON, SIEVERS, and MUES, Judges.

SIEVERS, Judge.

Robert Hroch, doing business as Associated Wrecking Co., appeals the district court order granting summary judgment to Farmland Industries, Inc. (Farmland). Hroch brought an action for tortious interference with a business relationship against Farmland after Borton, Inc., a general contractor, canceled Hroch's subcontract with Borton to perform certain demolition work on grain bins owned by Farmland.

STATEMENT OF FACTS

Farmland hired a general contractor, Borton, to remove grain bins at a grain terminal elevator located near 34th and Vinton Streets in Omaha. Borton in turn subcontracted with Hroch. Borton and Hroch entered into an agreement on February 1, 1989, the terms of which included those in purchase order No. 89-0060, which was attached to the agreement and incorporated therein. The purchase order specified that Hroch was to remove the grain bins by cutting sections of concrete and lowering them to the ground and that at no time was Hroch or his employees to use a torch or electrical arc welder on the project. Borton's general contract with Farmland stated that neither Borton nor its subcontractor could use any torches or welders unless Farmland gave advance approval. The Borton-Hroch agreement also contains the following provision:

> Should the subcontractor at any time refuse or neglect to supply a sufficient number of properly skilled workmen, or of materials of the proper quality or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, and the contractor shall deem that such refusal, neglect or failure is sufficient grounds for such action, the contractor shall have the right to terminate the employment of the subcontractor for

> the said work by written notice stating the effective date . . . .

The agreement further provides that should the contractor terminate the employment, it will not pay the subcontractor until the contractor finishes the work left undone by the subcontractor. Moreover, any further payments will be calculated by deducting any expenses and damages incurred by Borton from the unpaid amount.

According to the affidavit of Borton's purchasing agent, Bill Jennings, Borton orally notified Hroch on April 26, 1989, that the purchase order would be terminated. Farmland's answer to Hroch's petition alleged that Hroch was ordered to discontinue all demolition work and immediately vacate the jobsite because Hroch used an acetylene torch without permission, failed to use care regarding falling debris from the demolition work, and failed to work at a timely pace. Hroch testified in his deposition that sometime prior to noon on April 29, 1989, he received a phone call from Borton informing him that Borton was canceling his contract. Hroch testified that at noon on April 29, he received a purchase order form from Borton dated April 27, 1989, which was entitled "ADDITION TO P. O. NO. 89-0060" and stated, "PLEASE CANCEL THIS ORDER IN ITS ENTIRETY."

Hroch alleged in an affidavit in evidence that he received a letter of termination from Borton "on or after" May 3, 1989, which stated that his contract was terminated and that the letter was to serve as confirmation of the oral notification and the addition to the purchase order, dated April 27, 1989, canceling the contract. The letter stated that Hroch's contract was terminated because of (1) failure to conduct work at a timely pace, (2) disregard for instructions disallowing the use of an acetylene cutting torch on the premises, (3) failure to exercise care and caution during demolition work, (4) repeated complaints by Farmland about the progress of the work and the manner in which it was done, and (5) a demand by Farmland that Hroch be discharged for letting slabs of concrete " 'free fall,' " instead of lowering them to the ground by crane, as required under the contract.

On May 3, 1993, Hroch filed suit alleging that Farmland had tortiously interfered with his business contract with Borton. Farmland filed a motion for summary judgment on the basis that Hroch's petition was time barred as the statute of limitations had run prior to his filing the petition. The district court granted Farmland's motion and dismissed Hroch's petition. Hroch appeals.

ASSIGNMENT OF ERROR

Hroch makes numerous assignments of error, all of which simply restate that the district court erred when it granted Farmland's motion for summary judgment.

STANDARD OF REVIEW

[1,2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *C.S.B. Co. v. Isham*, 249 Neb. 66, 541 N.W.2d 392 (1996). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

Hroch alleges the district court erred when it granted summary judgment on the basis that the statute of limitations had run prior to his filing of his petition. Hroch alleges that he was not damaged by Farmland's alleged tortious interference with his contractual relationship with Borton until after he received written confirmation of the termination on May 3, 1989. On appeal, Hroch argues that he did not receive written notice of the termination of his subcontract until May 3.

Hroch's own testimony, however, belies this argument. Hroch testified that he received written notice of termination of his contract on April 29, 1989, when he received the purchase order form, dated April 27, 1989, which stated that the purchase order for Hroch's services as a subcontractor would be canceled. The question for this court then is to determine whether Hroch's cause of action accrued by April 29.

Hroch argues in his brief that his cause of action against Farmland could not accrue until sometime after May 3, 1989, because in the contract between Hroch and Borton there is a provision which states that if the contractor terminates the contract, the subcontractor will not be paid until the contractor finishes the work and expenses and damages can be determined. Because Hroch's exact damages could not be determined until Borton finished the project, Hroch argues, his action did not accrue until sometime after May 3.

[3] In *L.J. Vontz Constr. Co. v. Department of Roads*, 232 Neb. 241, 440 N.W.2d 664 (1989), a contractor entered into a written construction contract with the Department of Roads (Department) on September 27, 1983, and the contractor began work on May 9, 1984, and continued until the contractor received a letter from the Department on July 23, in which the Department declared the contractor in default under the contract and ordered the contractor to remove its personnel and equipment from the project sites. The Department, however, continued to make payments for previous work done until April 1985. The contractor filed suit for breach of contract on February 3, 1987, and the court held that the statute of limitations barred his claim. The contractor argued that the cause of action did not accrue until his damages could be determined, which did not occur until after the final payment in April 1985. However, the *L.J. Vontz Constr. Co.* court held that the breach occurred when the contractor was ousted on July 23, 1984, from the project, and the payments made after Vontz' ouster merely affected the amount of damages. "The cause of action for a breach of contract accrues, and the statute of limitations begins to run, when the breach occurs." *Id.* at 246, 440 N.W.2d at 667.

In the same manner, an action for tortious interference with a business contract accrues when the harm from the alleged interference occurred, that is, when the breach of the business contract occurs. The Nebraska Supreme Court has held that the elements of tortious interference with a business relationship or expectation are

> "(1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted."

Koster v. P & P Enters., 248 Neb. 759, 764, 539 N.W.2d 274, 278-79 (1995).

[4] The cause of action in this case is based upon Farmland's alleged interference, inducing Borton to breach its contract with Hroch. "A claim for damages based on intentional interference with contractual relations . . . accrues when the subject contract is breached, regardless of when the defendant supposedly induced the breach . . . ." *Kartiganer Assoc. v Town of New Windsor*, 108 A.D.2d 898, 899-900, 485 N.Y.S.2d 782, 784 (1985). "[I]nducing another to break a contract does not become a legal wrong upon which an action may be based until damage is suffered as a result, and that occurs only when the breach happens." *Fury Imports, Inc. v. Shakespeare Co.*, 625 F.2d 585, 588 (5th Cir. 1980), *cert. denied* 450 U.S. 921, 101 S. Ct. 1369, 67 L. Ed. 2d 349 (1981). See, also, *Hi-Lite Prod. v. American Home Products Corp.*, 11 F.3d 1402 (7th Cir. 1993); *Norris v. Grosvenor Marketing Ltd.*, 803 F.2d 1281 (2d Cir. 1986); *Blake v. Gilbert*, 702 P.2d 631 (Alaska 1985), *overruled on other grounds, Bibo v. Jeffrey's Restaurant*, 770 P.2d 290 (Alaska 1989).

[5] Although Hroch does not directly argue that he was unable to discover his injuries until May 3, 1989, we take his emphasis upon the effect of the May 3 letter as an assertion that he did not discover he had a cause of action for tortious business interference until May 3, 1989, when he received Borton's letter, informing him that among other reasons, his subcontract was terminated at the behest of Farmland. Actions for tortious business interference must be filed within 4 years under Neb. Rev. Stat. § 25-207 (Reissue 1995). In *Omaha Paper Stock Co., Inc. v. Martin K. Eby Constr. Co., Inc.*, 193 Neb. 848, 230 N.W.2d 87 (1975), the plaintiff's warehouse was destroyed by fire on October 1, 1968, after its sprinkler system failed

because of an underground break at some unknown point at the waterline. In October 1971, plaintiff discovered that its waterline had ruptured due to negligent installation of a sewer. Plaintiff filed suit on March 7, 1973, against the construction company for negligent construction of the sewer. The court held that the § 25-207 statute of limitations runs when the injury actually occurs.

> It would seem reasonable to believe when plaintiff discovered that "no water flowed from the 8-inch water line to the automatic sprinkler systems" some attempt would have been made promptly to trace the cause. Plaintiff slept on whatever rights it may have had for 3 years. When the waterline was excavated for rebuilding purposes in October 1971, plaintiff discovered what it now claims was the cause of the break. This was well within the statutory period . . . . Still, plaintiff waited until March 7, 1973, or approximately 17 months thereafter, to file its petition herein.
>
> . . . .
>
> . . . Plaintiff knew October 1, 1968, that some of its fire damage was attributable to the fact that no water flowed from its waterline into its sprinkler system. . . .
>
> . . . An action for an injury to the rights of the plaintiff accrues under section 25-207, R. R. S. 1943, when the damage occurs and not when plaintiff discovers the cause of the damage.

Id. at 850-51, 230 N.W.2d at 89-90.

Section 25-207 does not provide for a discovery rule for tortious interference; neither has the Nebraska Supreme Court created a discovery rule exception to the general rule stated in *Omaha Paper Stock Co., Inc.* for cases of tortious interference. Just as in *Omaha Paper Stock Co., Inc.*, Hroch discovered well within the statutory period that Farmland had allegedly tortiously interfered with his contract with Borton. Hroch chose to sit on his right to file suit until 4 years had passed. If Hroch was damaged, it was when the breach occurred, which happened no later than April 29, 1989.

> The traditional rule is that the statute begins to run as soon as the action accrues, and the cause is said to accrue

> when the aggrieved party has the right to institute and maintain a suit. In a contract action this means as soon as breach occurs, and in tort, as soon as the act or omission occurs. These rules would apply even though the plaintiff was then ignorant of the injury sustained or could not ascertain the amount of his damages.

Grand Island School Dist. #2 v. Celotex Corp., 203 Neb. 559, 562-63, 279 N.W.2d 603, 606 (1979).

There is no genuine issue of material fact that the breach of Hroch's contract with Borton occurred later than April 29, 1989, and therefore Farmland's act of interference occurred by April 29 at the latest. The letter of May 3 was merely written formalization of what had already occurred and which was already known by Hroch, according to the admissions in his own evidence. Hroch's cause of action against Farmland for tortious interference accrued by April 29. The statute of limitations having run by April 29, 1993, the district court correctly granted summary judgment to Farmland.

AFFIRMED.

MEMORIAL HOSPITAL OF DODGE COUNTY, APPELLEE, V. CHERYL L. PORTER, APPELLANT, AND DAN DOLAN, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLEE.

548 N.W.2d 361

Filed May 28, 1996. No. A-95-1045.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.

3. ____. It is not within the province of the courts to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
4. **Statutes: Legislature: Intent: Presumptions.** An appellate court will, if possible, give effect to every word, clause, and sentence of a statute, since the Legislature is presumed to have intended every provision of a statute to have a meaning.
5. **Employment Security.** The Nebraska Employment Security Law is to be liberally construed to accomplish its beneficent purposes of paying benefits to involuntarily unemployed workers.
6. **Workers' Compensation.** The Nebraska Workers' Compensation Act seeks to compensate an employee for a loss of earning power because of an accidental injury arising out of and in the course of his or her employment.
7. **Workers' Compensation: Words and Phrases.** Reference in a case to the Nebraska Workers' Compensation Act as providing exclusive remedy for the employee for an injury means that the Nebraska Workers' Compensation Act relieves the employer from tort liability in connection with the accident.
8. **Statutes: Ordinances: Legislature: Intent.** Where a statute or ordinance enumerates the things upon which it is to operate, it is to be construed as excluding from its effect all those not expressly mentioned, unless the legislative body has plainly indicated a contrary purpose or intention.
9. **Statutes: Legislature: Presumptions.** It is presumed that the Legislature has full knowledge and information of the subject matter of a statute, as well as the relevant facts relating to prior law and existing pertinent legislation, and has acted with respect thereto.
10. **Workers' Compensation.** Neb. Rev. Stat. § 48–628(e)(2) (Cum. Supp. 1994) disqualifies a person from receiving unemployment benefits only if he or she is also receiving workers' compensation for temporary partial disability.

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

Laura A. Lowe, of Cobb, Hallinan & Ehrlich, P.C., for appellant.

John F. Sheaff and John H. Albin for appellee Dolan.

Douglas D. Johnson for appellee Memorial Hospital of Dodge County.

MILLER-LERMAN, Chief Judge, and IRWIN and INBODY, Judges.

MILLER-LERMAN, Chief Judge.

INTRODUCTION

Cheryl L. Porter appeals the judgment of the district court which reversed the decision of the Nebraska Appeal Tribunal.

The district court concluded that Porter was not entitled to receive unemployment benefits, because she was receiving workers' compensation for temporary total disability. For the reasons stated below, we reverse.

FACTUAL BACKGROUND

Porter was employed full time by Memorial Hospital of Dodge County (Hospital), and her duties included shampooing and buffing the hospital floors. She earned approximately $230 per week. While performing her duties in March 1994, Porter injured her shoulder. As a result, she took a medical leave from her employment. Shortly thereafter, Porter began receiving workers' compensation of $153.54 per week for temporary total disability.

On October 18, 1994, Porter's doctor authorized her to return to work with the restriction that she could not lift, pull, or push over 5 to 10 pounds. On November 4, Porter was terminated from her employment because she had exceeded the 6-month limitation for a medical leave and because the Hospital was unable to accommodate her restrictions.

Upon her termination of employment, Porter applied for unemployment benefits. On her application, Porter indicated that she was receiving workers' compensation. She began receiving $126 per week in unemployment benefits beginning December 24, 1994.

PROCEDURAL BACKGROUND

On March 8, 1995, the Hospital requested that the Nebraska Department of Labor (Department) determine whether Porter was eligible for unemployment benefits when she was also collecting workers' compensation for temporary total disability and unable to work. After an investigation, a claims deputy for the Department determined that Porter was able to do other work, although she was unable to work in her previous job.

On March 20, 1995, the Hospital requested that the Department determine whether Porter's receipt of workers' compensation should disqualify her from receiving unemployment benefits pursuant to Neb. Rev. Stat. § 48-628(e)(2) (Reissue 1993) of the Nebraska Employment Security Law. Section 48-628(e)(2) generally provides that an individual is disqualified from receiving unemployment benefits if he or she is receiving temporary partial disability benefits under the Nebraska Workers' Compensation Act, Neb. Rev. Stat. § 48-101 et seq. (Reissue 1993). Section 48-628(e)(2) does not state that an individual is disqualified from receiving benefits if he or she is receiving temporary total disability benefits. A claims deputy determined that the amount of workers' compensation received by Porter for temporary total disability should not be deducted from her unemployment benefits.

The Hospital appealed the above determinations to the Nebraska Appeal Tribunal. A telephonic evidentiary hearing was held on April 11, 1995. A claims deputy and Porter testified. Among other things, the claims deputy testified that the Department's position was that one receiving workers' compensation for temporary total disability could also receive unemployment benefits. On April 20, the Nebraska Appeal Tribunal affirmed the determination of the claims deputy based upon the "plain, clear and unambiguous language" of § 48-628(e)(2).

On May 15, 1995, the Hospital filed a petition for review with the district court for Dodge County. On August 25, the district court reversed the decision of the Nebraska Appeal Tribunal and concluded that Porter was disqualified from receiving unemployment benefits. The court held that a construction based upon the "literal meaning" of § 48-628(e)(2) would defeat the Legislature's intent and that payment of workers' compensation and unemployment compensation to Porter in excess of wages she received through her employment "would amount to an absurd result."

From this decision, Porter timely appealed. Generally, Porter assigns that the district court erred in reversing the decision of the Nebraska Appeal Tribunal and expanding the plain, clear, and unambiguous language of § 48-628(e)(2) to include receipt of temporary total disability payments under workers' compensation as disqualifying compensation.

RELEVANT STATUTORY AUTHORITY

Section 48-628 states, in relevant part:

> An individual shall be disqualified for [unemployment] benefits:
>
> . . . .
>
> (e) For any week with respect to which he or she is receiving or has received remuneration in the form of (1) wages in lieu of notice, or a dismissal or separation allowance, (2) compensation for temporary partial disability under the workers' compensation law of any state or under a similar law of the United States, (3) primary insurance benefits under Title II of the Social Security Act, as amended, or similar payments under any act of Congress, (4) retirement or retired pay, pension, annuity, or other similar periodic payment under a plan maintained or contributed to by a base period or chargeable employer, or (5) a gratuity or bonus from an employer, paid after termination of employment, on account of prior length of service, or disability not compensated under the workers' compensation law.

The remaining subsections of § 48-628 outline other behaviors or scenarios which disqualify an employee from receiving benefits and are not applicable here.

STANDARD OF REVIEW AND ANALYSIS

The issue before us is whether a claimant is ineligible to receive unemployment benefits if he or she is receiving workers' compensation for temporary total disability. Neither the Nebraska Supreme Court nor this court has addressed this question of law.

[1] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994). See *Dillard Dept. Stores v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637 (1995).

Several states have statutory language similar to that before us. See, Mo. Ann. Stat. § 288.040 (Vernon Cum. Supp. 1996); N.H. Rev. Stat. Ann. § 282-A:14 (1987 & Cum. Supp. 1995); Ohio Rev. Code Ann. § 4141.31 (Anderson 1995); S.D.

Codified Laws Ann. § 61-6-20 (1993); Tenn. Code Ann. § 50-7-303 (Supp. 1995). However, it does not appear that these states have addressed the issue presented by this case.

A review of the opinions from states with dissimilar statutes shows that they are split on the issue of whether the receipt of either workers' compensation or unemployment benefits bars or causes an offset from the receipt of the other. As urged by Porter, some states allow awards of both workers' compensation and unemployment benefits simultaneously. See, e.g., *Levi Strauss & Co. v. Laymance*, 38 Ark. App. 55, 828 S.W.2d 356 (1992) (holding that claimant may simultaneously receive unemployment benefits and workers' compensation for temporary partial disability where statute only precludes receipt of workers' compensation for temporary total or permanent total disability if claimant is receiving unemployment benefits); *Mendez v. Southwest Com. Health Services*, 104 N.M. 608, 725 P.2d 584 (N.M. App. 1986) (holding that in absence of statute prohibiting recovery, claimant may receive workers' compensation and unemployment benefits simultaneously). Accord, *Neuberger v. City of Wilmington*, 453 A.2d 804 (Del. Super. 1982); *Stafford v. Welltech*, 867 P.2d 484 (Okla. App. 1993). The rationale in the cases for permitting recovery under both acts is that the statutory language does not prohibit a dual recovery and is further based upon the beneficent objectives of both workers' compensation and employment security legislation. See *Levi Strauss & Co., supra*; *Neuberger, supra*; *Mendez, supra*; *Stafford, supra*.

As noted by the defendants, other states deny or reduce unemployment benefits by the amount of workers' compensation the claimant receives or vice versa. See, e.g., *Cuellar v. Northland Steel*, 226 Mont. 428, 736 P.2d 130 (1987) (holding that pursuant to statute, unemployment benefits must be offset against workers' compensation payments); *St. Pierre v. Fulflex, Inc.*, 493 A.2d 817 (R.I. 1985) (holding that legislature clearly intended that workers' compensation act and unemployment security act be construed together, thus prohibiting worker from receiving both unemployment compensation and workers' compensation payments for same period). Accord, *Wells v. Pete Walker's Auto Body*, 86 Or. App. 739, 740 P.2d 245 (1987);

Bethlehem Mines Corp. v. Workmen's Comp., etc., 48 Pa. Commw. 247, 409 A.2d 516 (1980). The cases denying dual recovery or requiring an offset generally rely upon statutory language requiring offset or forbidding dual recovery or rely upon the conclusion that if one is receiving workers' compensation, he or she is unable to work and, therefore, unable to receive unemployment benefits, the purpose of which is to protect able-bodied workers while unemployed through no fault of their own. See, *Wells, supra*; *St. Pierre, supra*.

Professor Larson states:

> [S]everal jurisdictions have permitted collection of both unemployment and workmen's compensation benefits for the same period, in the absence of any statutory prohibition. The majority of unemployment statutes, however, now specifically forbid benefits to anyone drawing workmen's compensation. These statutes vary in scope, some applying only to temporary workmen's compensation payments and some to temporary and permanent; many make an exception of schedule benefits. . . .
>
> . . . .
>
> . . . [T]he optimum solution is to have . . . coordination achieved by the legislature, since detailed questions are certain to arise which can only be handled by carefully considered legislation.

4 Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 97.20 at 18-11 and 18-16 (1995).

[2-4] According to Nebraska jurisprudence, the general rules of statutory interpretation are as follows: In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *Dillard Dept. Stores v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637 (1995); *State v. Flye*, 245 Neb. 495, 513 N.W.2d 526 (1994). In addition, it is not within the province of the courts to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.

Dillard Dept. Stores, supra; *Matrisciano v. Board of Ed. of Sch. Dist. No. 6*, 236 Neb. 133, 459 N.W.2d 230 (1990); *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985). An appellate court will, if possible, give effect to every word, clause, and sentence of a statute, since the Legislature is presumed to have intended every provision of a statute to have a meaning. *Sorensen, supra*; *Iske v. Papio Nat. Resources Dist.*, 218 Neb. 39, 352 N.W.2d 172 (1984).

[5-7] We note that the Nebraska Employment Security Law is to be liberally construed to accomplish its beneficent purposes of paying benefits to involuntarily unemployed workers. *Dillard Dept. Stores, supra*; *IBP, inc. v. Aanenson*, 234 Neb. 603, 452 N.W.2d 59 (1990). The Nebraska Workers' Compensation Act, which was enacted over two decades prior to the Employment Security Law, seeks to compensate an employee for a loss of earning power because of an accidental injury arising out of and in the course of his or her employment. *Warner v. State*, 190 Neb. 643, 211 N.W.2d 408 (1973). Reference in a case to the Workers' Compensation Act as providing exclusive remedy for the employee for an injury means that the Workers' Compensation Act relieves the employer from tort liability in connection with the accident. *Abbott v. Gould, Inc.*, 232 Neb. 907, 443 N.W.2d 591 (1989), *cert. denied* 493 U.S. 1073, 110 S. Ct. 1119, 107 L. Ed. 2d 1026 (1990). See, also, *Tompkins v. Raines*, 247 Neb. 764, 530 N.W.2d 244 (1995). The Workers' Compensation Act and the Nebraska cases under it do not state that receipt of workers' compensation benefits is exclusive of benefits under the Employment Security Law.

According to the explicit language of § 48-628(e)(2), Porter would be disqualified for any weeks she received "compensation for *temporary partial disability* under the workers' compensation law." (Emphasis supplied.) This particular provision is plain and unambiguous. The phrase "temporary partial disability" has a specific meaning under Nebraska workers' compensation law. See *Heiliger v. Walters and Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990). Temporary partial disability cannot be read to include temporary total disability.

[8,9] The maxim "expressio unius est exclusio alterius" is applicable. " '[W]here a statute or ordinance enumerates the things upon which it is to operate . . . it is to be construed as excluding from its effect all those not expressly mentioned, unless the legislative body has plainly indicated a contrary purpose or intention.' " *Nebraska City Education Assn. v. School Dist. of Nebraska City*, 201 Neb. 303, 306, 267 N.W.2d 530, 532 (1978). Had the Legislature wanted persons receiving workers' compensation for temporary total disability such as Porter to be disqualified from receiving unemployment benefits, it would have specifically provided therefore. Furthermore, the Legislature has amended the Employment Security Law numerous times since its enactment and has not altered this particular provision. It is presumed that the Legislature has full knowledge and information of the subject matter of a statute, as well as the relevant facts relating to prior law and existing pertinent legislation, and has acted with respect thereto. *Sanitary & Improvement Dist. # 222 v. Metropolitan Life Ins. Co.*, 201 Neb. 10, 266 N.W.2d 73 (1978).

The appellees seem to argue that to allow a person to receive both workers' compensation for temporary total disability and unemployment benefits is an untenable result. In support of this argument, they discuss a Nebraska Appeal Tribunal case, In re Franklin, vol. 88, No. 1349 (1988), in which the tribunal concluded that unemployment benefits may not be allowed to a claimant receiving workers' compensation for temporary total disability. It stated that this result was necessary in order to avoid "an absurd and unjust result." *Id.* We note that in the case before us, the tribunal was aware of, considered, and rejected In re Franklin and determined it was at odds with the express language of the statute. We agree.

We are also not persuaded by appellees' argument that the Nebraska Supreme Court's holding in *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985), dictates that we must affirm the decision of the district court. The issue before the court in *Sorensen* was whether a lump sum severance payment must be prorated under Neb. Rev. Stat. § 48-627(e) (Reissue 1993), which provides monetary eligibility requirements. In its discussion, the court compared the statutory provision of

§ 48-627(e) with § 48-628(e), which expressly provides that a lump sum severance allowance be prorated when determining disqualification. In this context, the court stated that the purpose of the proration provision in § 48-628(e) is "to avoid such double payments." 220 Neb. at 464, 370 N.W.2d at 178. The court held that the statutory language must prevail: The "silence of § 48-627(e) . . . compared to the mandate of § 48-628(e) that a lump sum severance allowance be prorated, persuades us that the Legislature intended there be no proration for the purpose of [§ 48-627(e)]." 220 Neb. at 465, 370 N.W.2d at 179. We read *Sorensen* for the proposition that the plain and unambiguous language in the Employment Security Law should control. For the purposes of the case before us, the Legislature clearly provided the specific circumstances under which a claimant should be disqualified from receiving unemployment benefits. Those circumstances are not present here.

[10] We decline to expand upon the plain language of § 48-628(e)(2) to include the receipt of temporary total disability as a disqualifying event. In light of the plain language of the statute and the beneficent purposes of the Employment Security Law, we construe § 48-628(e)(2) to disqualify a person from receiving unemployment benefits only if he or she is also receiving workers' compensation for temporary partial disability. Any statutory change, if warranted, should be left to the Legislature.

REVERSED.

IN RE GUARDIANSHIP OF ALICE D. ET AL., CHILDREN UNDER 18 YEARS OF AGE.
LARRY G. BLACK, APPELLEE, V. NEBRASKA DEPARTMENT OF SOCIAL SERVICES, APPELLANT, AND TAMMY D., APPELLEE.

548 N.W.2d 18

Filed May 28, 1996. Nos. A-95-1139 through A-95-1142.

1. **Jurisdiction: Appeal and Error.** An appellate court has both the power and the duty to determine whether it has jurisdiction of a case before it.
2. ____: ____. Subject matter jurisdiction may be raised sua sponte by an appellate court.
3. **Jurisdiction.** Subject matter jurisdiction is a question of law for the court.
4. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach a conclusion independent from the trial court's conclusion.
5. **Juvenile Courts: Courts: Minors: Guardians and Conservators: Jurisdiction.** When a minor has been adjudicated a juvenile as defined under Neb. Rev. Stat. § 43-247(3) (Reissue 1993) and the juvenile court retains jurisdiction, a probate court cannot appoint a guardian of that juvenile without the consent of the juvenile court.

Appeal from the County Court for Lancaster County: GALE POKORNY, Judge. Appeal dismissed.

Don Stenberg, Attorney General, Royce N. Harper, and Lisa Swinton, Special Assistant Attorney General, for appellant.

Margaret A. McDevitt, of Legal Services of Southeast Nebraska, for appellee Tammy D.

HANNON, SIEVERS, and MUES, Judges.

HANNON, Judge.

This opinion concerns appeals from four separate proceedings in the county court in which Larry G. Black sought to be appointed the guardian of four of his grandchildren, all of whom are under 14 years of age. The questions raised in each of these cases are identical, and therefore the cases have been combined for argument and opinion. The county court dismissed the petitions with prejudice for the stated reasons that no notice of the applications was given to the children's fathers and that the evidence was insufficient to warrant the appointment of a guardian. The record shows that these children are currently subject to proceedings in a juvenile court and that their care has been awarded by that court to the Nebraska Department of Social Services (DSS). We conclude that the juvenile court has exclusive jurisdiction over these minor children, and therefore the county court was without jurisdiction to appoint a guardian. We dismiss the appeals for lack of jurisdiction and in so doing hold the county court's order dismissing the petitions with prejudice is ineffective.

FACTUAL BACKGROUND

In separate petitions, Black alleged that he had had "the principal care and custody of [the minor children] during the preceding sixty days and the Nebraska Department of Social Services has had the legal custody of the minor child[ren]." He also alleged that the children live with him in Lancaster County; that the natural mother cannot provide for the care of the minor children; that the fathers of the minor children are not listed on any of the children's birth certificates; and that for all but one child, the children's fathers have not claimed paternity. Black nominated himself as guardian and requested that the court so appoint him. A "Waiver of Notice and Nomination of Guardian" signed by a DSS case manager is attached to each petition. Each transcript also contains a "Waiver of Notice" signed by the natural mother, stating that she has no objection to Black being appointed guardian and waiving all required notices.

A combined hearing was held on all four petitions on September 19, 1995. The bill of exceptions is 10 pages in length. The record shows that all four children were present as well as Black, his counsel, counsel for the natural mother, and Billie Jo Dieckhaus, the DSS case manager handling the children's cases. Only Black and Dieckhaus were called as witnesses. The evidence is sketchy at best.

Black testified that he has had custody of two of the children for 3 years, of one for 2 years, and of one since "last year"; that the children have done well with him; that he can provide a good home for them; that he is working with DSS; and that with DSS approval, he has "facilitated visitation" with the children's natural mother.

Dieckhaus then testified that she has been the DSS case manager for the children for at least the past 3 years. She opined that Black has provided excellent care for the children and that it is in the best interests of the children that they remain with Black because of the stability, love, and permanency Black provides to them.

The judge then asked several questions. These questions indicated that the judge was concerned about the lack of notice to the children's parents and that guardianship proceedings were being instigated by DSS while proceedings concerning these children were pending in a juvenile court. Dieckhaus advised the court that there was an open juvenile case regarding the children.

Dieckhaus explained that Black, as the guardian, would continue to receive money from DSS. The trial judge questioned the need for a guardian for the children. Counsel for Black stated to the court that the proceedings mean the children could be "relieved of the juvenile court jurisdiction." The dialog between the judge and counsel is not completely clear, but it establishes that DSS intended to use the appointment of Black as guardian as a step in terminating the jurisdiction of the juvenile court over the children. The judge indicated displeasure at this approach, but took the matter under advisement.

The court made the following findings in the journal dismissing the petitions with prejudice: that no reason for abandonment by the mother was provided to the court, that there appear to be two or three biological fathers of the children and no notice was provided to any of them, that there is no evidence regarding the rights of the natural parents, that Black is not the driving force behind these petitions, that there was no showing of a necessity for " 'permanency in placement,' " and that "[t]he evidence adduced herein is wholly insufficient to warrant any appointment along those grounds." DSS and the children's mother contest this order.

ASSIGNMENTS OF ERROR AND PARTIES

DSS filed the appeal and the children's mother filed a brief as an appellee, but both allege that the county court abused its discretion by denying the petitions for guardianship and by dismissing the petitions with prejudice.

[1] An appellate court has both the power and the duty to determine whether it has jurisdiction of a case before it. *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995). This issue is presented because DSS was not a named party below, but it appealed to this court. Neb. Rev. Stat. § 30-1601(2) (Reissue 1995) provides: "An appeal may be taken by any party and may also be taken by any person against whom the final judgment or final order may be made or who may be affected thereby." The record contains no documentation of the juvenile proceedings. However, the testimony shows that DSS was awarded the care of the minors by a juvenile court, and Neb. Rev. Stat. § 43-285 (Reissue 1993) provides in substance that when a juvenile court awards the care of a juvenile to DSS, that juvenile becomes the ward of DSS and subject to its guardianship, and DSS has standing as a party. We therefore conclude that DSS may be affected by the judgment of dismissal, and therefore it may appeal that order.

DISCUSSION

[2-4] There is an additional jurisdictional issue that must be considered, that is, the jurisdiction of the county court over the appointment of a guardian of minors when those minors are already subject to juvenile proceedings under Neb. Rev. Stat. § 43-247(3) (Reissue 1993). Subject matter jurisdiction may be raised sua sponte by an appellate court. *Scherbak v. Kissler*, 245 Neb. 10, 510 N.W.2d 318 (1994). Subject matter jurisdiction is a question of law for the court. *Miller v. Walter*, 247 Neb. 813, 530 N.W.2d 603 (1995). On questions of law, an appellate court has an obligation to reach a conclusion independent from the trial court's conclusion. *George Rose & Sons v. Nebraska Dept. of Revenue*, 248 Neb. 92, 532 N.W.2d 18 (1995).

Neb. Rev. Stat. § 30-2611 (Reissue 1995) provides in significant part:

> (a) Notice of the time and place of hearing of a petition for the appointment of a guardian of a minor is to be given

> by the petitioner in the manner prescribed by section 30-2220 to:
>
> (1) the minor, if he is fourteen or more years of age;
>
> (2) the person who has had the principal care and custody of the minor during the sixty days preceding the date of the petition; and
>
> (3) any living parent of the minor.
>
> (b) Upon hearing, if the court finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the requirements of section 30-2608 have been met, and the welfare and best interests of the minor will be served by the requested appointment, it shall make the appointment.

The trial court found that notice was not given to the children's fathers as required by this statute. We do not reach that question because we conclude that we must dismiss the cases for lack of jurisdiction.

The trial court's finding that the evidence was insufficient to warrant the appointment of a guardian appears to result from the trial judge's belief that no guardian should be appointed while juvenile proceedings are pending. Section 43-285(1) provides in part:

> When the court awards a juvenile to the care of the Department of Social Services, an association, or an individual in accordance with the Nebraska Juvenile Code, the juvenile shall, unless otherwise ordered, become a ward and be subject to the guardianship of the department, association, or individual to whose care he or she is committed.

It therefore appears that if a juvenile court has awarded the care of a juvenile to DSS, an association, or an individual, the minor has a guardian by virtue of the above statute unless the juvenile court otherwise orders.

In such a situation, the need for a guardian to be appointed by a probate court is not apparent. Furthermore, § 43-285(1) also provides: "Any such association and the department shall have authority, by and with the assent of the court, to determine the care, placement, medical services, psychiatric services, training, and expenditures on behalf of each juvenile committed to it." Section 43-285(3) provides that DSS, the association, or the individual who is awarded the care of the juvenile shall file a report every 6 months or as ordered by the court, and that statute provides for judicial supervision of the care of juveniles under the jurisdiction of the juvenile court.

In order for a guardian to be appointed under § 30-2611, the court must find that the welfare and best interests of the minor are served by the appointment. If the juvenile court already has appointed a guardian, it is difficult to articulate a reason why the welfare and best interests of the minors would be served by the appointment of another guardian. If one considers the powers and duties that are placed upon a guardian of a minor by Neb. Rev. Stat. § 30-2613 (Reissue 1995), the powers and duties of the guardian appointed by the probate court would clearly conflict with the powers and duties of DSS, an association, or an individual as guardian under juvenile court proceedings. This conflict could well be the basis for a finding that the appointment of a guardian by the probate court does not serve the best interests of a minor whose care has been awarded to someone else.

Even if the person or entity appointed guardian of a minor is the person or entity to whom the juvenile court has awarded custody, the situation is just as bad or worse because such persons or entities could be subject to supervision by two separate courts concerning their responsibilities. We realize that in most counties the county judge is also the juvenile judge, but this is not true in all counties. In addition, it appears quite possible that the children could be living in a different county when the guardianship proceeding would be attempted than the county the juveniles lived in at the time the juvenile proceeding was commenced. It is therefore possible that different county courts could have jurisdiction over the same juvenile. For this reason, we believe that the proper analysis of the situation includes a consideration of the jurisdiction of the juvenile court.

Section 43-247 provides in significant part:

> The juvenile court shall have exclusive original jurisdiction as to any juvenile . . . defined in subdivision (3) of this section, and as to the parties and proceedings provided in subdivisions (5), (6), and (8) of this section. .

> . . [T]he juvenile court's jurisdiction over any individual adjudged to be within the provisions of this section shall continue until the individual reaches the age of majority or the court otherwise discharges the individual from its jurisdiction.

Section 43-247(5) provides that the juvenile court has jurisdiction over the parent, guardian, or custodian who has custody of any juvenile described in § 43-247. If a probate court should appoint a guardian of such a minor, that guardian would then be subject to the jurisdiction of the juvenile court. We believe that a court such as the juvenile court should appoint the guardians it is expected to supervise.

[5] When § 43-247 is read in light of § 43-285, it can only mean that when a minor has been adjudicated a juvenile as defined under § 43-247(3) and the juvenile court retains jurisdiction, a probate court cannot appoint a guardian of that juvenile without the consent of the juvenile court.

Such evidence as the record contains establishes that some juvenile court has jurisdiction over all four children because of neglect; that necessarily means an adjudication under subdivision (3) of § 43-247. The evidence also establishes that the juvenile court has awarded to DSS the care of these children. If a juvenile court has jurisdiction of a juvenile under § 43-247 and has awarded the care of the juvenile to DSS, DSS is the guardian of that juvenile under § 43-285.

DSS relies upon Neb. Rev. Stat. § 43-284.02 (Reissue 1993), which provides that DSS may make payments as needed on behalf of the ward to a guardian after one is appointed. The statute does nothing more than allow payments to a guardian; it makes no provision for the appointment of a guardian, nor does it purport to limit the jurisdiction of the juvenile court.

The briefs and arguments of DSS and the mother lead us to conclude that DSS felt the appointment of a guardian was a proper method of ending the jurisdiction of the juvenile court. In its brief, DSS put forth arguments in support of the notion that termination of a juvenile proceeding by the appointment of a friend or relative who has custody of the minor as guardian is a desirable outcome for many children who have been subject to juvenile proceedings due to the neglect of their parents. DSS might well be correct; however, DSS does not explain why such an outcome is not possible in the juvenile court, or at least with its cooperation. It appears as though such questions can be addressed in the juvenile court. In any event, it seems clear that DSS should not be allowed to use the probate court as a means of ignoring the juvenile court, and we are confident that the Legislature did not intend for the probate court to interfere with the juvenile court's work.

We therefore dismiss these cases for lack of jurisdiction, but we note that the order of the county court purporting to adjudicate some of the merits of these cases is ineffective, and therefore the county court's dismissal with prejudice is ineffective.

APPEAL DISMISSED.

RAMAEKERS, MCPHERRON AND SKILES, P.C., A NEBRASKA PROFESSIONAL CORPORATION, APPELLEE, v. VIOLA H. RAMAEKERS, PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM F. RAMAEKERS, DECEASED, APPELLANT.

549 N.W.2d 662

Filed June 11, 1996. No. A-94-1194.

1. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court has the obligation to reach a conclusion independent of that of the trial court.
2. **Debtors and Creditors: Interest.** In the absence of contract or statute, compensation in the form of compound interest is not allowed to be computed upon a debt.
3. **Judgments: Interest.** Although compound interest generally is not allowable on a judgment, it is established that a judgment bears interest on the whole amount from its date even though the amount is in part made up of interest.
4. **Judgments: Interest: Time.** Judgment interest shall accrue on decrees and judgments for the payment of money from the date of rendition of judgment until satisfaction of the judgment.
5. **Judgments: Interest: Time: Appeal and Error.** When a judgment is modified upon appeal, interest runs on the full amount of the judgment as modified from the date the original judgment was rendered by the trial court.

6. ___: ___: ___: ___. Interest on a judgment increased upon appeal commences to run from the date the trial court entered its original judgment.
7. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
8. **Judgments: Interest.** Interest on a judgment or debt is computed up to the time of the first payment, and that payment is first applied to interest and the balance to principal.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Reversed and remanded with directions.

James E. Schneider, of Schneider Law Office, P.C., for appellant.

G. Peter Burger, of Burger, Bennett & Green, P.C., for appellee.

HANNON, SIEVERS, and MUES, Judges.

HANNON, Judge.

In a previous appeal, *Ramaekers, McPherron & Skiles v. Ramaekers*, 94 NCA No. 35, case No. A-93-068 (not designated for permanent publication) (*Ramaekers I*), this court directed the trial court to increase a judgment by $32,435.09, the amount of interest that accrued before judgment on the contract sued upon. This appeal involves what rate of interest, if any, should accrue on that increased judgment and the date the accrual should commence. The trial court allowed interest from the time this court's mandate was spread until the amount was paid in full, a period of 7 days, at the rate of 6.69 percent per annum, which was the interest rate provided under Neb. Rev. Stat. § 45-103 (Cum. Supp. 1994) for judgments entered in early October 1994. The judgment creditor appeals, alleging the estate is entitled to interest on the increase ordered by this court from the date the trial court entered its original judgment at the rate the contract sued upon provided that principal payments due under the contract should bear. We conclude interest on the increase in the decree ordered by this court should accrue from the date of the original judgment, January 19, 1993, at the interest rate provided for in § 45-103 (Reissue

1993) for judgments entered on that date, that is, 4.67 percent per annum. We therefore reverse the judgment and remand the cause to the trial court.

BACKGROUND

Ramaekers, McPherron and Skiles, P.C., is a professional corporation engaging in the practice of accounting, and *Ramaekers I* was an action to determine the amount that the corporation owed the estate of its principal stockholder, William F. Ramaekers, upon his death under a written agreement which provided for the sale of stock of the deceased stockholders of the corporation to the corporation. In *Ramaekers I*, this court ordered as follows:

> We conclude that the agreement provided for interest of 10 percent per annum on the value of the stock, $406,832, from September 2, 1990 [20 days after Ramaekers' death], to June 20, 1991 [the date the amount was paid]. The total number of days at which the interest should be calculated is 291 days, which results in interest of $32,435.09. The trial court shall modify its judgment by increasing the judgment for the estate by the amount of $32,435.09.

94 NCA No. 35 at 26.

The order became final, and this court issued its mandate on October 7, 1994. The mandate was filed with the district court on October 10, and on October 17, the corporation paid the $32,435.09.

On November 7, 1994, the estate filed a "Motion and Notice of Hearing to Compute Interest" in which it alleged the corporation refused to pay interest on the increased judgment, and requested the court to determine the amount of interest due. After a hearing, the trial court found that the mandate of this court was spread on October 10 and that on October 17 the judgment of $32,435.09 was paid. It found the estate was entitled to interest from October 10 at the rate of 6.69 percent per annum, that is, $41.58, and ordered that sum paid.

ASSIGNMENTS OF ERROR

The estate assigns five errors, which can be summarized as a claim that the trial court erred in computing the interest in respect to both its rate and the date that it began to accrue.

STANDARD OF REVIEW

[1] The questions raised by this appeal are questions of law. Regarding questions of law, an appellate court has the obligation to reach a conclusion independent of that of the trial court. *Winfield v. CIGNA Cos.*, 248 Neb. 24, 532 N.W.2d 284 (1995); *Union Ins. Co. v. Land and Sky, Inc.*, 247 Neb. 696, 529 N.W.2d 773 (1995).

DISCUSSION

Should Judgment Draw Interest?

The corporation contends that although it has not cross-appealed the award of $41.58 interest because it was so small, it believes that the judgment should not draw any interest, and therefore notwithstanding the lack of a cross-appeal, further interest should not be allowed.

[2] The general rule is that " 'in the absence of contract or statute, compensation in the form of compound interest is not allowed to be computed upon a debt.' " *Ashland State Bank v. Elkhorn Racquetball, Inc.*, 246 Neb. 411, 420, 520 N.W.2d 189, 195 (1994). Upon the basis of this authority, the corporation argues that the $32,435.09 judgment was for interest and that therefore any interest allowed on that sum would be compound interest, and not allowable.

We cannot agree. We believe the true rule to be the following:

> "Where the parties have contracted for the payment of a particular lawful rate of interest, to be paid after the maturity of the debt and on default in payment, such contract controls and the rate thus fixed is recoverable, provided the rate is not unconscionable. Thus, if the contract provides for a certain rate of interest until the principal sum is paid, such contract generally will control the recovery as to the rate after maturity; in other words, *the contract governs until the payment of the principal or until the contract is merged in a judgment.*"

(Emphasis supplied.) *Prudential Ins. Co. v. Greco*, 211 Neb. 342, 347–48, 318 N.W.2d 724, 728 (1982) (quoting 47 C.J.S. *Interest & Usury* § 40 a. (1982)).

[3] In 47 C.J.S. *Interest & Usury* § 24 at 70 (1982), the author notes: "Compound interest on a judgment generally is

not recoverable, unless it is authorized by statute; but this rule has been held not to be violated by interest on the whole amount of a judgment, although such amount is made up partly of interest on the original obligation." Similarly, in 45 Am. Jur. 2d *Interest and Usury* § 78 at 71 (1969), the author states: "Although compound interest generally is not allowable on a judgment, it is established that a judgment bears interest on the whole amount from its date even though the amount is in part made up of interest . . . ."

We therefore conclude the estate is entitled to interest on the judgment, but the date that it should commence and its rate need to be determined.

Date Interest Commences.

The corporation argues that if the estate is entitled to any interest it should commence to run when the mandate was spread, that is, October 10, 1994. The estate argues that the trial court should have awarded it interest on the $32,435.09 from June 21, 1991. Under a written agreement between the decedent and the corporation, the corporation was bound to buy and the estate was bound to sell all of the decedent's stock in the corporation. On June 18, the parties entered into a stipulation under which the corporation paid to the estate more than it thought it owed for the stock, but less than the estate thought it was owed. The parties had a sound reason for arriving at the amount paid under the stipulation, and ultimately both the trial court and this court determined that the amount paid was the true value of the stock.

The stipulation provided that the payment that was made to the estate on June 20, 1991, would be applied to the amount to be determined by the court as due under the contract. Thus the sale price, or principal, due under the contract was deemed paid on June 20. In *Ramaekers I*, the estate maintained that it was entitled to interest at the contract rate of 10 percent per annum until June 20. This court agreed and determined that amount was $32,435.09.

[4] Neb. Rev. Stat. § 45-103.01 (Reissue 1993) provides: "Judgment interest shall accrue on decrees and judgments for the payment of money from the date of rendition of judgment

until satisfaction of judgment." Neb. Rev. Stat. § 25-1301(2) (Reissue 1995) provides: "Rendition of a judgment is the act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket, or one made at the direction of the court or judge thereof, of the relief granted or denied in an action." By judicial decision, the Supreme Court has held that when no oral pronouncement is made, the date of rendition of a judgment is the date the order is spread on the record of the court. *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994). Neb. Rev. Stat. § 25-1926 (Reissue 1995) provides in part: "When a judgment or final order is reversed either in whole or in part in the Court of Appeals or Supreme Court, the appellate court shall proceed to render such judgment as the court below should have rendered or remand the cause to the court below for such judgment." These statutes do not answer the question of when a judgment that is increased upon appeal is considered to have been rendered for purposes of interest accrual.

We are unable to find any Nebraska case squarely on point. However, two cases at least indicate that when a judgment is modified on appeal, then interest on the award as modified commences to accrue from the date of the original judgment, whether the modification increases or decreases the trial court's judgment.

In *Rawlings v. Anheuser-Busch Brewing Co.*, 69 Neb. 34, 94 N.W. 1001 (1903), the Supreme Court expressly held that interest commenced to run on the date the trial court rendered its original judgment when the amount of that judgment had been decreased on appeal by a remittitur. The statute quoted in that opinion provided that interest on a judgment should run from the date of rendition thereof, just as § 45-103.01 now provides. The court stated the remittitur related back to the date of the rendition of the original judgment.

[5] In the recent case *Koterzina v. Copple Chevrolet*, 249 Neb. 158, 542 N.W.2d 696 (1996), the Supreme Court was presented with a situation where the amount of the judgment had not been increased on appeal, but the percentage of a workers' compensation disability award that a judgment debtor was required to pay had been increased. The court held that

interest commenced to run from the date of the original workers' compensation award. In a previous case involving the same parties, the Court of Appeals had modified a workers' compensation judgment by concluding that the Second Injury Fund should pay 100 percent of certain temporary and permanent disability benefits rather than the 30 percent of the permanent benefits that the Workers' Compensation Court had previously determined. After that modification had become final, the plaintiff sought to enforce the judgment, including interest on the full amount of the judgment from the date of the original compensation court award at the judgment rate. The Supreme Court determined that in part under Neb. Rev. Stat. § 48-188 (Reissue 1993) and §§ 45-103.01 and 25-1301(2), the plaintiff was entitled to interest on 100 percent of the disability award from the Second Injury Fund from the date of the original workers' compensation award. In making that decision, the court stated, "[T]he Court of Appeals' modification of that award also had a nunc pro tunc effect, pursuant to § 48-188." 249 Neb. at 167, 542 N.W.2d at 703. The *Rawlings* court uses the legal fiction of relation back to hold the decreased judgment was rendered when the original judgment was rendered, and the *Koterzina* court uses a "nunc pro tunc effect" to accomplish the same result. Both cases indicate that when a judgment is modified upon appeal, interest runs on the full amount of the judgment as modified from the date the original judgment was rendered by the trial court.

We find the authorities from other states accept this principle:

> [T]he current view taken by a majority of the states is that where a money award has been modified on appeal and the only action necessary in the trial court is compliance with the mandate of the appellate court, then the interest on the award, as modified, should run from the date of the original judgment . . . as if no appeal had been taken. . . .
>
> Furthermore, interest has been held to accrue on a judgment from the date of its original entry whether on appeal the amount of the judgment is reduced, or increased.

47 C.J.S. *Interest and Usury* § 68 at 158-59 (1982).

[6] The author of an annotation on interest after modification of judgments summarizes the cases on this subject as follows:

> In most cases where a money award has been modified on appeal, and the only action necessary in the trial court has been compliance with the mandate of the appellate court, the view has been taken that interest on the award as modified should run from the same date as if no appeal had been taken, that is, ordinarily, from the date of entry of the verdict or judgment. It has been so held regardless of whether the appellate court reduced or increased the original award.

Annot., Date From Which Interest on Judgment Starts Running, as Affected by Modification of Amount of Judgment on Appeal, 4 A.L.R.3d 1221, 1223 (1965). It therefore seems clear that interest on a judgment increased upon appeal commences to run from the date the trial court entered its original judgment.

The corporation next argues that the judgment for $32,435.09 ordered upon appeal did not modify an original judgment because the original judgment of the trial court did not provide for a money judgment, and therefore notwithstanding the above authority, interest would still accrue when the trial court entered this court's judgment.

In this particular case, the procedural facts could justify that position, because the amount that the estate had already received under the stipulation was the amount the trial court found to be due. The prepayment had the effect of stopping interest on the principal sum before the judgment was entered. The judgment entered by the court required the estate to transfer its stock to the corporation, but did not order the payment at the time. It can be argued that the order of this court did not increase the trial court's judgment, but, rather, that the judgment of this court originated a judgment for $32,435.09. It can also be argued that the order of this court did increase the nonmoney original judgment of the trial court. Under the terms of this court's order in *Ramaekers I*, we cannot consider this interesting question. In *Ramaekers I*, 94 NCA No. 35 at 26, this court directed the trial court to "modify its judgment by increasing the judgment for the estate by the amount of $32,435.09."

[7] Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. *Wicker v. Vogel*, 246 Neb. 601, 521 N.W.2d 907 (1994); *Waite v. Carpenter*, 3 Neb. App. 879, 533 N.W.2d 917 (1995). See, also, *Pendleton v. Pendleton*, 247 Neb. 66, 525 N.W.2d 22 (1994) (holding erroneous interpretation of law does not necessarily void law-of-the-case doctrine). Therefore, we conclude that interest should run from the date the trial court entered its original judgment, January 19, 1993.

Rate of Interest.

We next consider the appropriate rate of interest. Postjudgment interest is provided for by § 45-103 (Reissue 1993), which in significant part provides: "Judgment interest on decrees and judgments for the payment of money shall be fixed at a rate equal to one percentage point above the bond equivalent yield . . . ."

If an increased judgment draws interest from the date of the original judgment, it seems clear that the rate of interest applicable to that increase would be the rate that was provided for judgments when that original judgment was entered. In this case, that would be January 19, 1993. The rate of interest published in the Nebraska Advance Sheets for judgments entered upon January 19, 1993, was 4.67 percent per annum. The estate is therefore entitled to interest at that rate from January 19, 1993, until it is paid.

Application of Payment.

[8] The corporation has already paid $32,435.09 on October 17, 1994, and perhaps it has paid the $41.58 the court determined it owed, but we do not know the date it was paid. We fear the partial payments might cause further difficulties. We call the parties' attention to the rule that interest on a judgment or debt is computed up to the time of the first payment, and that payment is first applied to interest and the balance to principal. *State ex rel. Beck v. Associates Discount Corp.*, 168 Neb. 298, 96 N.W.2d 55 (1959), *overruled on other*

grounds, Dailey v. A. C. Nelsen Co., 178 Neb. 881, 136 N.W.2d 186 (1965); *Davis v. Neligh*, 7 Neb. 78 (1878); *Mills v. Saunders*, 4 Neb. 190 (1875). The trial court's order on interest indicates that this rule was ignored by the court in its computation of $41.58. Of course the effect of that action would be minimal. However, the effect could be considerable by the time this case is returned to the trial court.

CONCLUSION

We conclude that the estate was entitled to interest on the $32,435.09 from January 19, 1993, at the rate of 4.67 percent per annum until it is paid, and the trial court's order determining otherwise is reversed and the cause remanded so the judgment for $32,435.09 plus interest less payments may be enforced.

REVERSED AND REMANDED WITH DIRECTIONS.

ELMER THOMSEN AND PHYLLIS THOMSEN, HUSBAND AND WIFE, APPELLANTS AND CROSS-APPELLEES, V. RON GREVE AND NANCY GREVE, HUSBAND AND WIFE, APPELLEES AND CROSS-APPELLANTS.

550 N.W.2d 49

Filed June 11, 1996. No. A-95-191.

1. **Summary Judgment: Final Orders: Appeal and Error.** The denial of a motion for summary judgment is not a final order and therefore is not appealable.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, when credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Judgments: Appeal and Error.** An appellate court has an obligation to reach its own independent conclusions as to questions of law.
4. **Nuisances: Real Estate: Words and Phrases.** A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land.

5. **Nuisances: Liability.** The Nebraska Supreme Court has expressly adopted the Restatement (Second) of Torts (1979) as the law of private nuisance actions in Nebraska, specifically citing § 822 as expressing a suitable standard to determine when one may be subject to liability.
6. **Nuisances: Real Estate: Liability.** One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land and the invasion is intentional and unreasonable.
7. **Nuisances: Real Estate: Equity.** For a nuisance in the context of an equity action, the invasion of or interference with another's private use and enjoyment of land need only be substantial.
8. **Nuisances.** To justify the abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities.
9. **Nuisances: Presumptions.** There is a presumption, in the absence of evidence to the contrary, that a plaintiff in an action for abatement of a nuisance has ordinary sensibilities.
10. **Nuisances: Equity: Damages.** In a nuisance action for equitable relief, the trial court may also award damages.
11. **Nuisances: Property: Damages.** In determining the amount of damages, it is proper to take into consideration all the injuries and losses caused by the nuisance, such as the depreciation in the market or rental value of plaintiffs' property, and the discomfort, annoyance, and inconvenience in the use thereof.
12. **Juries: Damages.** General damages are such damages as the jury may give when the judge cannot point out any measure by which they are to be assessed except the opinion and judgment of a reasonable man.
13. **Equity: Injunction: Proof.** A court of equity will not usually enjoin the operation of a lawful business. It will require the cause of the grievance to be corrected and will enjoin the conduct of the enterprise perpetually after it has been proven that no application of endeavor, science, or skill can effect a remedy where the owners cannot be induced to conduct it properly.

Appeal from the District Court for Thurston County: DARVID D. QUIST, Judge. Affirmed in part as modified, and in part reversed and remanded for further proceedings.

Stuart B. Mills and Gregory C. Damman for appellants.

Michael F. Scahill, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

HANNON, SIEVERS, and MUES, Judges.

HANNON, Judge.

This is a nuisance action brought by the plaintiffs, Elmer Thomsen and Phyllis Thomsen, to enjoin the defendants, Ron Greve and Nancy Greve, from using a wood-burning stove to heat their home and for damages resulting from the smoke originating from the stove. The trial court found the smoke from the Greves' stove created a nuisance, and ordered the Greves to abate the nuisance by raising the height of their chimney by 3 feet and burning only clean, dry firewood. The court also found that the Thomsens failed to prove specific monetary damages, and thus awarded no damages. The Thomsens appeal, and the Greves cross-appeal. We conclude that the smoke from the Greves' wood-burning stove constitutes a nuisance and that damages are appropriate, and therefore, we affirm as modified that portion of the trial court's decree. With regard to abatement, there was insufficient evidence in the record to fashion an appropriate equitable remedy, and therefore, we reverse the judgment and remand the matter with directions to hold further proceedings.

I. PLEADINGS AND FACTS

On April 1, 1993, the Thomsens filed a petition in the district court for Thurston County, alleging that since the fall of 1992, in the winter months, the Greves have used a wood-burning stove to heat their home, that it has produced intolerable odors and caused the Thomsens' home to smell, that the Thomsens asked the Greves to stop burning wood but they refused, and that the Greves knew of the effect of their stove on the Thomsens. The Thomsens requested general damages and that the Greves be enjoined from using their stove. The Greves filed a general denial and a motion for summary judgment. The motion was overruled on January 31, 1994, and a bench trial was had on October 25.

The evidence produced at that trial may be summarized as follows: The parties own and live in adjacent homes in Pender, Nebraska. The Greves have lived in their home since 1973. In 1990, the Thomsens moved into the house situated 15 feet west of the Greves' home. For approximately the first 2 years, the Thomsens and the Greves had a friendly relationship. Phyllis Thomsen and Nancy Greve visited in each other's homes on a frequent and regular basis. The parties have had some disputes, such as the location of their boundary line west of the Greves' fence and the Greves' practice of raising rabbits, which led to the demise of their friendship. Nancy Greve testified she has not spoken to the Thomsens since August 1992.

In August 1992, the Thomsens complained to the Greves about the odor and smoke from the wood-burning stove, claiming that it smelled dirty. The Greves both testified that in the 6 years in which they had been operating the stove, this was the first time anyone complained about the smoke. The Greves both testified that Phyllis Thomsen told them that the smoke made the Thomsens' house smell dirty, but that Elmer Thomsen stated that it only had happened once and that it was not that bad. The Thomsens agree that in August they complained to the Greves about the smoke, but they deny that Elmer Thomsen stated it happened only once. They testified that Nancy Greve told them to just keep their windows and doors shut.

Ron Greve is a licensed electrician who owned his own business. In 1986, the Greves put an addition on their home, at which time they installed a wood-burning stove. Since 1986, the wood-burning stove has been the primary source of heat in the Greves' home; prior to that time they had a gas furnace and then electrical baseboard heat. The Greves claim to have burned only "dry, hard wood" in their stove and that Ron has cleaned the chimney once a month to prevent the buildup of creosote. The Greves supplement the wood-burning stove with electrical heat only on days when the temperature is below zero. They claim to never have burned garbage or railroad ties or anything else containing creosote.

The Greves testified that they have an "Earth Stove," and there is a buildup of creosote in the chimney from burning wood. Ron Greve has to clean the chimney once a month because of this buildup. In an attempt to reduce the frequency that he needed to clean the chimney, he increased the height of the chimney by 30 inches in 1987, but to no avail. The evidence shows that "Earth Stove" is a brand name, and such stoves are sealed tight. The Thomsens' son, Keith Thomsen, has a similar stove which he used for several years, and he never cleaned the chimney for that stove. The significance, if any, of the type and operating method of the Greves' stove was not developed by the evidence.

The Greves also testified that the smoke was not malodorous and that they burn nothing but clean, dry wood, usually ash, in their stove. Nancy Greve also testified that for the winter of 1993–94 the wind blew from the northeast only 5 times and was still 16 times and that the wind came from the northwest 99 times, from the north 8 times, from the south 11 times, from the southeast 17 times, and from the southwest 26 times.

Phyllis Thomsen testified that during the previous 4 years, the smoke entered her house about 140 times in total and that the smoke entered under certain weather conditions. The air has to be "moist" and the wind either still or from the northeast in order for the smoke to get into the Thomsens' home. The Thomsens described the smoke as "unbearable." They claimed that it was a creosote smell, which was a "rotten smell." They both testified that when the weather was right, the smoke would surround their house and creep inside. The smell made them physically ill. Phyllis Thomsen testified that besides making her distraught, the smoke gets in her throat and nose, causing a burning and scratchy sensation. She testified that at times the odor is so bad she would be forced to leave her home to escape it, and at times it causes them to not be able to sleep at night. Elmer Thomsen testified that he gets a bad cough as a result of the smoke, which forces him to leave his house on occasion to clear it up. The smoke and odor have prevented the Thomsens from having family get-togethers and visitors over to their home. They testified that the smoke and odor infiltrate their home to such a degree that even their clothes dryer fills with the smoky odor.

Frank Appleton, chairman of the Pender Village Board, went to the Thomsens' home on two separate occasions, and he testified that the smoke smelled like wood burning. The Pender chief of police also visited the Thomsens, as did another board member, and both testified that the smoke smelled like wood burning, and it was not an offensive odor. On cross-examination, it was revealed that Ron Greve served on the village board for some time prior to the filing of the petition in this case.

The Thomsens called family members and a neighbor to testify on their behalf. The Greves also called several neighbors who testified that the smoke from the Greves' chimney did not smell like creosote. The witnesses for both sides were impeached to a degree by a showing of friendship or other reasons for their partiality to the party calling them.

After the trial, the court found the smoke to be a nuisance and ordered the Greves to raise the height of the chimney by 3 feet and to burn only "clean dry firewood." The court also found that the Thomsens failed to prove with specificity the actual monetary loss or damage, and thus awarded no damages. The Thomsens appeal from this order, and the Greves cross-appeal.

II. ASSIGNMENTS OF ERROR

The Thomsens allege that the trial court erred (1) by failing to enjoin the Greves from using their stove as a means of abating the nuisance and (2) by failing to find and award to the Thomsens monetary damages. The Greves cross-appeal, alleging that the trial court erred (1) in denying their motion for summary judgment and (2) in finding that their wood-burning stove constituted a nuisance. We will address the cross-appeal first.

[1] The denial of a motion for summary judgment is not a final order and therefore is not appealable. *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 500 N.W.2d 828 (1993); *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989). Therefore, that assignment will not be discussed further.

III. STANDARD OF REVIEW

[2,3] This is an appeal of a nuisance action for both an injunction and damages, and as such, the Supreme Court has stated the following standard of review applies:

> An action for an injunction sounds in equity. *County of Dakota v. Worldwide Truck Parts & Metals*, [245 Neb.] 196, 511 N.W.2d 769 (1994). In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, when credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact

> that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993).
>
> An appellate court has an obligation to reach its own independent conclusions as to questions of law. *Drew v. Walkup*, 240 Neb. 946, 486 N.W.2d 187 (1992); *State v. Melcher*, 240 Neb. 592, 483 N.W.2d 540 (1992).

Goeke v. National Farms, Inc., 245 Neb. 262, 264, 512 N.W.2d 626, 629 (1994).

IV. DISCUSSION

1. Existence of Nuisance

The Greves argue that the Thomsens failed to meet their burden to show the wood-burning stove was a nuisance. Since this issue is an issue of fact, we will consider the Greves' arguments on the weight of the evidence in a de novo trial of the factual issue later in this opinion. The Greves also argue that their conduct did not create a nuisance as a matter of law. They argue that they are unable to find any case where a court has been asked to determine that using a wood-burning stove created a nuisance, and they argue that under the principles set forth in §§ 826 through 828 of the Restatement (Second) of Torts (1979), the trial court should have determined their activity did not create a nuisance as a matter of law. The fact that other courts have not been confronted with cases involving heating stoves is not significant except to explain why neither the parties nor this court can cite similar cases. We shall therefore approach the legal issue from the basic principles involved.

(a) Question of Law: Could Greves' Conduct Create Nuisance?

[4,5] A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land. *Hall v. Phillips*, 231 Neb. 269, 436 N.W.2d 139 (1989). The Nebraska Supreme Court has expressly adopted the Restatement (Second) of Torts (1979) as the law of private nuisance actions in Nebraska, specifically citing § 822 as expressing a " 'suitable

standard to determine when one may be subject to liability . . . .' " *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 851, 510 N.W.2d 41, 47 (1994) (quoting *Hall v. Phillips, supra*). We conclude that in these cases, the Supreme Court has recognized that the applicable sections of the Restatement contain, in substance, the Nebraska law on the subject, although the Nebraska Supreme Court has not always used the words or the approach set forth by the Restatement. We will therefore consider the issues raised with reference to the Restatement.

[6] Section 822 provides in significant part: "One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) . . . ."

The Supreme Court has recognized that the principles stated in the Restatement, *supra*, §§ 826 through 831, are to be used by judges as a guide to determine whether an intentional interference is unreasonable as a matter of law. *Kopecky v. National Farms, Inc., supra*. Section 826 defines what constitutes an unreasonable invasion and provides in significant part: "An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if (a) the gravity of the harm outweighs the utility of the actor's conduct, or (b) . . . ."

The following sections further refine the definition of "unreasonable" and assist in determining whether the gravity of the harm suffered by the Thomsens is outweighed by the utility of the Greves' conduct. Section 827 provides:

> In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
>
> (a) The extent of the harm involved;
>
> (b) the character of the harm involved;
>
> (c) the social value that the law attaches to the type of use or enjoyment invaded;
>
> (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
>
> (e) the burden on the person harmed of avoiding the harm.

Section 828 provides:

> In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
>
> (a) the social value that the law attaches to the primary purpose of the conduct;
>
> (b) the suitability of the conduct to the character of the locality; and
>
> (c) the impracticability of preventing or avoiding the invasion.

Section 829 A provides:

> An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation.

Section 831 provides:

> An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm is significant, and
>
> (a) the particular use or enjoyment interfered with is well suited to the character of the locality; and
>
> (b) the actor's conduct is unsuited to the character of that locality.

In applying these principles to the instant case to determine whether or not the Greves' conduct could create a nuisance, we must necessarily assume that the Greves' conduct on their land interferes with Thomsens' enjoyment of their land in the manner that the Thomsens claim. Whether as a matter of fact the Thomsens have suffered the damages they claim is an issue of fact that need only be determined if the Greves' conduct under the Thomsens' version of the facts could be a nuisance.

The evidence shows that the parties live in a residential neighborhood in a small Nebraska town. Both their homes appear to be small one-story homes of a type that has been built since the 1950's. Pictures in evidence show both parties' homes to be attractive and in an attractive setting insofar as grass, trees, bushes, flowers, and other amenities are concerned.

The Thomsens testified that in a 4-year period the smoke entered their home approximately 140 times, which has made their house smell of creosote, a "rotten smell." It affected their use of their home and affected them physically. We have no trouble concluding that, at least in our society, to have the use and enjoyment of one's home interfered with by smoke, odor, and similar attacks upon one's senses is a serious harm. The social value of allowing people to enjoy their homes is great, and persons subjected to odor or smoke from a neighbor cannot avoid such harm except by moving. One should not be required to close windows to avoid such harm.

On the other hand, aside from the simple right to use their property as they wish, it is difficult to assign any particular social value to the Greves' wood-burning stove. This method of heating does save on fossil fuels, but assuming that the stove used by the Greves emits foul-smelling smoke, society is certainly blessed if only a few people avail themselves of the opportunity to save fuel by using such stoves. The Greves could avoid invading the Thomsens' property by using other means of heating.

Under the Restatement (Second) of Torts § 822 (1979), we therefore conclude that if the Thomsens' evidence is true, the Greves' invasion of the Thomsens' land in the manner claimed by the Thomsens is unreasonable.

[7] The Supreme Court has approached this problem from a different perspective. It has stated:

> The Restatement's requirement of "unreasonable" has not been an explicit or implicit requirement for equitable relief from a private nuisance in Nebraska. Rather, for a nuisance in the context of an equity action, the invasion of or interference with another's private use and enjoyment of land need only be substantial.

Hall v. Phillips, 231 Neb. 269, 278, 436 N.W.2d 139, 145 (1989).

[8,9] In *Goeke v. National Farms, Inc.*, 245 Neb. 262, 270–71, 512 N.W.2d 626, 632 (1994), the Supreme Court said it had not found that it had ever defined "substantial interference" in the context of a suit to abate a nuisance, and then proceeded to state:

> [T]o justify the abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. There is a

> presumption, in the absence of evidence to the contrary, that a plaintiff in an action for abatement of a nuisance has ordinary sensibilities.

(Citations omitted.)

This definition would undoubtedly go to the extent and character of the harm under the Restatement, *supra*, § 827. The Thomsens' testimony regarding their physical discomfort, that is, their burning; watery eyes; scratchy throats; and coughing is enough, if believed, to establish physical discomfort.

"[A]n intentional invasion of another's interest in land exists when an actor purposefully causes the invasion, knows that the invasion is resulting from the actor's conduct, or knows that the invasion is substantially certain to result from the actor's conduct." *Hall v. Phillips*, 231 Neb. at 273, 436 N.W.2d at 143. Clearly, the record in the instant case reveals that the Greves knew that the invasion, or smoke, resulted from their conduct. The Greves admitted that they were told by the Thomsens of the smoke problem in August 1992. We therefore conclude, as a matter of law, that the Greves' conduct under the Thomsens' version of the evidence could create a nuisance.

(b) Question of Fact:
Did Greves' Conduct Create Nuisance?

The facts adduced by both parties are in direct conflict on the issue of whether the Greves have actually created a nuisance. The trial court heard and observed the witnesses and their manner of testifying, and it necessarily accepted the Thomsens' version of the facts to the extent necessary to find that a nuisance existed. In concluding that the Greves have created a nuisance by their conduct, we rely heavily upon the trial court's determination, but not entirely.

The fact that the chairman of the village board smelled smoke in the Thomsens' house on two occasions, when there was no source other than the Greves' wood-burning stove for that smell, is significant. The Pender chief of police was called as a witness by the Greves. He testified to seeing smoke down between the parties' homes and to similar observations about smoke from another home in Pender that burns wood. On one occasion, the police chief was called to the Thomsens' residence in regard to the smoke. He reported smelling the strong odor of smoke in the Thomsens' home, but said that it smelled like wood burning. When the judge asked him if he found the odor in the Thomsens' home offensive, he said, "Well, it was just a heavy wood-burning," but he stated it did not smell of creosote. Another member of the village board went to the Thomsens' home, and he testified, "It smelled to me like they had a wood-burning stove in their house." He also testified "it stunk" outside of the house. He took the complaint seriously enough to contact the State Fire Marshal and others in an attempt to solve the problem. These witnesses characterized the Thomsens' smoke problem differently than the Thomsens and their witnesses, yet they support the Thomsens' claim to the extent that the Thomsens had a significant smoke odor in their house, and the source of that odor had to be outside.

The parties spent considerable time differentiating between the smell of burning wood and creosote. The record leaves the reader with the impression that the parties thought creosote originated from petroleum. The parties seem to approach the case as though a serious problem would not result if the Greves burned only clean, dry wood. Creosote is defined in part by Webster's Encyclopedic Unabridged Dictionary of the English Language 342 (1989) as "an oily liquid having a burning taste and a penetrating odor, obtained by the distillation of wood tar." Ron Greve testified that he found it necessary to clean his chimney monthly and that when he started burning wood he felt it advisable to make his chimney 30 inches higher, in an effort to decrease the number of times he needed to clean the chimney. Keith Thomsen testified that he saw "juices" running from around the Greves' chimney. Such matters do not establish that the smoke results from the wood the Greves burned, but they do tend to eliminate any supposition that a nuisance would be abated if they burned only clean, dry wood.

We conclude that the Greves have created a nuisance which the Thomsens are entitled to have abated; we therefore conclude that the Greves' cross-appeal should be dismissed.

2. Damages

Having concluded that the smoke from the Greves' chimney constitutes a nuisance, we turn to the Thomsens' assignment of error that the trial court applied an improper measure of damages and thus erred in not awarding them any damages. Specifically with regard to damages, the court order stated: "On the issue of damages, the Court finds that the plaintiff has failed to prove with specificity actual monetary loss or damage and therefore, [no damages] are ordered."

[10] We first conclude that although this is mainly an equitable action, the trial court has the authority to award damages. In *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994), the Supreme Court held that in a nuisance action for equitable relief, the trial court may also award damages. In so doing, the court stated:

> When an equity court has properly acquired jurisdiction in a suit for equitable relief, it will make a complete adjudication of all matters properly presented and involved in the case and ordinarily will grant such relief, legal or equitable, as may be required and thus avoid unnecessary litigation. [Citations omitted.] Therefore, the district court could properly award damages for injuries that the plaintiffs proved were proximately caused by the nuisance created by the [defendants'] waste-treatment system. [Citations omitted.] Just because an action is equitable in nature, no different standards need be applied in adjudicating damages incidental to the main equitable relief sought.

Id. at 270, 512 N.W.2d at 632.

[11] In determining the amount of damages to award, the Supreme Court has held that in addition to nominal damages, "[i]t is proper to take into consideration all the injuries and losses caused by the nuisance, such as the depreciation in the market or rental value of plaintiffs' property, and the discomfort, annoyance, and inconvenience in the use thereof." *Karpisek v. Cather & Sons Constr., Inc.*, 174 Neb. 234, 242, 117 N.W.2d 322, 327 (1962). The Thomsens did not prove any depreciation in the market or rental value of their property. Such damages would be special damages, and without specific proof for such special damages no award may be made.

[12] General damages are " ' "such as the jury may give when the judge cannot point out any measure by which they are to be assessed except the opinion and judgment of a reasonable

man." . . .' " *Bank of Commerce v. Goos*, 39 Neb. 437, 446–47, 58 N.W. 84, 87 (1894) (quoting from legal authorities of that day). This rule has not changed. It is apparent that by the nature of things, a court cannot point out any measure of damages for discomfort, annoyance, or inconvenience. Obviously, the Thomsens cannot be expected to prove such damages with specificity. We therefore conclude that the trial court erred in not awarding damages.

As we stated previously, the Thomsens have suffered physical discomfort including scratchy throats; burning, watery eyes; and coughing and sleepless nights. They also have been forced to rearrange family gatherings and other social events at their home. Phyllis Thomsen testified that they have suffered from such inconveniences and annoyances approximately 140 times over the past 4 years. Under the above-cited authority, the Thomsens were only entitled to injunctive relief if they suffered substantial interference. As discussed above, the finding that the smoke created a nuisance results from a finding that the Thomsens suffered substantial discomfort.

The parties are entitled to a trial by this court de novo on the record on the amount of damages the Thomsens suffered. The evidence is sufficient for this court to determine damages as of the date of the district court trial. Thus, we find and determine that the Thomsens suffered damages in the sum of $4,000 as a result of the Greves' nuisance, from the date of its commencement to the date of the trial.

3. Scope of Injunction and Abatement

In its order, the trial court stated the Greves "shall abate this nuisance by burning only clean dry firewood and by raising the height of the chimney by three feet." The Thomsens contend that the court's order does nothing to abate the nuisance, for the Greves already claim to burn nothing but clean, dry firewood, and that there is no evidence showing that raising the chimney will do anything to abate the nuisance. An injunction against a nuisance is an extraordinary remedial process which is granted not as a matter of right but in the exercise of the discretion of the court, to be determined on consideration of all the circumstances of each case. *Cline v. Franklin Pork, Inc.*, 219 Neb. 234, 361 N.W.2d 566 (1985).

[13] In *Cline*, the Supreme Court, in affirming the trial court's order enjoining the operation of the defendant's pig feeding and breeding facility, stated:

> "A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance caused thereby. *In the first instance*, at least, it will require the cause of the grievance to be corrected and will enjoin the conduct of the enterprise perpetually after it has been proven that no application of endeavor, science, or skill can effect a remedy where the owners cannot be induced to conduct it properly."

219 Neb. at 239, 361 N.W.2d at 571 (quoting *Cline v. Franklin Pork, Inc.*, 210 Neb. 238, 313 N.W.2d 667 (1981)).

Although the defendants in the instant case are not a business, we conclude that the principles and procedures found in these cases are just as applicable. The record before us is devoid of any evidence as to what will or will not abate the nuisance, if anything. Therefore, neither the trial court nor this court has the information necessary to make a final order on exactly how the nuisance can be abated. We therefore conclude that the trial court order should be amended to read that the Greves are ordered to abate the nuisance of smoke and odor emanating from their home to the Thomsens' adjacent home and that the Greves shall be allowed 30 days from the spreading of the mandate of the Court of Appeals to propose a reasonable means of abatement of the nuisance, which may be short of ceasing to heat their home by the existing system. The trial court shall allow the Greves such time as it finds reasonably necessary to abate the nuisance by such means that the trial court might find to have a reasonable likelihood of success, but if the Greves cannot abate the nuisance by the means proposed by them after reasonable time and efforts, then, and in that event, the court shall order the nuisance abated by permanently enjoining the Greves' use of their present wood-burning stove. Therefore, we remand the matter to the trial court with directions to hold further proceedings regarding a reasonable abatement plan.

V. CONCLUSION

Therefore, in our de novo review, we hold that the Greves caused a nuisance, and we thus affirm that portion of the trial court's decree. We conclude that damages can properly be awarded and that the Thomsens did prove damages, and we thus modify that portion of the decree to award damages in the amount of $4,000. We modify the order of abatement as above provided.

AFFIRMED IN PART AS MODIFIED, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, v. ROBERT E. LEE, APPELLANT.

550 N.W.2d 378

Filed June 11, 1996. No. A-95-821.

1. **Prior Convictions: Collateral Attack.** Separate proceedings are available to collaterally attack previous convictions on the grounds set forth in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Licenses and Permits: Revocation: Drunk Driving: Prior Convictions: Proof.** In a prosecution for driving while one's operator's license is revoked under Neb. Rev. Stat. § 60-6,196(6) (Reissue 1993), proof of the prior conviction under § 60-6,196(2)(c) (third-offense driving while under the influence) is an essential element of the offense.
4. **Prior Convictions: Collateral Attack: Proof.** The procedure for collateral attack upon a prior conviction being used for enhancement also applies in cases where an essential element of the crime charged is proof of a prior conviction.
5. **Prior Convictions: Collateral Attack.** The separate proceeding must be instituted in the court where the prior conviction was had.
6. **Constitutional Law: Prior Convictions: Proof.** A conviction is constitutionally infirm and may not be used for enhancement, or as proof of an essential element of a crime, when the conviction is defective because of an inadequate advisory of *Irish-Boykin* rights.

7. **Criminal Law: Time.** Retroactive application of a new rule of law is appropriate when it is a means of enhancing the accuracy of criminal trials, when there has not been justifiable reliance on the prior rule of law, and when retroactive application will not have a disruptive effect on the administration of justice.
8. **Collateral Attack: Prior Convictions: Appeal and Error.** A party may not attack a separate proceeding decision except by timely direct appeal in that case.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and vacated.

Brett McArthur for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

HANNON, SIEVERS, and INBODY, Judges.

SIEVERS, Judge.

Robert E. Lee was convicted in the district court for Lancaster County of violating Neb. Rev. Stat. § 60-6,196(6) (Reissue 1993) by operating a motor vehicle when his license had been revoked under § 60-6,196(2)(c) for third-offense driving while under the influence of alcohol (DUI). He appeals, arguing that the State should not have been permitted to introduce, over his objection, a certified copy of a Lancaster County Court transcript of his prior conviction and license revocation under § 60-6,196(2)(c). The basis of his objection was that the conviction had been set aside in a "separate proceeding." We conclude that because the prior conviction had been voided in a separate proceeding it should not have been received in evidence against him to support the instant conviction of driving during a 15-year revocation. We therefore reverse.

BACKGROUND

Lee contests only the admission of the evidence showing the prior revocation of his license. The evidence clearly shows that on December 16, 1994, Lee was driving a motor vehicle on the public streets of Lancaster County. Lee entered a plea of not guilty to the charge of driving during a 15-year revocation, and trial to the court was held on June 9, 1995.

At the outset of the trial Lee made a motion in limine, asking the court to preclude the State from offering any evidence of

Lee's prior conviction for third-offense DUI, because in a separate proceeding which Lee had instituted, the county court had entered an order prohibiting the use of the conviction "for purposes of enhancement." This order is exhibit 1, which is certified by the deputy clerk of the Lancaster County Court to be a full and correct copy of "the original instrument duly filed and of record in this court." Exhibit 1 carries a date of March 15, 1995, and the case No. 91L04-6257, and it states:

> The record of the Court's plea taking on May 17, 1991 clearly does not inform Mr. Lee of his right to a trial by jury.
>
> As such the Court does not believe the May 17[,] 1991 plea may be used for purposes of enhancement.
>
> So Ordered.
>
> /s/ Gale Pokorny
> Lancaster County Judge

[1] In arguing the motion to the district court, Lee's counsel stated that Lee had filed a separate proceeding in case No. 91L04-6257, which was "where Mr. Lee was convicted of third offense drunk driv[ing]." Lee's counsel explained that the basis for the separate proceeding was that Lee had not been properly advised of his constitutional right to a jury trial during the plea proceedings on the prior conviction and that after briefs and oral argument Judge Pokorny entered the order which is exhibit 1. The district court received exhibit 1 into evidence without any objection from the State. The motion in limine was heard after our decision of *LeGrand v. State*, 3 Neb. App. 300, 527 N.W.2d 203 (1995), but before that decision was rejected by the Supreme Court in *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995). Our decision in *LeGrand v. State* held that it was impermissible to attack a prior conviction in an enhancement proceeding, except where the transcript of the prior conviction failed to show that the defendant had or waived counsel. The Supreme Court's decision in *State v. LeGrand* held that separate proceedings were available to collaterally attack previous convictions on grounds set forth in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986) (for free, intelligent, voluntary, and understanding guilty plea, trial court must advise defendant of certain rights, including, where applicable, defendant's right to

trial by jury). Such rights are often referred to as "*Boykin* rights." See *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). The district judge overruled the motion in limine, relying on our decision in *LeGrand v. State*.

The trial then commenced, and the State introduced evidence which proved that Lee was driving at the time and place alleged. The State offered exhibit 2, which was Lee's driving abstract as certified by the Department of Motor Vehicles. The State also offered exhibit 3 to prove that Lee's driver's license had been revoked prior to his being charged in this case. Lee's attorney objected to exhibits 2 and 3 by renewing the objections stated and argued in the motion in limine. The objection was overruled.

The documents in exhibit 3 clearly show that Lee was found guilty of third-offense DUI pursuant to a plea of guilty on May 17, 1991, and that he was then represented by an attorney. Exhibit 3 is certified by the deputy clerk of the Lancaster County Court as a true copy of the "entry of Complaint, Journal Entries and Order as it appears on the original record of this Court." Examination of the exhibit shows that exhibit 3 is a record of case No. 91L04-6257, the same case as that where Judge Pokorny entered his order, quoted above, prohibiting use of the conviction for enhancement. Exhibit 3 contains the complaint, several pages of a "Case Action Summary," a "Driving While Intoxicated Plea," a "Waiver of Rights - DWI," a "Pre-Arraignment Information" form, and the order sentencing Lee.

Exhibit 3 also contains two entries on the last page of the "Case Action Summary" for case No. 91L04-6257 which are dated 3½ years after the entry of Lee's sentence. The first entry, dated December 2, 1994, states, "Set for hearing on Petition for Sp. Relief. 9:00 Wed. 12-21-94." We take "Sp. Relief" to mean separate relief. In the column next to this entry is a clerk's note stating that both the defense and prosecution were notified of this hearing. The second entry, dated December 21, 1994, is a postponement of the hearing by agreement until January 13, 1995.

The State rested, and Lee moved to dismiss for failure to establish a prima facie case. After this motion was denied, Lee's attorney reoffered exhibit 1, and it was received without objection. The case was submitted, and the trial court found Lee guilty and in due course sentenced him to not less than 2 nor more than 4 years' incarceration.

ASSIGNMENTS OF ERROR

Lee alleges that the trial court erred in admitting his prior conviction for DUI, third offense, to support a conviction of driving during a 15-year revocation, when the prior conviction had been held, in a separate proceeding, to be constitutionally infirm.

STANDARD OF REVIEW

[2] The only issue in this appeal is whether there was valid evidence of a conviction upon which to base a violation of driving when his license had been revoked. Lee does not contest the sufficiency of the other evidence. The only questions raised by this appeal are questions of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

DISCUSSION

In *State v. LeGrand*, 249 Neb. at 9, 541 N.W.2d at 386, the Nebraska Supreme Court held that "separate proceedings are a valid means to collaterally attack allegedly constitutionally invalid prior convictions used for sentence enhancement." Therefore, the procedure followed in *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992), and its antecedents was reaffirmed.

[3,4] We digress to note that in a prosecution for driving when one's operator's license has been revoked under § 60-6,196(6), proof of the prior conviction under § 60-6,196(2)(c) (third-offense DUI) is an essential element of the offense. *State v. Watkins, ante* p. 356, 543 N.W.2d 470 (1996). The procedure for collateral attack upon a prior conviction being used for enhancement also applies in cases where an essential element of the crime charged is proof of a prior conviction. See *State v. Jones*, 1 Neb. App. 816, 510 N.W.2d 404 (1993).

[5] The Supreme Court's decision in *State v. LeGrand* holds that the separate proceeding must be instituted in the court where the prior conviction was had. This was done here. The prior conviction at issue is found in exhibit 3, made up of the records of the county court for Lancaster County in case No. 91L04-6257. Exhibit 3 shows a sentence for DUI, third offense, which includes a 15-year license revocation. The case action summary contained within exhibit 3, as previously recited, contains the court's entry setting a hearing on "Petition for Sp. Relief." Our record does not include the petition for "separate relief" or the record of those separate proceedings, but we do have the county court's judgment. That judgment is exhibit 1, which was entered in case No. 91L04-6257, dated March 15, 1995, and signed by a judge of the Lancaster County Court. The judgment was duly certified as a true and correct copy of the original. Exhibit 1 recites that the record of the court's "plea taking" on May 17, 1991, shows that Lee was not informed of his right to a trial by jury, and as a consequence the May 17, 1991, guilty plea may not be used for purposes of enhancement. During the motion in limine hearing, exhibit 1 was received in evidence without objection. When the same exhibit was offered as part of the defense case, again there was no objection by the State, and it was received into evidence. When the State offered exhibit 3, the court record proving the prior conviction for DUI, third offense, in case No. 91L04-6257, the defense objected on the grounds "stated and argued in my motion in limine."

We repeat those grounds in their entirety here:

> [Defense counsel]: As this court is aware, Mr. Lee has previously been convicted of the offense of [DUI]. And prior to this trial we filed a petition to — separate proceeding to collaterally attack the offense found at Docket 91LO4, Page 6257. That was where Mr. Lee was convicted of third offense drunk driv[ing].
>
> We filed that petition in a separate proceeding in front of Judge Gale Pokorny and asked that [the] conviction be set aside for the reason that Mr. Lee was not properly advised of his Constitutional rights. After briefs and oral argument, Judge Pokorny entered the order which is in Exhibit No. 1. And he indicated that Mr. Lee's conviction

> cannot be used for the purposes of enhancement, that it was Constitutionally infirm for the reason Mr. Lee was not advised of his right to trial by jury.
>
> It's our position that because of this ruling the State should be precluded from using any evidence that Mr. Lee was ever convicted of third offense drunk driv[ing].

[6] On the basis of our opinion in *LeGrand v. State*, 3 Neb. App. 300, 527 N.W.2d 203 (1995), the district court overruled the objection. The county court ruling in exhibit 1 was a final order on June 9, 1995, when the district court was holding its trial. Because of the order in exhibit 1, neither the authenticity nor the admissibility of which was contested by the State, exhibits 2 and 3, containing the evidence of the prior conviction for third-offense DUI, were inadmissible evidence because that conviction had been ruled to be constitutionally infirm. Thus, whether exhibit 1 makes exhibits 2 and 3 irrelevant or whether the pronouncement in exhibit 1 is seen as simply binding on the district court, the result is the same. When exhibit 1 was offered into evidence in the district court, it was a final judgment on the constitutional validity of that guilty plea. The ruling held that Lee's conviction was constitutionally infirm. As said previously, a conviction is constitutionally infirm and may not be used for enhancement, or as proof of an essential element of a crime, when the conviction is defective because of an inadequate advisory of *Irish-Boykin* rights.

Although the State now argues that exhibit 1 is not proof of a judgment, there was no objection to it at trial on any basis. Moreover, the State never asserted that exhibit 1 was not what it appears to be. The parties proceeded on the basis that exhibit 1 was the county court's order holding that the prior conviction was constitutionally infirm for failure to properly advise Lee of his right to a jury trial. Cases are heard in an appellate court on the theory upon which they were tried. *Sunrise Country Manor v. Neb. Dept. of Soc. Servs.*, 246 Neb. 726, 523 N.W.2d 499 (1994) (because both parties relied on exhibit as containing applicable medicaid regulations, court considered exhibit to contain applicable regulations for purposes of its analysis).

[7] Of the arguments advanced by the State in its brief, most have been rendered ineffective by the Supreme Court's rejection

of this court's decision in *LeGrand v. State, supra*. But two arguments remain. The first is that the rule of *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992), which extended the right to a jury trial to third-offense DUI cases, had not been announced at the time the county court denied Lee's request for a jury trial on May 6, 1991. The State argues that the *Wiltshire* rule is not one to be given retroactive application in view of the trial court's original justifiable reliance on the prior law. In support of this proposition, the State cites *State v. Clark*, 217 Neb. 417, 350 N.W.2d 521 (1984) (holding retroactive application of new rule of law is appropriate when it is means of enhancing accuracy of criminal trials, when there has not been justifiable reliance on prior rule of law, and when retroactive application will not have disruptive effect on administration of justice). Even though we might agree with the State's position that the county court wrongfully gave *Wiltshire* retroactive effect in the separate proceeding to void the conviction, we believe there is a different threshold issue. That threshold issue is whether, in the context of the appeal of this criminal conviction, the State may "collaterally" attack the separate proceeding decision.

[8] The separate proceeding concept recently reaffirmed by the Nebraska Supreme Court is gradually acquiring some procedural focus. See *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995) (holding that separate proceeding is to be filed in court where conviction resulted). But see *State v. Oliver*, 230 Neb. 864, 876, 434 N.W.2d 293, 301 (1989), where Justice Shanahan's dissent asks, "What is the 'separate proceeding' available to set aside the prior plea-based conviction?" See, also, *State v. Crane*, 240 Neb. 32, 480 N.W.2d 401 (1992) (Shanahan, J., dissenting). Nonetheless, there is enough clarity about the nature of "separate proceedings" to enable us to draw one fundamental proposition, which is that if "separate proceedings" are to be separate proceedings, as the Supreme Court reaffirmed in *State v. LeGrand*, then any attack upon the result of the separate proceeding must come via an appeal from the separate proceeding result. If this is not the rule, then the notion of

"separateness" becomes merely a fiction, and a procedural morass inevitably results. Accordingly, for the sake of procedural uniformity and clarity, we hold that a party may not attack a separate proceeding decision except by timely direct appeal in *that* case. If the final ruling from a separate proceeding is offered in evidence before a trial court dealing with an enhancement issue or, as in this case, when the prior conviction is an element of the offense, the separate proceeding decision cannot be attacked or "appealed" in the trial court. To hold otherwise would result in a "collateral attack" upon a "collateral attack."

The State's final argument is that proof of the prior conviction by the county court documents, exhibit 3, was not necessary because when arrested, Lee admitted to the arresting officer that he was driving on a "suspended" license, and the officer so testified without objection in the trial of this case. We agree that this was the testimony, but we reach a different conclusion because there are a number of reasons for suspension or revocation of one's driver's license under Nebraska law, including accumulation of points, Neb. Rev. Stat. § 60-4,183 (Reissue 1993), and lack of financial responsibility, Neb. Rev. Stat. § 60-524 (Reissue 1993), to name two. The charge here requires proof of revocation for a particular reason, i.e., DUI, third offense. The officer's testimony did not provide any information as to the specific basis for the "suspension" when Lee made his admission to him, and thus it was not sufficient proof of this element of the crime. This contrasts with *State v. Ristau*, 245 Neb. 52, 511 N.W.2d 83 (1994), which involved an admission by the defendant that he had the prior conviction as alleged in the complaint. In *Ristau*, proof by a formal record of a conviction was found to be unnecessary when properly waived. This case is obviously different because the admission here is simply to the fact of suspension, not the specific grounds therefor. The specific reasons for the suspension constitute an element of the crime which the State must prove, and the police officer's testimony is patently insufficient for this purpose.

CONCLUSION

For the reasons set forth herein, the district court erred in admitting the prior conviction, although its error was solely based on its reliance upon a then-unchanged published opinion of this court, for which we obviously cannot fault the district court. However, the Supreme Court's decision in *State v. LeGrand* dictates that we now reverse the district court's judgment and vacate the conviction.

REVERSED AND VACATED.

HANNON, Judge, dissenting.

I am convinced that for two separate but related reasons exhibit 1 is not sufficient to prove that the previous conviction was invalidated in a separate proceeding; therefore, I must dissent. First, the words of the document relied upon by Lee to prove that the prior conviction was vacated do not state in substance that the prior conviction was invalidated. That order contains a finding that Lee was not informed of his right to a trial by jury and then states, "[T]he Court does not believe the May 17[,] 1991 plea may be used for purposes of enhancement." This cannot be interpreted as an order setting aside the conviction. In *State v. LeGrand*, 249 Neb. 1, 11, 541 N.W.2d 380, 387 (1995), the Supreme Court states: "We affirm the denial of LeGrand's petitions *to invalidate the prior convictions* . . . ." (Emphasis supplied.) In my view, exhibit 1 does not prove that the prior conviction was invalidated, as I believe *LeGrand* and its predecessors require.

Second, I do not believe that an order of a court, at least one of limited jurisdiction, unaccompanied by the documentation necessary to show how that court's jurisdiction was invoked, is adequate proof that the order is valid. The evidence necessary to prove in one court that a certain judgment has been rendered or action taken in some other court is not clearly delineated in the cases. 29A Am. Jur. 2d *Evidence* § 1339 at 738 (1994) states:

> A copy of a part of a judicial record is generally inadmissible in evidence; a copy of a judicial record offered in evidence must contain the whole record. A judgment entry alone, unaccompanied by any other part of the record of such judgment or any sufficient explanation

> of its absence, when offered in evidence for a purpose other than to show the fact of its rendition, is inadmissible if an objection is properly made . . . .

In 7 John H. Wigmore, Evidence in Trials at Common Law § 2110 at 649 (James H. Chadbourn rev. 1978), the issue of the necessary contents of a judicial record as evidence is discussed, and in summary the author concludes that "the scope of the copy will depend upon the *nature of the issue in hand*. No fixed rule can be laid down; the substantive law applicable to the case in hand will have an important bearing." (Emphasis in original.) To paraphrase Professor Wigmore, I think that the contents of the certified document necessary to prove a particular judicial action depend upon the judicial action sought to be proved. For instance, the Supreme Court held that proof of a prior conviction is properly made by offering into evidence the complaint or information, the judgment rendered on the verdict or plea of guilty, and evidence that the judgment became final. *Danielson v. State*, 155 Neb. 890, 54 N.W.2d 56 (1952). In my opinion, in order to prove in one court that a conviction of another court has been invalidated, analogous certified documentation must be offered, that is, a copy of the petition to set aside the conviction and documents showing that appropriate notice was given to the State and that a hearing was held, in addition to an intelligible order vacating the previous conviction. The document relied upon by Lee met none of these requirements.

STATE OF NEBRASKA, APPELLEE, v. RICKY G. HINGST, APPELLANT.

550 N.W.2d 686

Filed June 18, 1996. No. A-95-1120.

1. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court.
2. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
3. **Trial: Evidence: Appeal and Error.** The erroneous admission of evidence in a bench trial of a law action, including a criminal case tried without a jury, is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings. A reversal is warranted in such a case only where the record shows that the trial court actually made a factual determination or otherwise resolved a factual issue or question through the use of erroneously admitted evidence.
4. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
5. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict. The inquiry is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial surely was not attributable to the error.
6. **Convictions: Evidence: Appeal and Error.** If it appears the evidence is sufficient to support a conviction, the cause may be remanded to the district court for further proceedings; if the evidence is not sufficient, the cause must be dismissed.

Appeal from the District Court for Pierce County, RICHARD P. GARDEN, Judge, on appeal thereto from the County Court for Pierce County, RICHARD W. KREPELA, Judge. Judgment of District Court reversed, and cause remanded for a new trial.

Mark A. Johnson and Dennis W. Morland, of Johnson & Morland, P.C., for appellant.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

HANNON, SIEVERS, and MUES, Judges.

MUES, Judge.

Ricky G. Hingst appeals his conviction of driving while under the influence of intoxicating liquor (DUI), second offense, by the county court for Pierce County as affirmed by the district court for Pierce County. For the reasons recited below, we reverse.

STATEMENT OF FACTS

On October 26, 1994, at approximately 3:30 a.m., Officer Matthew Roskens of the Pierce Police Department approached the vehicle of Ricky G. Hingst. The officer had observed Hingst's vehicle as it drove out of Pierce on Highway 13. According to the officer, the vehicle appeared to cross both the center line and the shoulder line of the road. When the officer approached the car, Hingst, who had been driving the car, explained that the car had suddenly accelerated and was suffering from mechanical problems. The officer testified that at that time he could detect the odor of an alcoholic beverage on Hingst's breath, and Hingst was speaking quickly. The officer also found a partial six-pack of beer in Hingst's car including two open bottles. Officer Roskens called his dispatcher and requested assistance.

While waiting for the other officer to arrive, Hingst was allowed to work on his car, which he could not get started. Hingst, who was a mechanic, told the officer that he believed the fuel pump had malfunctioned. During his attempts to get the car started, Hingst sucked gasoline into his mouth and then spit it out.

At approximately 4 a.m., Pierce County Deputy Sheriff Scott Blair arrived at the scene. Deputy Blair testified that he detected the odor of an alcoholic beverage on Hingst's breath and that Hingst's eyes were bloodshot. Deputy Blair requested that Hingst perform three field sobriety tests. Hingst failed twice to correctly recite the alphabet. In addition, when requested to count backward from 100 to 79, Hingst continued to count backward to 59. The third test, a finger dexterity test, Hingst performed correctly. However, Hingst failed to follow the deputy's directions in that he began the test before being told to begin. The deputy noted that Hingst's speech was slurred at this time. Hingst also admitted to consuming 2½ beers. Deputy Blair testified that it was his opinion that Hingst was under the influence of alcohol at that time.

Officer Roskens eventually arrested Hingst. Hingst was then transported to the Pierce County sheriff's office, where Deputy Blair read Hingst the "Administrative License Revocation Advisement Post Arrest" form, advising him of the consequences of taking and failing or refusing to take a breath test. Hingst consented to a breath test and signed the form. Deputy Blair administered the breath test, which indicated that Hingst had an alcohol concentration in his breath of .129 of a gram of alcohol per 210 liters of breath. Hingst was charged with DUI, second offense, a Class W misdemeanor pursuant to Neb. Rev. Stat. § 60-6,196 (Reissue 1993).

On March 15, 1995, jury selection was conducted, and the trial before the jury was held on March 22. During the trial, the Administrative License Revocation Advisement Post Arrest form which had been read to and signed by Hingst was offered and received into evidence without objection, as well as testimony regarding the perception of one of the officers that Hingst was intoxicated at the time of the stop. Following the trial, the jury entered a verdict of guilty.

On April 26, 1995, an enhancement hearing was held. At the hearing, the county court sentenced Hingst to 30 days in jail, ordered him to pay a $500 fine, and revoked his license for 1 year. Hingst appealed this decision to the district court for Pierce County, which affirmed the conviction and sentence. This appeal timely followed.

ASSIGNMENTS OF ERROR

On appeal, Hingst asserts that the district court erred by (1) failing to find that the county court erred in overruling Hingst's motion to dismiss based upon double jeopardy; (2) failing to find plain error in that Hingst was not properly advised of the consequences of submitting to a breath test; and (3) failing to find plain error in that the jury selection for his trial was conducted on March 15, 1995, and the jury trial was not held until March 22.

STANDARD OF REVIEW

[1] Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court. *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996); *State v. Lynch*, 248 Neb. 234, 533 N.W.2d 905 (1995).

[2] Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *In re Estate of Morse*, 248 Neb. 896, 540 N.W.2d 131 (1995).

ANALYSIS

We will first address Hingst's assertion that the district court erred by failing to find plain error in the admission of the Intoxilyzer test results into evidence, since the advisory form read to Hingst prior to the chemical test did not properly advise Hingst of the consequences of submitting to the test. Hingst asserts that the advisory form read to him prior to his submitting to the Intoxilyzer test was inadequate because it was the same advisement ruled inadequate in *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995). Although Hingst failed to object to the admission of the advisory form or the Intoxilyzer results at trial, he nonetheless argues that we should find that the admission of the Intoxilyzer results was plain error.

In *Smith v. State*, the Nebraska Supreme Court interpreted Neb. Rev. Stat. § 60-6,197(10) (Reissue 1993), which provides that an arrestee "shall be advised of . . . the consequences if he or she submits to such test and the test discloses the presence of a concentration of alcohol in violation of [§ 60-6,196(1)]." The court found that the "Legislature intended drivers to be advised of the natural and direct legal consequences flowing from submitting to a chemical test and failing it." *Id.* at 365, 535 N.W.2d at 697-98.

In *Smith v. State*, the court held that while the advisory form partially complied with § 60-6,197's mandate requiring that drivers be advised of the consequences of failing a chemical test, it did not inform an arrestee of all of the administrative consequences of taking and failing the test. Among the consequences that the advisory form failed to inform the arrestee of were that the results of a valid chemical test could be competent evidence in any prosecution involving a DUI offense and that other, more serious penalties could result from a test disclosing an illegal concentration of drugs or alcohol. As a result, the court concluded that the advisory form was inadequate for purposes of the administrative license revocation statutes. See Neb. Rev. Stat. § 60-6,205(6)(c) (Reissue 1993).

While the Nebraska Supreme Court has not yet addressed this issue in a criminal context, it has reaffirmed the *Smith v. State* doctrine in *Perrine v. State*, 249 Neb. 518, 544 N.W.2d 364 (1996), and *Biddlecome v. Conrad*, 249 Neb. 282, 543 N.W.2d 170 (1996). In both *Perrine* and *Biddlecome*, the Nebraska Supreme Court held that the inadequacy of the advisory forms used, which were identical or similar to that in *Smith v. State*, constituted plain error. Specifically, the court in *Perrine* and *Biddlecome* reasoned that because the Legislature made the advisement of consequences mandatory and the advisory form was inadequate, there was no authority to revoke the arrestee's license pursuant to the administrative license revocation statutes.

This court, however, has addressed this issue in a criminal context in *State v. McGurk*, 95 NCA No. 45, case No. A-95-162 (not designated for permanent publication). In *McGurk*, we found that the advisement read to the arrestee was inadequate under the holding in *Smith v. State, supra*, and we therefore reversed his conviction for refusal to submit to a breath test.

We have also been presented with this issue in cases where the arrestee has appealed a conviction for DUI. See, *State v. Smith, ante* p. 66, 537 N.W.2d 539 (1995); *State v. Hatcliff*, 95 NCA No. 45, case No. A-95-198 (not designated for permanent publication). In *State v. Smith*, we addressed the criminal appeal of the same arrestee as in *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995). This court, however, did not address the issue of whether the trial court erred by receiving into evidence the results of a chemical breath test. Instead, we held that because the trial was a bench trial and there was other admissible evidence to sustain Smith's conviction of the crime charged without the test results, the conviction should be affirmed.

[3] In *State v. Hatcliff, supra*, also an appeal from a conviction for DUI, this court concluded that the results of a blood test which were preceded by an inadequate advisement were erroneously admitted into evidence in light of the Nebraska Supreme Court's ruling in *Smith v. State, supra*. However, we held that because the evidence had been admitted in a bench trial, as was the case in *State v. Smith, supra*, the error did not result in an automatic reversal. Specifically, this court relied on *State v. Chambers*, 241 Neb. 66, 70, 486 N.W.2d 481, 484 (1992), which held that "the erroneous admission of evidence in a bench trial of a law action, including a criminal case tried without a jury, is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings." A reversal is warranted in such a case only where the record shows that the trial court actually made a factual determination or otherwise resolved a factual issue or question through the use of erroneously admitted evidence. *Id.*

In light of the foregoing analysis, we must conclude that the advisory form read to Hingst, which was identical to or substantially similar to the form used in *Smith v. State, supra*, and its progeny, was inadequate. As in *Smith v. State*, the form failed to detail all of the consequences for taking and failing the chemical test, including that the results of such a test can be used as competent evidence in a proceeding such as this one or that other, more serious penalties may result. Furthermore, under the recent holdings in *Perrine v. State, supra*, and *Biddlecome v. Conrad, supra*, the inadequacy of the advisory form is such as to constitute plain error. Therefore, we conclude that the district court erred in failing to find that the results of the chemical test should have been excluded from evidence.

[4,5] The State argues that regardless of the form, there is other relevant evidence admitted which is sufficient to sustain Hingst's conviction for DUI. See, *State v. Smith, supra*; *State v. Hatcliff, supra*. However, unlike in *State v. Smith* or *State v. Hatcliff*, Hingst was convicted following a jury trial, not a bench trial. In a jury trial of a criminal case, 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. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994); *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994); *State v. Hughes*, 244 Neb. 810, 510 N.W.2d 33 (1993). As was stated in *State v. Carter*, harmless error review looks to the basis on which the jury actually rested its verdict. The inquiry is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial surely was not attributable to the error. *Id.*

There was arguably other evidence which indicated that Hingst was intoxicated at the time of his arrest, including testimony that Hingst's eyes were bloodshot, that he smelled of an alcoholic beverage, that he spoke rapidly, and that his speech was slurred. However, the evidence is not such that one can say that the guilty verdict was surely unattributable to the chemical test. In fact, a large portion of the State's testimony was centered on the reliability of chemical test procedures. Moreover, the very definition of plain error is such that it precludes us from finding that the error was harmless beyond a reasonable doubt.

> Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which *prejudicially affects a substantial right* of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

(Emphasis supplied.) *In re Estate of Morse*, 248 Neb. 896, 897, 540 N.W.2d 131, 132 (1995). Therefore, we find that the admission into evidence of the chemical test results was prejudicial to Hingst.

[6] Although we believe that the chemical test results were erroneously admitted into evidence and that this warrants a reversal, it is necessary for a complete resolution of this appeal that we examine the sufficiency of the evidence to support Hingst's conviction. See, e.g., *State v. Jimenez*, 3 Neb. App. 421, 530 N.W.2d 257 (1995), *modified* 248 Neb. 255, 533 N.W.2d 913. The court in *State v. Lee*, 227 Neb. 277, 283, 417

N.W.2d 26, 30 (1987), instructed that "[i]f it appears the evidence is sufficient to support the convictions, the cause may be remanded to the district court for further proceedings; if the evidence is not sufficient . . . the cause must be dismissed." Based upon the facts previously cited, and construing those facts in favor of the State, see *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994), we find that there is sufficient evidence to support the conviction. For the foregoing reasons, we reverse the judgment of conviction for DUI and remand the cause for a new trial.

Accordingly, we will not fully address Hingst's other assignments of error. We will note, however, that the Supreme Court's decision in *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996), effectively rendered Hingst's double jeopardy claim meritless. As to Hingst's claimed error in jury selection, such is unlikely to recur upon retrial provided there is adherence to the principles of *State v. Cisneros*, 248 Neb. 372, 535 N.W.2d 703 (1995), and L.B. 1249, Ninety-fourth Legislature, Second Session, both of which postdated the first trial.

CONCLUSION

Because we find that there was plain error regarding the adequacy of the advisory form read to Hingst and further that this error was not harmless beyond a reasonable doubt, we reverse the judgment of the district court with directions that the judgment of conviction of the county court be reversed and the matter be remanded to county court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, v. DARRELL JOHNSON, APPELLANT.

551 N.W.2d 742

Filed June 25, 1996. No. A-95-444.

1. **Postconviction: Proof: Appeal and Error.** One seeking postconviction relief has the burden of establishing the basis for such relief, and the findings of the postconviction court will not be disturbed unless they are clearly wrong.
2. **Postconviction: Effectiveness of Counsel: Proof.** In a postconviction action seeking relief on the basis of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that such deficient performance prejudiced the defendant.
3. **Criminal Law: Mental Competency.** Under the *M'Naghten* rule, a defendant is sane if he has (1) the capacity to understand the nature of the act alleged to be criminal and (2) the ability to distinguish between right and wrong with respect to such act.
4. **Insanity: Proof: Time.** For an insanity defense, the showing regarding the mental state of the accused must relate to the time of the acts charged.
5. **Mental Competency: Trial: Effectiveness of Counsel.** Attorneys have a duty, when a question of a client's competency arises, to ensure that the client is capable of making a rational choice among rationally understood probabilities. However, the duty is fulfilled if the defendant's attorney has the defendant evaluated for competency and the results reveal that the defendant is competent to stand trial.
6. ____: ____: ____. If a mental examination reveals that the defendant is incompetent to stand trial, or that there is a question of competency, and the defendant's attorney does not bring the issue to the attention of the court, the defendant has not been afforded effective counsel.
7. **Mental Competency: Attorney and Client: Presumptions.** A presumptively incompetent defendant cannot be entrusted with the responsibility of dictating counsel's tactics at a competency hearing.
8. **Convictions: Mental Competency: Due Process.** The conviction of an accused person while he or she is legally incompetent violates the constitutional guarantee of substantive due process.
9. **Mental Competency: Trial: Waiver.** A defendant does not waive the defense of his competency to stand trial by failing to demand a competency hearing.
10. **Mental Competency: Pleas: Trial.** A defendant is competent to plead or stand trial if he has the present capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.
11. ____: ____: ____. The test of mental capacity to plead is the same as that required to stand trial.
12. ____: ____: ____. If facts are brought to the attention of the court which raise doubts as to the sanity of the defendant, the question of competency should be determined at that time.
13. **Mental Competency: Trial.** Competency to stand trial is a factual determination, and the means to be employed to determine competency are discretionary with the district court.

14. **Mental Competency: Appeal and Error.** If there is sufficient evidence in the record to support the finding of competency, it will not be disturbed on appeal.
15. **Mental Competency: Trial: Due Process.** Due process requires that a hearing be held whenever there is evidence that raises a sufficient doubt about the mental competency of an accused to stand trial.
16. **Mental Competency: Expert Witnesses.** A medical opinion on the mental competency of an accused is usually persuasive evidence on the question of whether a sufficient doubt exists.
17. **Due Process: Notice.** Due process requires that notice not only must be given to inform a party of the pendency of an action, but also must be sufficient to provide a person with a meaningful opportunity to be heard, and at the least, must inform a party regarding the nature of the upcoming proceeding.
18. **Trial: Appeal and Error.** Plain error is when the trial court's ruling, action, or inaction is clearly untenable and unfairly deprives the defendant of a substantial right and a just result.

Appeal from the District Court for Polk County: EVERETT O. INBODY, Judge. Reversed and remanded for a new trial.

Thomas R. Lamb and Amie C. Martinez, of Anderson, Creager & Wittstruck, P.C., for appellant.

Don Stenberg, Attorney General, and Barry Waid for appellee.

HANNON, SIEVERS, and MUES, Judges.

SIEVERS, Judge.

Darrell Johnson appeals from the district court's denial of postconviction relief after holding an evidentiary hearing on Johnson's motion for relief. Johnson was charged with two counts of committing incest with his daughter, in violation of Neb. Rev. Stat. § 28-703 (Reissue 1995). As part of a plea bargain, Johnson pled guilty to one count. During the plea hearing, Johnson's attorney put into evidence a copy of a psychiatrist's report which said that Johnson was incompetent to stand trial; however, Johnson's attorney did not file a motion for or otherwise request a hearing on competency, and the district court did not hold a separate hearing sua sponte. Johnson alleges his trial counsel was ineffective because he did not raise the issue of competency or insanity with the court.

STATEMENT OF FACTS

Darrell Johnson was charged with having sexual intercourse with his daughter in the family home between July 1 and August

31, 1991. On March 12, 1993, Johnson was charged with two counts of incest. Trial counsel was retained for Johnson. Johnson was arraigned on March 16, 1993, and the court entered not guilty pleas on his behalf.

In his testimony during the postconviction relief hearing, Johnson's trial counsel stated that he discussed the issue of Johnson's competency several times with Johnson and his parents. Johnson's attorney stated that Johnson did not want to raise the issue. The attorney's testimony was that

> [w]e kept proceeding, and we would go from one meeting to the next and Mr. Johnson, Darrell, would kind of indicate that maybe he didn't understand what I said the first time. So we would repeat it. Eventually, it came down to asking Dr. Gutnik, Bruce Gutnik, in Omaha to perform an evaluation which included a determination with regard to competency to stand trial.

Dr. Bruce Gutnik examined Johnson on August 16, 1993, approximately 15 days before Johnson's plea hearing, and authored a written report dated August 26, 1993. Dr. Gutnik diagnosed Johnson as suffering from posttraumatic stress disorder and dissociative disorder, with associated paranoia. Dr. Gutnik noted that Johnson stated that his actions in his past were "as if someone else took his place. At times he speaks about himself in the third person stating that he did this or he did that." Johnson, born in 1948, reported to Dr. Gutnik that he was supposed to be 23 years old and did not understand how he got to 1993. Johnson was under the belief that he had been in Vietnam and was hypnotized by the Army, and that as a result he " 'lost 20 some years.' " Dr. Gutnik stated that Johnson was not "feigning his symptoms and in my opinion, with reasonable medical certainty, his disorders are real." Moreover, Dr. Gutnik stated that "Mr. Johnson has a questionable appreciation for his presents [sic] in time, place, and with regard to others. He still believes that it is somewhere between 1970 and August of 1972."

While Dr. Gutnik found that Johnson understood that he had been charged with a criminal offense, that a prosecutor would attempt to convict him, and that his attorney would serve to defend him, and found that Johnson would be able to give and receive advice and to decide upon a plea and testify, Dr. Gutnik stated that Johnson would "do so all based on what others have told him to do and would not be able to make such decisions on his own." Dr. Gutnik stated, "I question his ability to confer coherently with appreciation of the proceedings." Dr. Gutnik's report, which was offered and received in evidence at the plea hearing, concludes by stating that

> Mr. Johnson's symptoms at this time have reached the level of psychosis, in which he has lost touch with reality. His paranoid thinking, and belief that he is still in the Army, make it difficult for me to understand how he can reasonably be expected to help defend himself against the charges that have been filed. Based on the above, in my opinion, with reasonable medical certainty, Mr. Johnson is not at this time competent to stand trial.

Johnson's trial attorney testified at the evidentiary hearing that he noticed that Johnson talked about himself as if he were two persons and seemed to have dissociative problems regarding time. However, despite Dr. Gutnik's report and his own observations, Johnson's attorney stated that he believed Johnson was competent to stand trial because it was his belief that Johnson had an understanding of the procedure and the nature of the procedure. His attorney testified that while Johnson did not want to raise the issue of competency, the attorney nonetheless told Johnson that he thought he had an obligation to call the court's attention to the issue of competency.

During the plea hearing, the court noted that Johnson's attorney had raised the issue of competency. The court then asked Johnson how old he was, what grade he had completed, whether he could read and write, whether he could understand what the judge was saying, and whether he was on drugs. Johnson answered appropriately. The court then found that Johnson had freely, voluntarily, knowingly, and intelligently withdrawn his former plea of not guilty. A factual recitation of the charges was made, and the court advised Johnson of his *Boykin* rights, which Johnson stated he understood. The following colloquy then occurred on the record between Johnson and his attorney:

[Attorney]: . . . We discussed also your competency to stand trial?

[Johnson]: Right.

[Attorney]: And you believe that you were competent to stand trial and competent to enter this plea today?

[Johnson]: That is correct.

The court then asked Johnson whether he committed the offense contained in the information. The following colloquy then occurred:

[Johnson]: I wasn't here — I don't know. I do believe that it happened, yes.

THE COURT: I'm sorry. I can't hear you.

[Johnson]: I do believe it happened.

THE COURT: Okay, and you believe you did it?

[Johnson]: Well, I think Darrell Johnson did it, yes.

THE COURT: And you're Darrell Johnson.

[Johnson]: I'm Darrell Johnson.

THE COURT: And you did it?

[Johnson]: Well, I wasn't here, you know, I can't say.

THE COURT: You don't have any independent recollection of it taking place; is that correct?

[Johnson]: That is correct.

. . . .

THE COURT: And even though you don't have an independent recollection of it taking place, you're willing to proceed with a guilty plea at this time based upon the information they have told you?

[Johnson]: Yes.

The court then found that Johnson had the capacity to understand the nature and the object of the proceedings against him, that he was able to "comprehend his own position in reference to the proceedings against him," and that he was able to make a rational defense and decision on how he should proceed. The court further found, beyond a reasonable doubt, that Johnson understood his rights and freely and voluntarily waived his rights and entered a plea.

On September 21, 1993, at Johnson's sentencing hearing, his attorney requested that Johnson receive a diagnostic evaluation prior to sentencing. Johnson's attorney noted in support of this request that the presentence investigation report contained "even more evidence of the defendant's actual psychiatric or mental problems." Presumably, counsel was referring to such documents in the presentence investigation report as a letter from Sally Herrold, a certified alcohol and drug abuse counselor with Mid-East Nebraska Mental Health Clinic, Inc., who stated in a March 3, 1993, letter that Johnson, a client of the agency, had received a psychiatric assessment by Dr. Charles Graz, "who agreed with the diagnosis of Psychogenic Amnesia from Lincoln Regional Center. In addition, Dr. Graz suggested that Darrell may be experiencing post traumatic stress disorder."

As a result of the evaluation ordered by the court prior to sentencing, an evaluation report from the Department of Correctional Services was received by the court, which contained the following statements: "As one might guess, the conversation with Mr. Johnson seems somewhat disjointed and tangential at times with his explanations of questions being very lengthily involved and sometimes off the subject at hand. This interviewer would suggest that Mr. Johnson still is a confused and potentially dangerous person."

Another sentencing hearing was held on December 21, 1993. At that time, Johnson's attorney put Johnson on the stand and asked him whether he thought he had been competent to enter a plea. Johnson stated yes. Johnson then made a lengthy, obviously disjointed, and mostly nonsensical statement in which he talked about joining the Army and being hypnotized, being sent to Vietnam to look for POW's, and shooting two prisoners in order to help them. Johnson said he was brought out of hypnotism in 1992. Johnson's attorney asked Johnson whether he doubted the truth of his daughters' allegations, and Johnson stated,

> I have conversations in my head between them and their father. Their father he didn't know anything about it because it was a trauma for him.
>
> . . . .
>
> . . . The Darrell that they know is in my body and my heart and out of — not of my mind. Their father had no memory because they took it from him so he could have a life.

The court sentenced Johnson to 48 to 96 months' incarceration. Johnson did not file a direct appeal. Johnson filed a postconviction relief motion before the district court, which granted an evidentiary hearing. At the conclusion of that hearing, the district court denied Johnson postconviction relief. Johnson appeals.

ASSIGNMENTS OF ERROR

Johnson alleges that the trial court erred when it did not determine that his trial counsel failed to inform him of available defenses and did not properly advise Johnson regarding his competency to stand trial.

STANDARD OF REVIEW

[1] One seeking postconviction relief has the burden of establishing the basis for such relief, and the findings of the postconviction court will not be disturbed unless they are clearly wrong. *State v. Rehbein*, 235 Neb. 536, 455 N.W.2d 821 (1990).

ANALYSIS

Insanity Defense.

[2] In a postconviction action seeking relief on the basis of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that such deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To determine the first prong of the *Strickland* test, the court must use the standard of whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. The second prong is satisfied if the defendant shows how he was prejudiced in the defense of his case as a result of his attorney's actions or inactions. *State v. Rehbein, supra*. In order to satisfy the prejudice prong, the defendant must show that there is a reasonable probability that but for his attorney's actions or inactions, the defendant would not have pled guilty, but would have insisted on going to trial. *Id.* If it is easier to analyze the matter from the standpoint of the "prejudice prong" rather than determining whether the attorney's actions were deficient, that

course should be followed. *State v. Schoonmaker*, 249 Neb. 330, 543 N.W.2d 194 (1996).

[3,4] Johnson alleges that his trial counsel was ineffective in failing to pursue an insanity defense and in failing to explain to Johnson his options regarding an insanity defense. However, Johnson has not shown that such a defense would have been available to him. Setting aside for the moment the issue of Johnson's potential incompetency to stand trial, Johnson has made no showing that at the time of the crime, he was insane, and that he is therefore entitled to an insanity defense. Johnson was institutionalized at the Lincoln Regional Center a little over a year after the crime was committed. However, the record only hints at why Johnson was committed. Dr. Gutnik's evaluation that Johnson was incompetent to stand trial did not take place until 2 years after the crime was committed. In any event, the defense of insanity has a different focus than whether a defendant is incompetent to stand trial. Under the *M'Naghten* rule, a defendant is sane if he has (1) the capacity to understand the nature of the act alleged to be criminal and (2) the ability to distinguish between right and wrong with respect to such act. *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993). And, the showing regarding the mental state of the accused must relate to the time of the acts charged. *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1982). Johnson has adduced no evidence whatsoever that he was insane at the time of the crime. Therefore, he cannot show that an insanity defense would have been available to him. As a result, he has failed to show how he was prejudiced by his attorney's alleged ineffectiveness in failing to discuss an insanity defense with him prior to entry of his plea. Therefore, this assignment of error fails.

Competency to Stand Trial.

Johnson alleges that his trial counsel was ineffective in failing to advise Johnson of the availability of the "defense" that he was not competent to stand trial. Neb. Rev. Stat. § 29-1823 (Reissue 1995) provides, in relevant part:

> If at any time prior to trial it appears that the accused has become mentally incompetent to stand trial, such disability may be called to the attention of the district court

> by the county attorney, by the accused, or any person for the accused. The judge of the district court of the county wherein the accused is to be tried shall have the authority to determine whether or not the accused is competent to stand trial. The district judge may also cause such medical, psychiatric or psychological examination of the accused to be made as he deems warranted and hold such hearing as he deems necessary. Should he determine after a hearing that the accused is mentally incompetent to stand trial he shall order the accused to be committed to a state hospital for the mentally ill until such time as the disability may be removed.

[5] Attorneys do have a duty, when a question of a client's competency arises, to ensure that the client is "capable of making a rational choice 'among rationally understood probabilities.' " *Galowski v. Berge*, 78 F.3d 1176, 1180 (7th Cir. 1996) (quoting *Stewart v. Peters*, 958 F.2d 1379 (7th Cir. 1992). However, the duty is fulfilled if the defendant's attorney has the defendant evaluated for competency and the results reveal that the defendant is competent to stand trial. *Galowski v. Berge, supra*; *Miles v. Dorsey*, 61 F.3d 1459 (10th Cir. 1995); *LaRette v. Delo*, 44 F.3d 681 (8th Cir. 1995).

[6] If, however, the examination reveals that the defendant is incompetent, or that there is a question of competency, and the defendant's attorney does not bring the issue to the attention of the court, the defendant has not been afforded effective counsel. *Hull v. Freeman*, 932 F.2d 159 (3d Cir. 1991). In *Hull*, the defendant at a preliminary hearing was found incompetent to stand trial and was committed to a mental hospital. Four years later, Hull was subjected to another competency hearing, during which only the prosecution offered evidence of Hull's competency. Hull's attorney neither cross-examined the prosecution's psychiatrist nor presented witnesses on his client's behalf, notwithstanding the fact that Hull's attending psychiatrists at the mental hospital had recently found Hull to be incompetent to stand trial.

[7] Hull's attorney testified at the postconviction relief hearing that he did not present evidence or cross-examine the prosecution's witness because he believed Hull to be competent

and Hull himself had expressed a desire to be found competent. The court found the attorney's representation to be ineffective.

> First of all, few lawyers possess even a rudimentary understanding of psychiatry. They therefore are wholly unqualified to judge the competency of their clients. . . .
>
> Trial counsel's second explanation, Hull's professed desire to be declared competent, also can be dismissed as illegitimate. . . .
>
> . . . "Fundamental to our adversary system of justice, and perhaps especially of criminal justice, is the prohibition against subjecting to trial a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." [Citation omitted.] A presumptively incompetent defendant thus cannot be entrusted with the responsibility of dictating counsel's tactics at a competency hearing.

Id. at 168-69. See, also, *Bouchillon v. Collins*, 907 F.2d 589 (5th Cir. 1990) (counsel's decision not to investigate client competency held unreasonable because counsel knew defendant had mental problems and had been in mental institution, and defendant was diagnosed with posttraumatic stress disorder); *Wood v. Zahradnick*, 578 F.2d 980 (4th Cir. 1978) (counsel's failure to investigate incompetency unreasonable because defendant committed bizarre crime, told counsel he was using heroin and moonshine, and had no memory of act).

Johnson's trial counsel testified (1) that he felt Johnson was competent, (2) that Johnson himself felt he was competent, and (3) that Johnson did not wish to pursue the competency issue—none of which statements resolve Johnson's claim that his trial counsel did not effectively advise him concerning the matter of his competency to stand trial. If we were to hold that the explanation provided by Johnson's trial counsel answered the allegation, we would be embracing several flawed propositions: (1) that a lawyer is a better judge of competency than a psychiatrist engaged by the lawyer to examine the client's competency, (2) that an incompetent person is competent to waive his right to be free from criminal prosecution during his incompetency, and (3) that an incompetent person's opinion that he or she is competent is conclusive evidence of competency.

The answer, however, to the claim of ineffective counsel is that unlike the attorney in *Hull*, Johnson's trial counsel *did* bring to the court's attention the issue of Johnson's incompetency. He did so by offering Dr. Gutnik's report into evidence for the court's consideration. Because he raised the issue in defiance of his client's wishes, we do not believe more had to be done in this case for the lawyer to be effective. The lawyer does not, in order to be effective, need to always actively *advocate* for a finding of incompetency. A finding of incompetency under § 29-1823 can result in the indefinite commitment of the client—perhaps a good thing for society, but not necessarily what the accused might want, particularly if probation or limited jail time appears possible upon sentencing. Admittedly, counsel may be forced to navigate a tactical tightrope when there is evidence of incompetency, but the client does not wish to pursue the matter. Here, counsel made the trial court aware of the question of Johnson's competency by placing Dr. Gutnik's report into evidence. Because Johnson's counsel placed the report in evidence, the power of the trial court under § 29-1823 to examine competency was triggered. The trial judge here made specific findings that Johnson possessed the attributes of competency, that he understood his rights, and that the plea was made "freely, voluntarily, knowingly and intelligently." It is the adequacy of the court's inquiry into the competency of Johnson which we believe must now be addressed, although as said, the record fails to demonstrate that counsel was ineffective.

Due Process Rights Concerning Competency.

[8,9] The fundamental and long-established principle which dominates this case is that the conviction of an accused person while he or she is legally incompetent violates the constitutional guarantee of substantive due process. *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). Moreover, the U.S. Supreme Court has held that a defendant does not waive the defense of his competency to stand trial by failing to demand a competency hearing. "[I]t is contradictory to argue

that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Id.* at 384. Nebraska statutes recognize this principle, providing that "[a] person who becomes mentally incompetent after the commission of a crime or misdemeanor shall not be tried for the offense during the continuance of the incompetency." Neb. Rev. Stat. § 29-1822 (Reissue 1995).

[10,11] "A defendant is competent to plead or stand trial if he has the present capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense." *State v. Osborn*, 241 Neb. 424, 426, 490 N.W.2d 160, 163 (1992). The test of mental capacity to plead is the same as that required to stand trial. *State v. Quarrels*, 211 Neb. 204, 318 N.W.2d 76 (1982).

[12-14] If facts are brought to the attention of the court which raise doubts as to the sanity of the defendant, the question of competency should be determined at that time. *State v. Bolton*, 210 Neb. 694, 316 N.W.2d 619 (1982). Section 29-1823 provides the district court with the authority to determine competency when such issue is raised, and the district court may "cause such medical, psychiatric or psychological examination of the accused to be made" as the court deems warranted to help aid in the determination of competency. Competency to stand trial is a factual determination, and the means to be employed to determine competency are discretionary with the district court. *State v. Bolton, supra*. If there is sufficient evidence in the record to support the finding of competency, it will not be disturbed on appeal. See *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980). In federal habeas litigation, the U.S. Court of Appeals for the Eighth Circuit has said that "we generally presume that a state court's factual finding of competency is correct." *Griffin v. Lockhart*, 935 F.2d 926, 930 (8th Cir. 1991). However, the court in *Griffin* was quick to point out that the presumption does not apply if the accused did not receive a full, fair, and adequate hearing or was otherwise denied due process.

[15] *Griffin*, consistent with the pronouncements of the U.S. Supreme Court, articulates two fundamental underlying

constitutional principles. The first is that a conviction of a mentally incompetent accused is a violation of substantive due process. *Id.* (citing *Drope v. Missouri*, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966)). The second is that due process requires that a hearing be held whenever there is evidence that raises a sufficient doubt about the mental competency of an accused to stand trial. *Drope v. Missouri, supra*; *Pate v. Robinson, supra*. The Eighth Circuit points out that "[t]he latter principle operates as a safeguard to ensure that the former principle is not violated." *Griffin v. Lockhart*, 935 F.2d at 929.

[16] In *Griffin*, the court held that the trial court erred when it did not hold a hearing on the issue of competency. Under court order, Griffin had been examined by three doctors, who were unable to come to a consensus regarding Griffin's competency to stand trial. In light of the fact that they could not come to a consensus, the court found that there was sufficient doubt raised about Griffin's competency that the trial court should have held a competency hearing. The court noted that in the Eighth Circuit, "a medical opinion on the mental competency of an accused is usually persuasive evidence on the question of whether a sufficient doubt exists." *Id.* at 930. In addition, it rejected the prosecution's contention that because Griffin appeared rational and competent before and during his trial, a competency hearing did not need to be held.

> [Evidence of the defendant's appearance] is irrelevant, for once a doubt about the competency of an accused exists, later behavior " 'cannot be relied upon to dispense with a hearing.' " [Citations omitted.] . . . "While [a defendant's] demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue." . . .

Id. at 931 (quoting *Pate v. Robinson, supra*). Therefore, the court granted Griffin's habeas relief motion. The weakness in relying on the defendant's appearance during trial would seem to apply with equal force to the defendant's appearance during pretrial proceedings.

Although a separate competency hearing was not held in the instant case, and there was no announcement that a "competency hearing" was underway, the trial court apparently intended that the admission of the psychiatrist's report, the questioning of Johnson, the questioning of his counsel, and the court's observations of Johnson were in fact a competency hearing under § 29-1823, albeit done in the context of a hearing to enter a plea. Section 29-1823 does not specify a form of hearing, and the Supreme Court has said that the "means" of determining competency are discretionary with the trial court. *State v. Bolton*, 210 Neb. 694, 316 N.W.2d 619 (1982).

In the case at hand, we do not believe that the result wholly turns on the question of whether a hearing on competency was held, because it is apparent from the record of the plea hearing that competency was considered by the court at that time. Instead, the question we consider is whether the hearing held was sufficient, that is, whether it provided adequate procedural due process in order to protect Johnson's substantive due process right not to be tried for a crime while incompetent. See, *Lagway v. Dallman*, 806 F. Supp. 1322 (N.D. Ohio 1992); *Martin v. Dugger*, 686 F. Supp. 1523 (S.D. Fla. 1988).

Lagway is a federal habeas proceeding and addresses the adequacy of a competency determination made by the state trial court at a pretrial hearing to determine whether the defendant would be allowed to proceed pro se and allow his counsel to withdraw. Entered into evidence at the hearing was a report from a psychologist, who stated that while Lagway had an adequate understanding of courtroom procedures, at times could give relevant answers to questions, and seemed to have adequate insight into his behavior, he was not capable of rational thought and therefore was incompetent to stand trial. At the hearing, the trial judge questioned Lagway "at great length" regarding his competency to stand trial. 806 F. Supp. at 1326. The *Lagway* court noted that "[w]ithout referencing the expert's report, the trial judge reached his own conclusion on the competency issue" and ruled that Lagway was competent to stand trial and could proceed pro se. *Id.* In evidence before the trial court were Lagway's statements, many of which put into question whether Lagway had a grip on reality.

The *Lagway* court concluded that the lengthy colloquy with the trial judge regarding Lagway's competency amounted to a competency hearing. Therefore, the court determined the question was not whether Lagway was deprived of his right to have competency determined, but, rather, that "the fundamental question before the court is the *sufficiency* of the procedures followed in the competency hearing as those procedures are dictated by constitutional protections." *Id.* at 1333. Johnson's appeal presents us with the same issue.

The *Lagway* court noted that the report entered into evidence at the pretrial hearing was not challenged or contradicted by the prosecution or the court, as was true of Dr. Gutnik's report concerning Johnson.

> To the trial judge, apparently, the close of formal submission of evidence was not, however, the close of the truth-seeking process. He himself, an experienced, seasoned and perceptive jurist, engaged in a substantial investigation of his own—so substantial, in fact, that he seems to have ignored the report and made his ruling based upon his own impressions. There is no doubt that the trial judge's impressions raised as a result of his lengthy conversation with petitioner played a highly meaningful part in reaching his decision on the competency issue. Such impressions form a meaningful part in all such decisions. In law, they can not be the *only* basis for such decisions.

Id. at 1337.

The *Lagway* court noted that when the entire competency determination appears to turn not on an examination of an independent report, or even a studied rejection of it, but, rather, upon the trial judge's inquiries, problems arise, because the judge, acting as a diagnostician, is not subject to cross-examination, as an expert witness would be. "The trial judge here substituted his own psychological expertise for that of his court-appointed expert without any testimony concerning [the psychologist's] technical conclusions. The record is devoid of any explanation of how the judge evaluated the report and why he apparently dismissed it as valueless." *Id.* at 1338. The *Lagway* court noted that the trial judge had not made a meaningful inquiry of Lagway's attorney regarding whether Lagway appeared to be capable of making rational decisions.

> [T]o rule on the issue without reference to the report and without hearing from counsel for defendant in some meaningful way precludes even minimal procedural protections. . . . [T]he trial judge foreclosed the essence of the fact-finding process, disregarded without voiced reason the [psychologist's] report, and depended upon his own opinions, gained from his conversations with petitioner, to reach the ultimate decision in question.

Id. at 1338. Given that the trial judge's method of conducting the competency hearing did not meet the standards for procedural due process, the court found that the finding of competency was "entitled to no presumption of correctness." *Id.* at 1339.

[17] Procedural due process also requires notice. *Martin v. Dugger*, 686 F. Supp. 1523 (S.D. Fla. 1988). In *Martin*, the trial judge notified counsel that in 2 days, a hearing would be held regarding whether the defendant was competent to be executed, and that the judge had not yet decided whether the hearing would be an evidentiary one. At the hearing, the judge announced to counsel that he had, in fact, decided the hearing *would* be evidentiary. Martin's counsel protested, since he had had no prior notice, and therefore had not made arrangements for witnesses to appear at the hearing, some of whom lived out of the state. The trial judge received written reports and live testimony from a psychiatrist who testified on behalf of the state. Although the requirements of due process under these circumstances were said to be "less detailed than those required to determine the competency of a defendant to stand trial," the *Martin* court nonetheless found that minimal procedural due process requires that notice be given. *Id.* at 1561. The *Martin* court held that notice not only must be given to inform a party of the pendency of an action, but also must be sufficient to provide a person with a meaningful opportunity to be heard, and at the least, must inform a party regarding the nature of the upcoming proceeding.

In addition, the *Martin* court found that the trial court's rejection of the psychological reports on Martin's mental competency, on the basis that he found them biased and not credible, without the live testimony from the psychiatrists, was "unjust and fundamentally unfair, and, therefore, was not in accord with due process." *Id.* at 1564. Because the trial judge made a determination of credibility of witnesses who did not appear before him, there was a clear violation, because "[n]o determination of credibility is possible 'when the witness comes before the trial fact finder by the reading of a cold transcript.' " *Id.* (quoting *California v. Green*, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) (Brennan, J., dissenting)). Therefore, the *Martin* court determined that the trial court's determination of competency could not be given the presumption of correctness.

It would appear that a competency hearing of sorts was held in the case at hand; however, we believe that the hearing did not comport with fundamental procedural due process. The issue of competency was raised by defense counsel and heard that same day by the trial court, but with no advance notice to Johnson that such an issue would be heard. Given the contents of Dr. Gutnik's report, it appears that the trial court's determination of competency, as in *Lagway v. Dallman*, 806 F. Supp. 1322 (N.D. Ohio 1992), was made principally on the basis of the trial court's colloquy with the defendant. However, the colloquy goes only to Johnson's ability to understand the procedures, not his capability for rational decisionmaking, which is what Dr. Gutnik indicates is lacking. We do not believe that Johnson's assertion that he thought he was competent or his counsel's conclusory and unexplored opinion that his client was competent was sufficient evidence to negate the obvious import of Dr. Gutnik's report. First, an incompetent defendant cannot waive the problems presented by his or her incompetency. Second, when the trial court seeks the opinion of a defendant's counsel regarding his or her client's competency, counsel is placed in a difficult, if not untenable situation. If counsel privately has doubts about competency, but his or her client does not wish to contest competency, how does he or she respond to the court, and what argument should he or she offer on the issue? Counsel certainly cannot be a witness against his or her own client. See Canon 5, DR 5-102, of the Code of

Professional Responsibility. Moreover, although trial judges and lawyers by training and experience are often quite knowledgeable and perceptive about human nature, they nonetheless lack the specialized training and expertise of a psychiatrist. See *Hull v. Freeman*, 932 F.2d 159 (3d Cir. 1991). Without stating in the record why, the trial judge clearly rejected the uncontroverted report of Dr. Gutnik.

The colloquy between the accused and the court in this case may well form "a meaningful part in all such decisions [on competency]. In law, [it] can not be the *only* basis for such decisions." *Lagway v. Dallman*, 806 F. Supp. at 1337. For the reasons discussed, we do not believe that Johnson was afforded a full, fair, and adequate hearing on the issue of his competency. In addition, Johnson was not given notice that the plea hearing would turn into a competency hearing. In sum, we cannot give the trial judge's determination of Johnson's competency the presumption of correctness.

We are further troubled by the continuing and additional evidence before the court of Johnson's incompetency, even after the plea was entered. By the time Johnson reached sentencing, there was even more evidence to raise reasonable doubt about Johnson's incompetency. However, no further inquiry or hearing on competency was held. The statements of the accused at sentencing, as previously detailed herein, at least from the printed word in the bill of exceptions, are not a source of solace that Johnson was competent and solidly tethered to reality at the time he was sentenced, which also brings into question whether he was truly competent to enter a plea. The "trigger" for a competency hearing under Nebraska law has been set forth in *State v. Cortez*, 191 Neb. 800, 218 N.W.2d 217 (1974). The *Cortez* court held:

> If *at any time while criminal proceedings are pending* facts are brought to the attention of the court, either from its own observation or from suggestion of counsel, which raise a doubt as to the sanity of the defendant, the question should be settled before further steps are taken. However, although a hearing on the issue is sometimes said to be obligatory, if a reasonable doubt is raised, the doubt referred to is a doubt arising in the mind of the trial judge,

> as distinguished from uncertainty in the mind of any other person. State v. Anderson, *supra;* State v. Boston, 187 Neb. 388, 191 N. W. 2d 452 (1971); State v. Crenshaw, 189 Neb. 780, 205 N. W. 2d 517 (1973).

(Emphasis supplied.) 191 Neb. at 802, 218 N.W.2d at 219.

Thus, we conclude that further doubt was raised at sentencing. At the time Johnson waived his *Boykin* rights, entered a guilty plea, and was found competent to stand trial by the court, the court had in hand only one piece of evidence of psychological or psychiatric expertise. That was Dr. Gutnik's report, offered by Johnson's counsel, which concluded that Johnson was not then competent to stand trial. At the plea hearing, Johnson's responses to the trial court's inquiry about his rights at times were seemingly appropriate; however, when asked about the crime, he asserted that he was not there and had no independent memory of it.

On September 21, 1993, the day when Johnson was originally scheduled to be sentenced, a request was made by his counsel in light of material in the presentence investigation report that the court order a 90-day diagnostic evaluation of Johnson at the Nebraska Correctional Center. In that request, defense counsel stated to the court that "the presentencing report contains even more evidence of the defendant's actual psychiatric or mental problems, which may indeed be creating the inability to recall the events surrounding the instance with which he is charged." The court ordered Johnson committed to the Department of Correctional Services for a 90-day evaluation prior to sentencing under Neb. Rev. Stat. § 29-2204(2)(a) (Supp. 1993).

The report generated as a result of this evaluation is before us as part of the presentence investigation report, and it was submitted by the Department of Correctional Services to the trial judge. We quote from that report:

> Mr. Johnson has numerous incidents and documentation of prior counseling and therapy intervention. . . . [H]e was diagnosed Axis I as post-traumatic stress disorder and also has had various diagnoses consisting of dissociative disorder, adjustment disorder with mixed emotional and also probable Psychogenetic Ammesic [sic]. . . .

> In this interview, Mr. Johnson comes off as an individual who claims to have been two different people in the same body. He claims that he has been out of contact with society since 1972, when he experienced various traumas and such within the military system. He claims he is not the person who sexually assaulted his daughters . . . . Mr. Johnson believes that he is healthy at present time and should not be required to do prison or mental health time because the person who did those things is now no longer whom [sic] he is. . . . This interviewer would suggest that Mr. Johnson still is a confused and potentially dangerous person.
>
> . . . .
>
> Mr. Johnson would seem to be a person in obvious need of some extremely indepth and lengthy psychological help. . . .
>
> . . . .
>
> . . . [I]t is quite apparent to this interviewer that Mr. Johnson is a very confused and disturbed man at present time.

While not conclusive on the matter of Johnson's competency, this information is not encouraging for a finding of competency, and at the least should have raised further *doubt* in the trial judge's mind about Johnson's competency.

At the sentencing hearing on December 21, 1993, Johnson took the stand, and in response to his attorney's questions, stated that he felt he had been competent to stand trial and was not insane. He was asked if he desired to make a statement to the court and answered in the affirmative. Johnson then made a statement in which he related that he had been inducted into the Army in April 1969, that he went to basic training, that he was sent to the hospital to have his teeth checked and was hypnotized, that a house fell on top of him, and that "ever since then, there is nothing there outside of through my flashbacks . . . . I have to put myself in the dark so I can tell you the things that I do know." Johnson told the court that he was in a unit of nine men,

> [t]here was six black, two Hispanics and myself, and we were designed for long-range reconnaissance. . . . All of

> our training was done under hypnotism, and because of what we were asked to do. . . . We were sent over as long-range reconnaissance groups in search and rescue for POWs. We came across camp, and there were two MIAs by their arms, and they — they wanted help, so I helped them. I gave them help. The only way to help them was to shoot them. They told us that if we had to do something like that — that we were only suppose[d] to say, "God will forgive you." But you'll never forgive yourself. It was that helping ease the pain — it's the only reflection I have with the flashbacks that I have now. Where if I remember something it hurts.
>
> I know . . . that the Johnsons' [sic] are telling the truth. I've said it from the start. I did not doubt what they say happened.
>
> It's a process the Army uses to bring us back so we can heal, because we usually just can't take it, and we end up killing ourselves in the service. Most of the men that are listed as MIAs now were brought home, but it was the ones that we had — we had — we had to relieve their misery. They never — they thought if they brought me back by hypnotism, then I would kill myself so they left me under.

Johnson's attorney then asked him if he understood that there was no evidence he was ever in Vietnam, and Johnson stated: "I know. . . . I understand that." According to the court reporter's description, Johnson was sobbing at this point. When asked about what his daughters were saying, Johnson said that he did not doubt the truth of what they were saying and explained:

> A. . . . I have conversations in my head between them and their father. Their father he didn't know anything about it because it was a trauma for him.
>
> Q. Is that the other Darrell?
>
> A. The Darrell that they know is in my body and my heart and out of — not of my mind. Their father had no memory because they took it from him so he could have a life.

The State cross-examined Johnson, and during this cross-examination, when asked if he had two daughters, he stated: "They are both of ours. . . . Darrell is the one that raised them. I was the one in the dark that could only hear them talk that's why I don't know them."

Having heard these bizarre statements (at least they are bizarre on the printed page when we read them), and having the diagnostic evaluation in hand from which we have quoted, plus Dr. Gutnik's report, we believe that there was "reasonable doubt" raised as to the competency of Johnson on December 21, 1993, when he was to be sentenced, sufficient to require the trial court to hold a competency hearing. We emphasize that we believe such doubt had also been previously raised at the time of the plea hearing by virtue of Dr. Gutnik's report, which triggered the need for a competency hearing. Although a hearing of sorts was held in the context of the plea hearing, that hearing was inadequate to comport with Johnson's procedural due process rights. The situation deteriorated, and was far worse at sentencing. By then, the trial court had before it evidence which compelled the conclusion that there was reasonable doubt about Johnson's competency sufficient to require another competency hearing in order to comport with due process, and one which was full, fair, and adequate. See *State v. Cortez*, 191 Neb. 800, 218 N.W.2d 217 (1974). If this threshold level of "doubt" is reached, "any time while criminal proceedings are pending," the matter must be settled before further steps are taken. *Id.* at 802, 218 N.W.2d at 219. The matter of Johnson's competency was never settled.

In *Silverstein v. Henderson*, 706 F.2d 361 (2d Cir. 1983), the court held that the defendant should be granted habeas corpus relief on the basis that the state trial court did not hold a hearing on competency when the issue of competency was put before it prior to Silverstein's entry of his plea. The court held that Silverstein should be granted relief despite the fact that the lack of a competency hearing was not the subject of Silverstein's direct appeal in the state courts. At trial, neither the court nor Silverstein's counsel had suggested that the conflict in psychiatric opinions be settled at a competency hearing.

Silverstein did not appeal the failure of the court to hold a competency hearing in his direct appeal.

Although the prosecution in *Silverstein* argued that Silverstein was procedurally barred from relief because he had failed to raise the issue of competency on a direct appeal, the federal court held that the "New York courts could not constitutionally apply a procedural default rule to a possibly incompetent defendant." *Id.* at 366. The *Silverstein* court held that under *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966), a defendant cannot be deemed to have waived his rights if he is incompetent, and thus "when the trial court neglects its duty to conduct a hearing on competence, the defendant's failure to object or to take an appeal on the issue will not bar collateral attack." 706 F.2d at 367.

[18] In conclusion, we find that although counsel was not ineffective in failing to advise Johnson about incompetency, and properly brought the matter to the trial court's attention, there is nonetheless plain error in these proceedings because of the trial court's failure to hold a full, fair, and adequate hearing on the issue of Johnson's competency when the court was faced with reasonable doubt regarding Johnson's competency at least twice: at the plea hearing and at sentencing. Plain error is when the trial court's ruling, action, or inaction is clearly untenable and unfairly deprives the defendant of a substantial right and a just result. See *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993). That prosecution is undertaken only of the mentally competent is obviously a substantial right and a hallmark of constitutional due process. See *Pate v. Robinson, supra*. Thus, it seems abundantly clear that it is plain error when the trial court fails to act to protect such a fundamental hallmark of due process. Although Johnson's appellate counsel does not address these actions of the trial court, we find it incumbent upon us to do so under the plain error doctrine.

We now turn to two decisions of the Nebraska Supreme Court which suggest a procedural default in postconviction proceedings when the issue of competency to stand trial was not raised on direct appeal. *State v. Painter*, 229 Neb. 278, 426 N.W.2d 513 (1988), was a postconviction proceeding in which the defendant alleged he was incompetent at the time of the proceeding against him. The court said:

> In any event, we can dispose of any claimed errors as to the court's ruling on the first two issues in the petition by referring to our longstanding rule that a motion for postconviction relief may not be used to obtain review of issues which could have been raised on direct appeal. *State v. Rivers*, 226 Neb. 353, 411 N.W.2d 350 (1987). The questions of coerced confession and the defendant's competence could have been raised on direct appeal and cannot be the basis for postconviction relief.

229 Neb. at 280, 426 N.W.2d at 515. Despite this statement, the Supreme Court did not impose a procedural bar, but instead considered the merits of the trial counsel's decision not to have the defendant examined for competency, and rejected the claim.

In *State v. Rehbein*, 235 Neb. 536, 455 N.W.2d 821 (1990), the defendant in a postconviction proceeding asserted that he had not been competent to enter a plea of guilty. The court reviewed the evidence, including that concerning the defendant's psychiatric treatment and medication, and concluded that the defendant's plea was made knowingly, intelligently, and voluntarily while he was competent to do so. The court's next statement was the following:

> We also hasten to point out that a motion for postconviction relief may not be used to obtain review of issues which could have been raised on direct appeal. *State v. Painter*, 229 Neb. 278, 426 N.W.2d 513 (1988). See, also, *State v. El-Tabech*, 234 Neb. 831, 453 N.W.2d 91 (1990). The question of defendant's competence and whether his plea was coerced by the promises of his counsel could have been raised on direct appeal and cannot be the basis for postconviction relief. See, *State v. Painter, supra*; *State v. Threet*, 231 Neb. 809, 438 N.W.2d 746 (1989).

State v. Rehbein, 235 Neb. at 544–45, 455 N.W.2d at 827. We have already discussed *Painter*. *State v. Threet*, 231 Neb. 809, 438 N.W.2d 746 (1989), although a postconviction case, makes no mention whatsoever that the defendant was asserting either incompetency to stand trial or ineffectiveness of counsel for failing to investigate or raise incompetency.

Additionally, we have examined numerous postconviction cases, and in the following cases, the subject of the defendant's competency to stand trial or enter a plea was raised or, in some instances, the claim was that counsel was ineffective in failing to raise this issue. However, in none of these cases was a procedural bar used to avoid consideration of issues in postconviction proceedings dealing with competency to stand trial or enter a plea. *State v. Lyman*, 241 Neb. 911, 492 N.W.2d 16 (1992); *State v. Marshall*, 233 Neb. 567, 446 N.W.2d 733 (1989); *State v. Tully*, 226 Neb. 651, 413 N.W.2d 910 (1987); *State v. Bradford*, 223 Neb. 908, 395 N.W.2d 495 (1986); *State v. Evans*, 218 Neb. 849, 359 N.W.2d 790 (1984); *State v. Moore*, 217 Neb. 609, 350 N.W.2d 14 (1984); *State v. Beans*, 212 Neb. 31, 321 N.W.2d 72 (1982); *Marteney v. State*, 210 Neb. 172, 313 N.W.2d 449 (1981); *State v. Campbell*, 192 Neb. 629, 223 N.W.2d 662 (1974); *State v. Leadinghorse*, 192 Neb. 485, 222 N.W.2d 573 (1974); *State v. Cortez*, 191 Neb. 800, 218 N.W.2d 217 (1974); *State v. Blackwell*, 191 Neb. 155, 214 N.W.2d 264 (1974); *State v. Crenshaw*, 189 Neb. 780, 205 N.W.2d 517 (1973); *State v. Virgilito*, 187 Neb. 328, 190 N.W.2d 781 (1971). Moreover, despite the language quoted from *Painter* and *Rehbein*, the court there considered the issues relating to competency and did not impose any procedural bar.

The only case even approaching the actual use of a procedural bar for competency issues as suggested in *Painter* and *Rehbein* is *State v. Fincher*, 191 Neb. 446, 216 N.W.2d 172 (1974), which was a second postconviction proceeding. The court found that competency was not raised in the first postconviction proceeding and thus could not be raised in a second postconviction proceeding, absent a showing that the relief sought was not available at the time of the first proceeding. *Fincher* is obviously distinct from the procedural background of this case, and in any event, the continued viability of the rule used to deny relief in *Fincher* has to be very much in doubt at this point. See *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995) (second degree murder conviction overturned on second postconviction proceeding where jury instructions did not include malice in the elements of second degree murder). For these reasons, despite the suggestions in *Painter* and *Rehbein*, we do not believe the law is that there is a procedural bar in postconviction proceedings of issues relating to competency to stand trial, and we decline to impose such a procedural bar for these issues in this postconviction proceeding. In reaching this conclusion, we bear in mind the sanctity of constitutional protections and the need to guard against constitutionally infirm convictions.

In *State v. Ryan*, 249 Neb. 218, 229–30, 543 N.W.2d 128, 138 (1996), the court held:

> An appellate court is compelled to accept jurisdiction when the sentence entered by the trial court is invalid due to plain error in the proceedings. *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995). Moreover, the defendant's conviction was constitutionally infirm and, therefore, void ab initio. See, *State v. Rolling*, 218 Neb. 51, 352 N.W.2d 175 (1984); *State v. Ewert*, 194 Neb. 203, 230 N.W.2d 609 (1975). A void sentence is no sentence. *State v. Wren*, 234 Neb. 291, 450 N.W.2d 684 (1990). It has been longstanding law in Nebraska that a void judgment may be attacked at any time in any proceeding. See *State v. Ewert, supra*. Thus, to use a procedural default or waiver as a means of ignoring a plain error that results in an unconstitutional incarceration would place form over substance; would damage the integrity, reputation, and fairness of the judicial process; and would render the plain error doctrine and postconviction relief remedies meaningless. *State v. Plant, supra*.

We hold that the trial court's failure to hold a full, fair, and adequate hearing, affording Johnson procedural due process rights at the competency and plea hearing, coupled with the failure to conduct a sua sponte competency hearing at the time of sentencing, was a denial of due process. Thus, the trial court committed plain error when it dismissed the petition for postconviction relief.

Remedy.

Having reached the conclusion that Johnson was deprived of his constitutional guarantee of due process, we believe the Nebraska Postconviction Act, specifically Neb. Rev. Stat. § 29-3001 (Reissue 1995), dictates the remedy:

> If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial as may appear appropriate.

Included within the grant of a new trial, of necessity, will be the question, at the time of those proceedings, whether Johnson is now competent to stand trial, assuming that some 3 years later there remains reasonable doubt about his competency. Therefore, we reverse the conviction and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

VIVIAN OSBORN, APPELLANT, V. VANCE OSBORN, APPELLEE.

550 N.W.2d 58

Filed June 25, 1996. No. A-95-712.

1. **Judgments: Appeal and Error.** An appellate court has an obligation to reach conclusions on questions of law independent of the trial court's ruling.
2. **Service of Process: Notice: Pleadings: Time.** A summons notifies the defendant that in order to defend the lawsuit, an appropriate written response must be filed with the court within 30 days after service and that upon failure to do so, the court may enter judgment for the relief demanded in the petition.
3. **Service of Process: Legislature: Intent.** Where the Legislature has intended for service to be executed as a summons in civil cases, it has specifically stated so within the statutes.
4. **Service of Process: Notice: Words and Phrases.** Generally, a summons is an instrument used to provide notice to a party of civil proceedings and of the opportunity to appear and be heard.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Reversed and remanded.

Nancy S. Freburg for appellant.

No appearance for appellee.

MILLER-LERMAN, Chief Judge, and INBODY, Judge, and NORTON, District Judge, Retired.

NORTON, District Judge, Retired.

Vivian Osborn appeals from a judgment reducing Vance Osborn's alimony obligation from $600 per month to $100 per month. Vivian contends that the trial court erred in failing to inquire or make a determination as to whether sufficient legal pleadings had been filed and in failing to determine whether Vivian had been properly served. For the reasons set forth below, we reverse, and remand.

FACTUAL BACKGROUND

On September 18, 1981, the Dawson County District Court entered a decree of dissolution, dissolving the marriage of Vivian and Vance. Under the terms of the decree, Vance was to pay Vivian alimony in the sum of $600 per month commencing August 1, 1981, and continuing to and until the lump-sum amount of $144,000 had been paid or until Vivian had either died or remarried. On July 3, 1989, Vance filed a petition for modification of alimony, and on October 18, Vivian filed an answer and a cross-motion to modify. On December 19, 1990, the matter was dismissed without prejudice for lack of prosecution.

Vance subsequently filed a "Motion to Modify Decree" on May 8, 1995, again requesting that the court reduce his alimony obligation. This document did not contain a summons or a certificate of service. Also on May 8, Vance filed a "Notice of Hearing," setting the hearing date for June 2, 1995. The "Notice of Hearing" contained a certificate of service indicating that service had been made by U.S. mail upon Vivian's attorney of record, Nancy S. Freburg. We note that Freburg was Vivian's attorney in the first attempted modification and that she remains as such in the current attempted modification. The record does not reflect whether Freburg was Vivian's attorney in the original dissolution.

On June 15, 1995, the Dawson County District Court entered the following order:

> This matter comes before the Court on June 2, 1995, on the Motion to Modify filed by the Respondent. The Petitioner does not appear nor is represented by counsel. The Respondent is present and represented by Scott H. Trusdale. Evidence is adduced, and the matter is taken under advisement.
>
> This matter comes before the Court on June 6, 1995, after having been taken under advisement. The Court finds that alimony in this matter should be reduced to the amount of $100.00 per month commencing June 1, 1995.

ASSIGNMENTS OF ERROR

Vivian assigns the following as error: (1) The trial court failed to inquire or make a determination as to whether or not sufficient legal pleadings had been filed, and (2) the trial court failed to make a determination as to whether Vivian had been properly served.

STANDARD OF REVIEW

[1] An appellate court has an obligation to reach conclusions on questions of law independent of the trial court's ruling. *Shilling v. Moore*, 249 Neb. 704, 545 N.W.2d 442 (1996).

ANALYSIS

Vivian's arguments can essentially be summarized as complaints against Vance's drafting and service of process methods. Vivian contends that the trial court erred in entering judgment when Vance had failed to file a petition to modify alimony, had failed to serve her with a summons, and had failed to serve her with a notice of hearing.

While there is no individual statute concerning the procedure for filing for modification of alimony, we note that Neb. Rev. Stat. § 42-365 (Reissue 1993) states in part that

> [u]nless amounts have accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown, but when

> alimony is not allowed in the original decree dissolving a marriage, such decree may not be modified to award alimony.

Furthermore, under Neb. Rev. Stat. § 42-352 (Reissue 1993), "[a] proceeding under sections 42-347 to 42-379 shall be commenced by filing a petition in the district court. Summons shall be served upon the other party to the marriage by personal service or in the manner provided in section 25-517.02." According to Neb. Rev. Stat. § 25-504.01 (Reissue 1995), "[a] copy of the petition shall be served with the summons, except when service is by publication." Consequently, we conclude that Vance was required to file a petition for modification and to serve Vivian with both a copy of the petition and a summons.

In the instant case, Vance filed a "Motion to Modify Decree." Without determining the appropriateness of how pleadings should be formally entitled, we note that documents entitled as motions or applications have been used to modify awards of alimony. See, e.g., *Novak v. Novak*, 245 Neb. 366, 513 N.W.2d 303 (1994) (application to modify alimony); *Benedict v. Benedict*, 206 Neb. 284, 292 N.W.2d 565 (1980) (motion to modify alimony). However, regardless of what the document is called, the statutory procedures must be satisfied. We reiterate that § 42-352 requires that a summons be served upon the opposing party by personal service or in the manner provided in Neb. Rev. Stat. § 25-517.02 (Reissue 1995).

[2-4] A summons notifies the defendant that in order to defend the lawsuit an appropriate written response must be filed with the court within 30 days after service and that upon failure to do so, the court may enter judgment for the relief demanded in the petition. Neb. Rev. Stat. § 25-503.01 (Reissue 1995). Where the Legislature has intended for service to be executed as a summons in civil cases, it has specifically stated so within the statutes. *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994) (finding that service upon attorney of record was permissible under Neb. Rev. Stat. § 25-534 (Reissue 1995) where notice statute, Neb. Rev. Stat. § 20-333 (Reissue 1991), did not require any particular form of service). Generally, a summons is an instrument used to provide notice to a party of

civil proceedings and of the opportunity to appear and be heard. *Ventura v. State, supra.*

In the instant case, Vance never personally served Vivian with either a summons or a copy of the "Motion to Modify Decree." Vance did, however, serve Vivian's attorney with a "Notice of Hearing" by regular mail. The "Notice of Hearing" was dated May 5, 1995, and filed on May 8. Section 25-534 provides in part:

> Whenever in any action or proceeding, any order, motion, notice, or other document, *except a summons*, is required by statute or rule of the Supreme Court to be served upon or given to any party represented by an attorney whose appearance has been noted on the record, or is thus required to be served upon or given to the attorney for any party, such service or notice may be made upon or given to such attorney, unless service upon the party himself or herself is ordered by the court. Service upon such attorney or upon a party shall be made by delivering a copy to him or her or by mailing it to him or her.

(Emphasis supplied.) Vance failed to properly serve Vivian with a summons and, under § 25-534, service of the "Notice of Hearing" on Vivian's attorney of record was insufficient.

Section 42-352 also allows a summons to be served in the manner provided by § 25-517.02, which is as follows:

> Upon motion and showing by affidavit that service cannot be made with reasonable diligence by any other method provided by statute, the court may permit service to be made (1) by leaving the process at the defendant's usual place of residence and mailing a copy by first-class mail to the defendant's last known address, (2) by publication, or (3) by any manner reasonably calculated under the circumstances to provide the party with actual notice of the proceedings and an opportunity to be heard.

Vance cannot seek refuge under § 25-517.02, because he failed to make a motion and show by affidavit that service could not be made upon Vivian with reasonable diligence. Vance has not complied with either service of process alternative provided in § 42-352. Therefore, we conclude that the trial court erred in entering judgment before service had been perfected. Consequently, we need not address the fact that the court conducted a hearing on Vance's motion prior to the expiration of the 30-day response period provided in Neb. Rev. Stat. § 42-354 (Reissue 1993).

CONCLUSION

We conclude that the district court erred in entering judgment before Vance had properly served Vivian with a summons. The judgment of the district court is reversed and the cause remanded. Finally, we note that Vivian has filed a motion for attorney fees. We grant her motion in the amount of $1,600.

REVERSED AND REMANDED.

[BY ORDER OF THE COURT, OPINION WITHDRAWN.]

[By order of the court, opinion withdrawn.
(Page 808 left blank intentionally.)]

[By order of the court, opinion withdrawn.
(Page 809 left blank intentionally.)]

[BY ORDER OF THE COURT, OPINION WITHDRAWN.
(PAGE 810 LEFT BLANK INTENTIONALLY.)]

IN RE INTEREST OF BRANDON W., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE, V. GARY W., APPELLANT.

551 N.W.2d 273

Filed June 25, 1996. No. A-95-1143.

1. **Jurisdiction: Appeal and Error.** Whether a question is raised by the parties concerning jurisdiction of a lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Jurisdiction: Judgments: Appeal and Error.** Where a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the inferior court.
3. **Actions: Judicial Notice.** When cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.
4. **Jurisdiction: Appeal and Error.** It is an appellate court's duty to determine whether it has jurisdiction over the matter before it.
5. **Jurisdiction: Time: Appeal and Error.** The timeliness of an appeal is a jurisdictional necessity and may be raised by an appellate court sua sponte.
6. **Parental Rights: Final Orders: Time: Appeal and Error.** An adjudication order is an appealable order, and an appeal, if not made within 30 days after the order's entry, will be dismissed.
7. **Parental Rights: Revocation.** A duly executed revocation of a relinquishment of parental rights does not negate an adjudication that the child is a juvenile within Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993).
8. **Juvenile Courts: Jurisdiction.** Once the juvenile court properly obtains jurisdiction over a child, it retains its jurisdiction until the individual reaches the age of majority or the court otherwise discharges the individual from its jurisdiction.

Appeal from the County Court for Knox County: PHILIP R. RILEY, Judge. Appeal dismissed.

John Jedlicka for appellant.

John Thomas, Knox County Attorney, for appellee.

HANNON, SIEVERS, and MUES, Judges.

MUES, Judge.

INTRODUCTION

Brandon W. was adjudicated a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) on December 22,

1994. The attempted appeal by Brandon's mother from that order of adjudication, found at case No. A-95-273, was found to be untimely by this court in an order dated December 29, 1995. Despite Brandon's previous adjudication, a "second" adjudication hearing regarding Brandon was held on June 23, 1995. As a result, on October 12, 1995, Brandon was again adjudicated to be within § 43-247(3)(a). The appeal from this order by Brandon's father, case No. A-95-1143, is now before this court.

STATEMENT OF CASE

Brandon, now age 6, is the child of Rose W. and Gary W., who are not married. Prior to his removal from the home, Brandon resided with Rose, Gary, and two of Gary's children from a previous relationship, Jeremy W. and Tracey W. Brandon was removed from the home on June 29, 1994, following accusations that Jeremy had sexually assaulted him, and the Nebraska Department of Social Services (Department) was given temporary custody of Brandon.

On September 8, 1994, Gary signed a relinquishment of parental rights with regard to Brandon. Brandon was "first" adjudicated a child within the meaning of § 43-247(3)(a) on December 22, 1994. More on the proceedings which preceded and followed this December 1994 order will be set forth in the discussion portion of this opinion. Gary filed a revocation of relinquishment of parental rights regarding Brandon sometime in February 1995. Gary's relinquishment had never been formally accepted by the Department, since such acceptance was prohibited by Department policy absent a relinquishment of parental rights by Rose as well.

A "Supplemental Petition Against Gary [W.]" was filed on February 24, 1995. In this petition, it was alleged that Brandon was a child within § 43-247(3)(a) on the bases that he had been the victim of sexual assault by Jeremy in the family home; that Gary had failed to protect Brandon from such assault; that while in the home, Brandon was exposed to deviant and inappropriate sexual behavior, sexual child abuse, and inappropriate physical discipline; and that Gary had abandoned Brandon. Following a hearing on June 23, at which both Rose and Gary, as well as their respective counsel, were present, Brandon was adjudicated to be within § 43-247(3)(a) by order dated October 12, 1995. A case plan was filed on June 30, setting forth goals virtually identical to those contained in the case plan previously adopted by the court following Brandon's "first" adjudication. Unlike the previous case plan identifying various goals as to Rose, however, this plan applied said goals to Rose *and* Gary. Rose filed an "Objection to Proposed Case Plan" on July 11. Following a hearing, an order was entered on September 14, which, among other things, continued Brandon's custody with the Department.

Case No. A-95-1143, now before this court, consists of Gary's appeal from the October 12, 1995, adjudication order. While Rose initially filed a notice to appeal from the September 14, 1995, order, also found at case No. A-95-1143, she has since filed a "Dismissal of Appeal."

ASSIGNMENT OF ERROR

Gary asserts that the trial court erred in finding the evidence, with regard to him, sufficient to adjudicate Brandon to be within § 43-247(3)(a).

STANDARD OF REVIEW

[1,2] Whether a question is raised by the parties concerning jurisdiction of a lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Interest of Alex T. et al.*, 248 Neb. 899, 540 N.W.2d 310 (1995); *Jones v. State*, 248 Neb. 158, 532 N.W.2d 636 (1995). Where a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the inferior court. *Id.*

DISCUSSION

[3] When cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and

judgments in the former action. *Association of Commonwealth Claimants v. Moylan*, 246 Neb. 88, 517 N.W.2d 94 (1994). We have, therefore, taken judicial notice of the records contained in case No. A-95-273.

Prior Proceedings.

A review of those records reveals that a hearing to determine whether Brandon should remain in the temporary custody of the Department pending his "first" adjudication was held on July 28, 1994. Both Rose and Gary were present at this hearing, and each was represented by separate counsel. The court noted in its order that "the juvenile's father by and through his attorney, indicated to the court that the juvenile's father was intending to relinquish his parental rights and indicated to the court that he had no objections to the continued placement of the juvenile with the Department of Social Services." Over Rose's objection, the court ordered Brandon to remain in the temporary custody of the Department.

On September 8, 1994, a supplemental petition was filed, alleging that Brandon was within § 43-247(3)(a). One allegation contained in said petition was that Gary had abandoned Brandon by relinquishing his parental rights. Also on September 8, Gary signed a relinquishment of his parental rights to Brandon. At a hearing upon the petition, also held on September 8, Rose admitted the allegation that Gary had abandoned Brandon, but she denied the balance of the allegations.

A second supplemental petition, filed on October 11, 1994, alleged more specifically that Brandon had been the victim of a sexual assault by Jeremy in the family home; that Rose had failed to protect Brandon from such assault; that while in the home, Brandon was exposed to deviant and inappropriate sexual behavior, sexual child abuse, and inappropriate physical discipline; that Rose continued to reside with Gary; and that by virtue of relinquishing his parental rights, Gary had abandoned Brandon.

On September 15, 1994, notice that the adjudication hearing would be held on October 27 was sent to Gary's attorney. For reasons undisclosed by the record, the adjudication hearing was not held until December 16. Neither Gary nor his attorney was present. By order dated December 22, 1994, Brandon was found to be a child within the meaning of § 43-247(3)(a). A case plan was submitted to the court and mailed to Gary and his attorney in January 1995.

A dispositional hearing was held on February 14, 1995, at which Rose and Gary, along with their respective attorneys, were present. The dispositional order, filed on February 22, placed Brandon in foster care, awarded Rose at least one weekly visitation, and granted Gary at least one weekly supervised visitation. The order prohibited any contact between Rose and Gary without prior approval from the Department. Among other things, the order further required both Rose and Gary to participate in individual and family therapy and to continue present employment.

Rose filed a notice of appeal from the aforementioned orders of adjudication and disposition on March 15, 1995. Her appeal appears in this court as case No. A-95-273. By memorandum opinion, filed on December 29, 1995, this court found Rose's appeal from the December 22, 1994, order of adjudication to be untimely and affirmed the February 22, 1995, dispositional order. Case No. A-95-273 also contains a notice of appeal filed by Gary appealing from the dispositional order. However, upon Gary's motion of December 20, 1995, and upon stipulation by Rose, the county attorney, and Brandon's guardian ad litem, this cross-appeal was dismissed.

Jurisdiction.

[4,5] Although not raised by the parties, it is our duty to determine whether this court has jurisdiction over the matter before it. *In re Interest of Alex T. et al.*, 248 Neb. 899, 540 N.W.2d 310 (1995); *Jones v. State*, 248 Neb. 158, 532 N.W.2d 636 (1995). The timeliness of an appeal is a jurisdictional necessity and may be raised sua sponte. *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994); *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994); *In re Interest of Zachary L.*, *ante* p. 324, 543 N.W.2d 211 (1996).

At the time the December 1994 order was entered, Gary had already signed a relinquishment of parental rights regarding Brandon. Gary had informed the court of his intent to do so as early as July 1994. Accordingly, one of the bases upon which the court adjudicated Brandon in its December 1994 order was on the finding that Gary had abandoned Brandon within the meaning of § 43-247(3)(a). Gary received notice of the proceedings precipitating this December 1994 order of adjudication, and he failed to appear. Rose's appeal from the December 1994 order adjudicating Brandon was untimely. Gary filed no appeal from that order, although he did appear at the dispositional hearing with counsel and appealed the disposition order of February 22, 1995, which appeal was subsequently dismissed on his *own* motion.

[6] It is well settled that an adjudication order is an appealable order, and an appeal, if not made within 30 days after the order's entry, will be dismissed. *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992); *In re Interest of C.W. et al.*, 238 Neb. 215, 469 N.W.2d 535 (1991). Because Gary failed to timely appeal from the December 1994 order adjudicating Brandon, this court is without jurisdiction to determine issues regarding the juvenile court's assuming jurisdiction over Brandon. An appellate court is without jurisdiction to entertain appeals from orders affecting substantial rights entered more than 30 days prior.

Effect of Revocation.

[7] While the record does not expressly provide a reason, presumably the "second" adjudication proceeding, now on appeal, was conducted solely because Gary filed a revocation of relinquishment sometime in February 1995. Whether this revocation was filed before or after the February 22, 1995, dispositional order, which was the subject of case No. A-95-273, is unclear from the record. The record establishes that pursuant to the Department's policy, absent Rose's relinquishment of her parental rights as well, Gary's relinquishment could not be accepted by the Department. In any event, while we recognize that a duly executed revocation of a relinquishment prior to the Department's acceptance of said relinquishment has legal effects, see, e.g., *Kellie v. Lutheran Family & Social Service*, 208 Neb. 767, 305 N.W.2d 874

(1981), we do not believe that it negates an adjudication that the child involved is a juvenile within § 43-247(3)(a).

Once a child is adjudicated and the adjudication is not timely appealed, the juvenile court acquires jurisdiction over the child subject to several exceptions not at issue here. See, e.g., *In re Interest of D.M.B., supra* (when juvenile court's lack of jurisdiction is apparent on face of record); *In re Interest of Crystal T., ante* p. 503, 546 N.W.2d 77 (1996) (when procedural requirements of juvenile code have been ignored).

The second supplemental petition, filed on October 11, 1994, which led to the "first" adjudication proceeding, alleged, among other things, that Gary had abandoned Brandon. At the time of the December 1994 hearing, Gary had signed a relinquishment of parental rights regarding Brandon. The adjudication of a child to be within § 43-247 requires a finding that the child is a child as defined in the relevant portion of that statute *at the time* of the proceeding or is in danger of so becoming in the future. See *In re Interest of W.C.O.*, 220 Neb. 417, 370 N.W.2d 151 (1985). On the face of the record, it is not apparent that the juvenile court lacked jurisdiction over Brandon as a result of the "first" adjudication or that the procedures of the juvenile code were not followed.

[8] Once the juvenile court properly obtains jurisdiction over a child, it retains its jurisdiction. Section 43-247 provides in relevant part:

> Notwithstanding any disposition entered by the juvenile court under the Nebraska Juvenile Code, the juvenile court's jurisdiction over any individual adjudged to be within the provisions of this section shall continue until the individual reaches the age of majority or the court otherwise discharges the individual from its jurisdiction.

Once properly adjudicated, it was not necessary for the court to hold a separate adjudication hearing "as to Gary" merely because he subsequently revoked his relinquishment of parental rights. Gary was involved in the juvenile proceedings leading to the "first" adjudication, although he and his attorney were not present at the adjudication hearing itself. They did participate in the dispositional hearing of February 14, 1995, which followed the adjudication, and they even appealed the dispositional order to this court. While Gary's revocation would be relevant to any subsequent dispositional and review hearings, it does not require the court to hold another adjudication hearing.

Gary's failure to appeal from Brandon's adjudication in December 1994 renders this appeal untimely. Based on our determination that this court lacks jurisdiction over this matter, we need not address Gary's assigned error. Moreover, we have recently determined in *In re Interest of Joshua M. et al., ante* p. 659, 548 N.W.2d 348 (1996), that while an appeal is pending, the juvenile court lacks jurisdiction to enter a termination order. See, also, *Swain Constr. v. Ready Mixed Concrete Co., ante* p. 316, 542 N.W.2d 706 (1996). In the instant case, Rose's appeal from Brandon's "first" adjudication order was filed on March 15, 1995, and was not disposed of until December 29, 1995. The court's "second" adjudication occurred on October 12, 1995, during the pendency of Rose's appeal. The adjudication order of October 12 was not only unnecessary; it was also void.

CONCLUSION

Absent an appeal, once a child is properly adjudicated to be within § 43-247(3)(a), the child is within the juvenile court's jurisdiction. An appeal from an order of adjudication must be brought within 30 days. This court lacks jurisdiction over an appeal brought outside of the 30 days.

APPEAL DISMISSED.

DEAN E. MACH, APPELLANT, v. MARJORIE M. SCHMER, PERSONAL REPRESENTATIVE OF THE ESTATE OF FLOYD S. SCHMER, DECEASED, ET AL., APPELLEES. CAROLYN MACH, APPELLANT, v. MARJORIE M. SCHMER, PERSONAL REPRESENTATIVE OF THE ESTATE OF FLOYD S. SCHMER, DECEASED, ET AL., APPELLEES.

550 N.W.2d 385

Filed July 2, 1996. Nos. A-95-319, A-95-320.

1. **Final Orders: Parties: Appeal and Error.** When there are multiple defendants named in an action and the action is dismissed as to one defendant, but not all defendants, the dismissal is a final, appealable order.
2. **Demurrer: Pleadings.** A defendant may demur to the petition when it appears on the face of the petition that the petition does not state facts sufficient to constitute a cause of action against the defendant.
3. **Summary Judgment.** A defendant may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part of a claim asserted against him.
4. **Decedents' Estates: Claims: Jurisdiction.** A claim against an estate may be presented by filing a written statement of claim with the clerk of the court or by commencing a proceeding against the personal representative in any court having jurisdiction over the claim and over the personal representative.
5. **Decedents' Estates: Claims: Notice: Time.** If the personal representative complies with the notice provisions of the probate code, a claim generally must be presented within 2 months after the date of the first publication of notice to creditors.
6. ____: ____: ____: ____. If the personal representative fails to provide notice in compliance with the probate code, then a claimant may present his claim within 3 years after the decedent's death.
7. **Decedents' Estates: Claims: Insurance: Liability: Time.** The time requirements for presentation of claims, as contained in the probate code, do not affect or prevent any proceeding brought to establish liability of the decedent or the personal representative for which he or she is protected by liability insurance.
8. **Decedents' Estates: Claims: Time.** A claimant may proceed against a personal representative for breach of fiduciary duty within 6 months after the filing of the closing statement, unless the claim has otherwise been barred.
9. **Decedents' Estates: Claims.** The probate code does not authorize a claimant to present a claim against the estate by commencing an action against a former personal representative who has been discharged and whose appointment has been terminated.
10. **Decedents' Estates: Liability: Damages.** Potential liability of a decedent, without establishment of liability and amount of damage, does not constitute a direct legal interest in the estate of the deceased.
11. **Decedents' Estates: Claims: Insurance: Liability.** A claimant who possesses a claim for the proceeds of liability insurance under the probate code is not

authorized to commence a suit against a discharged personal representative, but must seek to have the estate reopened.

12. **Demurrer: Final Orders: Appeal and Error.** The sustaining of a demurrer, not followed by entry of a judgment dismissing the case and terminating the litigation, does not constitute a final, appealable order.
13. **Final Orders: Jurisdiction: Appeal and Error.** In the absence of a final, appealable order, an appellate court is without jurisdiction to entertain an appeal, and the appeal must be dismissed for lack of jurisdiction.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed in part, and in part dismissed.

Brian C. Bennett, of Bennett Law Office, P.C., for appellants.

J. Arthur Curtiss and Allan E. Wallace, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

MILLER-LERMAN, Chief Judge, and IRWIN and INBODY, Judges.

IRWIN, Judge.

I. INTRODUCTION

Dean E. Mach and Carolyn Mach appeal from a district court ruling granting summary judgment to appellee Marjorie M. Schmer, in her capacity as personal representative of the estate of Floyd S. Schmer, deceased, and sustaining the demurrer filed by appellee Allstate Insurance Company. Because we find no error in the granting of summary judgment, we affirm the district court's order in that regard. Because we find the sustaining of the demurrer did not constitute a final, appealable order, we dismiss the appeal in that regard.

II. BACKGROUND

As a preliminary matter, we note that Dean E. Mach and his wife, Carolyn Mach, filed separate petitions in the district court. The relevant questions and rulings, however, were identical in both cases. The district court's rulings in each case were appealed, and the cases have been consolidated for appeal. For clarification, we will treat both cases as one, and refer to the appellants collectively as "Mach."

This case originates out of an automobile accident involving Dean Mach and Floyd S. Schmer, deceased. On September 12, 1990, Mach's vehicle was struck from the rear by Floyd Schmer's vehicle. Mach alleges that Floyd Schmer was negligent in several particulars and that the negligence was the proximate cause of various injuries suffered by Mach.

On April 17, 1992, Floyd Schmer died, apparently of unrelated causes. Floyd Schmer's wife, Marjorie M. Schmer, was appointed personal representative of the estate on May 19. The first publication of notice to creditors of the estate was on May 21. Mach was not mailed individual notice of the opening of the estate. On September 21, 1993, the county court for Clay County, Nebraska, entered an order closing the estate and discharging Marjorie from her duties as personal representative. The estate was not thereafter reopened, and Marjorie was not thereafter reappointed as personal representative.

On August 11, 1994, Mach filed a petition in the district court for Hall County, Nebraska. Mach alleged that Floyd Schmer had acted negligently and had proximately caused the September 1990 automobile accident, and Mach sought recovery for personal injuries incurred as a result of the accident. Mach further alleged that Floyd Schmer had died, that Marjorie had been appointed personal representative, that Allstate Insurance Company had provided liability insurance for Floyd Schmer at the time of the accident, and that the estate assets had been distributed to three individuals, namely, Marjorie, Larry A. Schmer, and Stanley L. Schmer. Mach named as defendants "Marjorie M. Schmer, Personal Representative for the Estate of Floyd S. Schmer, Deceased," Allstate, and each of the distributees in their individual capacities.

On September 19, 1994, Marjorie filed a special appearance, objecting to the petition insofar as it named her as a defendant in her capacity as the personal representative of the estate. In her special appearance, Marjorie alleged that the district court lacked jurisdiction over her because there had been no valid service of summons upon her and because she was no longer the personal representative of the estate.

On September 19, 1994, Marjorie also filed a motion for summary judgment insofar as she was named as a defendant in her capacity as the personal representative of the estate. In support of her motion for summary judgment, Marjorie submitted the affidavit of David Maser, the attorney of record for the now-closed estate. The affidavit indicated that the county court had entered an order closing the estate and discharging Marjorie from her duties as personal representative, that the estate had not been reopened, and that Marjorie had not been reappointed as personal representative. Marjorie asserted that she was entitled to judgment as a matter of law insofar as she was named as a defendant in her capacity as the personal representative of the estate because she no longer served in that capacity, and therefore, "there is no such entity."

Allstate filed a demurrer to the petition, on the basis that it failed to state a cause of action against Allstate. Additionally, Marjorie, Larry Schmer, and Stanley Schmer, in their capacities as individual defendants, each filed demurrers to the petition, on the basis that it failed to state a cause of action against each of them.

On October 13, 1994, the district court conducted a hearing on the various filings. On February 23, 1995, the court ruled on the pending motions and demurrers as follows: The court overruled Marjorie's special appearance; the court granted Marjorie's motion for summary judgment; the court sustained Allstate's demurrer; and the court overruled the demurrers of Marjorie, Larry Schmer, and Stanley Schmer in their individual capacities.

Mach filed this appeal, challenging the district court's rulings on Marjorie's motion for summary judgment and Allstate's demurrer.

III. ASSIGNMENTS OF ERROR

Mach assigns five errors on this appeal, which we have consolidated for discussion to two. First, Mach asserts that the district court erred in granting Marjorie's motion for summary judgment. Second, Mach asserts that the district court erred in sustaining Allstate's demurrer.

IV. STANDARD OF REVIEW

In reviewing a district court order granting summary judgment, an appellate court must view the evidence in the light most favorable to the party against whom summary judgment has been entered, and the appellate court must give such party the benefit of every reasonable inference deducible from the evidence. *Curtis O. Griess & Sons v. Farm Bureau Ins. Co.*, 247 Neb. 526, 528 N.W.2d 329 (1995). Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Id.*

In the absence of a final, appealable order, an appellate court is without jurisdiction to entertain an appeal, and the appeal must be dismissed for lack of jurisdiction. *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994).

V. ANALYSIS

Mach sought recovery against the former personal representative of Floyd Schmer's estate, against Floyd Schmer's liability insurer, and against the three distributees of Floyd Schmer's estate. The district court's rulings concerning the three individual distributees are not involved in this appeal. This appeal is concerned only with the district court's ruling with respect to the former personal representative's motion for summary judgment and the liability insurer's demurrer.

1. Summary Judgment in Favor of Personal Representative

(a) Jurisdiction

[1] Summary judgment was granted in favor of Marjorie insofar as she was named as a defendant in her capacity as personal representative of Floyd Schmer's estate. We note that because there were several other named defendants, however, the grant of summary judgment did not dispose of the case as to *all* parties. Under these circumstances, the granting of summary judgment and dismissal of the case as to *one* defendant does constitute a final, appealable order. The Nebraska Supreme Court has held that when there are multiple defendants named in an action and the action is dismissed as to one defendant, but not all defendants, the dismissal is a final, appealable order. *Green v. Village of Terrytown*, 188 Neb. 840, 199 N.W.2d 610 (1972). As a result, we do have jurisdiction over this question on appeal.

(b) Summary Judgment Versus Demurrer

On appeal, Mach asserts that Marjorie's challenge to the petition should have been through a demurrer, not through a motion for summary judgment. Mach contends that Marjorie was actually asserting that the petition failed to state a cause of action against her insofar as it named her as a defendant in her capacity as personal representative of Floyd Schmer's estate.

Mach failed to assign this as error, although it is argued in Mach's brief. In the interest of providing a thorough review, we will consider the issue. However, we note that such oversight by counsel in the future may result in this court's not addressing the alleged error because it was not assigned as an error. To be considered by an appellate court, an allegedly prejudicial error must be both assigned and discussed in the brief of the asserting party. *Label Concepts v. Westendorf Plastics*, 247 Neb. 560, 528 N.W.2d 335 (1995); *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994); Neb. Ct. R. of Prac. 9D(1)d (rev. 1996).

[2] Neb. Rev. Stat. § 25-806 (Reissue 1995) provides that a defendant may demur to the petition when it appears on the face of the petition that the petition does not state facts sufficient to constitute a cause of action against the defendant. The Nebraska Supreme Court has held that a demurrer goes only to those defects which appear on the face of the petition. See *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992).

[3] Neb. Rev. Stat. § 25-1331 (Reissue 1995) provides that a defendant may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part of a claim asserted against him. The Nebraska Supreme Court has specifically held that a motion for summary judgment is not the proper vehicle for challenging the sufficiency of the petition to state a cause of action against the defendant. *Ruwe v. Farmers Mut. United Ins. Co.*, 238 Neb. 67, 469 N.W.2d 129 (1991).

In the present case, Mach's petition asserted that Marjorie was the personal representative of the estate of Floyd Schmer, having been appointed as personal representative on May 19, 1992, and named Marjorie as a defendant in her capacity as personal representative. Marjorie's attack on the petition was not that it failed to state a cause of action against her, which would have been a proper subject of a demurrer, but, rather, that she was no longer acting in her former capacity as personal representative because she had been discharged from that capacity by order of the county court.

In order to prove that the estate was closed and that she had been discharged and was no longer acting in the capacity of "Marjorie M. Schmer, Personal Representative for the Estate of Floyd S. Schmer, Deceased," Marjorie was required to bring forth evidence beyond what appeared on the face of the petition. In support of her motion, Marjorie was required to present an affidavit and a copy of the county court order of final discharge. Because Marjorie's challenge was not to any defect readily apparent from the face of the petition, but, rather, was a challenge requiring her to move with supporting affidavits, her challenge was properly contained in a motion for summary judgment.

(c) Statutory Provisions

In resolving the question whether the district court was correct in concluding that Marjorie was entitled to summary judgment insofar as she was named as a defendant in her former capacity as personal representative, several statutory provisions are relevant.

(i) Presentation of Claims

[4] The Nebraska Probate Code at the time this action was commenced provided two methods of presenting a claim against a decedent's estate: Under Neb. Rev. Stat. § 30-2486(1) (Reissue 1995), a claim could be presented by filing a written statement of claim with the clerk of the court, or under § 30-2486(2), a claim could be presented by commencing a proceeding against the personal representative in any court having jurisdiction over the claim and over the personal representative. Mach attempted to present the claim in the present case under § 30-2486(2), by commencing a proceeding against the *former* personal representative in the district court.

[5,6] Neb. Rev. Stat. § 30-2485 (Reissue 1995) provides the general time limitations within which a claimant must present his claim. If the personal representative complies with the notice provisions of Neb. Rev. Stat. §§ 25-520.01 and 30-2483

(Reissue 1995), a claim generally must be presented within 2 months after the date of the first publication of notice to creditors. § 30-2485(a)(1). According to §§ 25-520.01 and 30-2483, the personal representative need only provide potential creditors with notice by publication, except that the personal representative must mail a copy of the published notice to any party appearing to have a direct legal interest in the estate proceedings. If the personal representative fails to provide notice in compliance with §§ 25-520.01 and 30-2483, then a claimant may present his claim within 3 years after the decedent's death. § 30-2485(a)(2).

[7] The probate code also provides limited exceptions to the general time requirements for presentation of claims. Our review of the statute reveals that the only exception which is potentially applicable to the facts of the present case is contained in § 30-2485(c). The time requirements for presentation of claims, as contained in § 30-2485, do not affect or prevent any proceeding brought to establish liability of the decedent or the personal representative for which he or she is protected by liability insurance. § 30-2485(c)(2).

(ii) Other Miscellaneous Sections

[8] Neb. Rev. Stat. § 30-24,119 (Reissue 1995) imposes limitations on a claimant's ability to proceed against a personal representative. A claimant may proceed against a personal representative for breach of fiduciary duty within 6 months after the filing of the closing statement, unless the claim has otherwise been barred. § 30-24,119.

A personal representative may petition the court for an order of complete settlement of the estate. Neb. Rev. Stat. § 30-24,115 (Reissue 1995). The court may then enter an order determining the persons entitled to distribution of the estate and discharging the personal representative "from further claim or demand of any interested person." *Id.*

A personal representative's appointment may also be terminated pursuant to the provisions of Neb. Rev. Stat. § 30-2451 (Reissue 1995). Termination of a personal representative's appointment pursuant to § 30-2451 "terminates his authority to represent the estate in any pending or future proceeding." The comment to § 30-2451 (Reissue 1989) indicates that "termination" and "discharge" are different concepts, but that an order entered pursuant to § 30-24,115 "both terminates the appointment of, and discharges, a personal representative."

(d) Resolution

(i) Authority to Proceed Against Discharged Personal Representative

[9] Mach attempted to present a claim against the estate of Floyd Schmer by commencing an action against the *former* personal representative of the estate. Although § 30-2486(2) provides that a claimant may present a claim against the estate by commencing an action against the personal representative, we are unable to find any authority, and Mach has failed to provide us with any, indicating that a claimant may present a claim against the estate by commencing an action against a *former* personal representative who has been discharged and whose appointment has been terminated. See § 30-2486(2).

The only section of the probate code which appears, in limited circumstances, to allow a claim to be presented through instituting proceedings against a personal representative after the personal representative has been discharged is § 30-24,119, which allows a claimant to present a claim against the personal representative *for breach of fiduciary duty*. Mach's claim against the former personal representative in the present case was entirely based upon an automobile accident between Mach and the decedent, not on any claim that the personal representative breached her fiduciary duty in any way. Accordingly, § 30-24,119 is not applicable to the present case.

In the present case, Marjorie submitted the affidavit of Maser, the attorney of record for the estate, in support of her motion for summary judgment. Maser's affidavit included a copy of a county court "Decree of Final Discharge" in which the court closed the estate and discharged Marjorie as personal representative in accordance with § 30-24,115. Marjorie was discharged "from further claim or demand of any interested person" by order of the county court, and her "authority to represent the estate in any pending or future proceeding" was terminated when the county court entered a decree of final settlement pursuant to § 30-24,115. See §§ 30-2451 (Reissue 1995) and 30-24,115; comment to § 30-2451 (Reissue 1989).

The fact that the estate was closed and the fact that Marjorie was discharged from her capacity as personal representative are not genuinely in dispute. Accordingly, Marjorie was entitled to judgment as a matter of law in that the probate code does not authorize Mach to bring the present claim against a *former* personal representative while the estate remains closed. This assigned error is without merit.

(ii) Time Bar

In the interest of providing a full discussion, we note that even if Mach were permitted to commence proceedings against Marjorie after she was discharged, Mach's claim would still be subject to the time requirements of § 30-2485. The first notice to creditors was published on May 21, 1992. Pursuant to § 30-2485(a)(1), unless Marjorie failed to provide proper notice, Mach's claim had to be presented within 2 months of the first publication of notice, or by July 21, 1992.

[10] Neither party disputes that Mach was not mailed notice of the opening of the estate. According to § 25-520.01, Mach was entitled to receive notice by mail if Mach appeared to have a "direct legal interest" in the estate proceedings. Mach argues that the decedent's potential liability for the automobile accident gave rise to a direct legal interest in the estate proceedings. Marjorie asserts that Mach did not have a direct legal interest in the estate proceedings and, therefore, notice by publication was sufficient. The Nebraska Supreme Court has noted that potential liability of a decedent, without establishment of liability and amount of damage, does not constitute a direct legal interest in the estate of the deceased. *Farmers Co-op. Mercantile Co. v. Sidner*, 175 Neb. 94, 120 N.W.2d 537 (1963). See, also, *Tank v. Peterson*, 214 Neb. 34, 332 N.W.2d 669 (1983) (noting that tort claims filed against estate in pursuit of liability insurance proceeds do not affect interests of beneficiaries of estate).

Because Mach did not possess a "direct legal interest" in the estate, Marjorie did comply with the notice provisions of

§§ 25-520.01 and 30-2483 by publishing notice, and Mach was required to present the claim within 2 months of the date of the first publication of notice. Mach's petition was not filed until August 11, 1994, more than 2 *years* after the first publication of notice. Accordingly, Mach's claim was barred unless an exception to the general time requirement is applicable.

As noted above, the only potentially applicable exception to the time requirement of § 30-2485 in the present case is the exception stated in § 30-2485(c)(2), which provides that the general time requirement does not apply to a proceeding to establish liability of the decedent or the personal representative for which he or she is protected by liability insurance. Although it is apparent that Mach was attempting, in part, to reach the liability insurance proceeds in the present case, Mach did not present the claim until almost 1 year after the estate was closed and the personal representative was discharged.

[11] In *Tank v. Peterson, supra*, the Nebraska Supreme Court noted that neither the probate claims statute, § 30-2485, nor the closing of the estate can bar a claim insofar as the deceased was protected by liability insurance. *Tank* does not, however, provide that a claimant may institute proceedings against a discharged personal representative while the estate is closed. According to the Supreme Court's holding in *Tank*, a claimant who possesses a claim for the proceeds of liability insurance under § 30-2485(c)(2) is entitled to have the estate reopened for the limited purpose of service of process in the civil action to establish liability and liability insurance coverage. Mach did not proceed to have the estate reopened, however, and instead attempted to proceed while the estate remained closed.

Although Mach's claim was not barred by § 30-2485 to the extent Mach had a right to proceed to have the estate reopened, so long as the estate remains closed, Marjorie is entitled to summary judgment because she has been discharged and her appointment has been terminated, as discussed above. Any claim Mach may have possessed other than the claim provided for in § 30-2485(c)(2) was barred by the claims statute, and Marjorie was entitled to summary judgment because Mach failed to present the claim within the time limitations provided in the claims statute.

2. Demurrer in Favor of Allstate Insurance Company

Allstate filed a demurrer, asserting that Mach's petition failed to state facts sufficient to constitute a cause of action against Allstate. On February 23, 1995, the district court sustained the demurrer. The record before us does not, however, include any order of dismissal.

[12,13] It is a well-established principle of law in Nebraska that the sustaining of a demurrer, not followed by entry of a judgment dismissing the case and terminating the litigation, does not constitute a final, appealable order. *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995). Because there was no order of dismissal entered following the district court's sustaining of Allstate's demurrer, there is no final, appealable order concerning Allstate. In the absence of a final, appealable order, an appellate court is without jurisdiction to entertain an appeal, and the appeal must be dismissed for lack of jurisdiction. *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994). As a result, we dismiss the appeal with regard to Allstate.

VI. CONCLUSION

Because we find that summary judgment was properly entered in favor of Marjorie, we affirm the district court's order in that regard. Because the district court order sustaining Allstate's demurrer was not a final, appealable order, we dismiss the appeal with regard to Allstate.

Affirmed in part, and in part dismissed.

DON KUBIK, APPELLANT, v. UNION INSURANCE COMPANY AND ST. PAUL FIRE & MARINE, APPELLEES.

550 N.W.2d 691

Filed July 2, 1996. No. A-95-1043.

1. **Workers' Compensation: Evidence: Appeal and Error.** The workers' compensation review panel may reverse or modify the findings, order, award, or judgment of the original hearing only on the grounds that the judge was clearly wrong on the evidence or the decision was contrary to law.
2. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
3. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
4. **Evidence: Appeal and Error.** When testing the sufficiency of the evidence to support the factual findings of the trial court, the evidence is considered in the light most favorable to the successful party, and the successful party is given the benefit of every inference reasonably deducible from the evidence.
5. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
6. **Workers' Compensation: Time.** Neb. Rev. Stat. § 48-125 (Reissue 1993) authorizes a 50-percent penalty payment for waiting time where the employer fails to pay compensation after 30 days' notice of the disability and where no reasonable controversy exists regarding the employee's claim for benefits.
7. ____: ____. Whether a reasonable controversy exists regarding Neb. Rev. Stat. § 48-125 (Reissue 1993) is a question of fact.
8. ____: ____. A reasonable controversy may exist (1) if there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) 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.
9. ____: ____. To avoid the payments assessable under Neb. Rev. Stat. § 48-125 (Reissue 1993), the employer must have a reasonable basis in law or in fact for disputing the employee's claim and refraining from payment of compensation.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

Rod Rehm, P.C., for appellant.

Andrew S. Pollock, of Knudsen, Berkheimer, Richardson & Endacott, for appellees.

MILLER-LERMAN, Chief Judge, and IRWIN and INBODY, Judges.

INBODY, Judge.

Don Kubik appeals from the order of a Workers' Compensation Court review panel which affirmed the order of award entered by a trial judge. Kubik contends that the court erred (1) by finding that a reasonable controversy existed which barred the award of waiting-time penalties, attorney fees, and interest and also (2) by failing to assign an independent medical examiner. For the reasons recited below, we affirm in part, and in part reverse and remand with directions.

STATEMENT OF FACTS

Don Kubik had been employed by Union Insurance Company (Union) since 1987 as a systems consultant. On August 31, 1990, Kubik suffered bilateral carpal tunnel syndrome as a result of an accident arising out of and in the course of his employment.

As a result of the symptoms, Kubik saw Dr. Thomas Green, a chiropractor, who had previously treated Kubik for various ailments. Dr. Green then referred Kubik to Dr. William Garvin, an orthopedic surgeon. Dr. Garvin performed surgery on Kubik's right wrist in November 1990 and on Kubik's left wrist in May 1992. On September 3, 1992, Dr. Garvin wrote that Kubik had a 5-percent permanent physical disability impairment rating in each wrist as a result of the carpal tunnel syndrome. Dr. Garvin also reported on September 3 that Kubik "has reached a plateau in terms of his recovery." Dr. Garvin later reported, however, that Kubik did not reach his maximum medical improvement until December 1, 1994.

After receiving Dr. Garvin's ratings, St. Paul Fire & Marine (St. Paul), the insurer for Union, sent Kubik a settlement offer on the compensation claim per letter dated September 18, 1992. The letter offered Kubik $4,462.50 of required compensation under the Workers' Compensation statutes, plus $187.50 in additional consideration to settle the claim. The letter also requested that Kubik telephone St. Paul to discuss the settlement. Kubik did not respond to this letter. On October 22, St. Paul sent Kubik another letter which stated that if he did not respond to the previous offer within 30 days, St. Paul would assume he was not interested in a lump-sum settlement and would begin making permanent partial disability payments. Kubik responded in a letter dated November 10, 1992, informing St. Paul that he rejected its lump-sum settlement offer and requested that benefits be paid to him in accordance with his disability rating. On November 16, St. Paul issued Kubik $4,462.50 for payment based on Dr. Garvin's rating.

On August 30, 1993, Kubik saw Dr. D.M. Gammel for a second opinion regarding the degree of disability to his wrists. In a report dated August 31, 1993, Dr. Gammel determined that Kubik had an impairment rating of 10 percent for the right wrist and 8 percent for the left wrist. Upon receiving Dr. Gammel's ratings, St. Paul sent Kubik a payment for the difference between what it had already paid and the average of Dr. Garvin's and Dr. Gammel's ratings.

On July 15, 1994, Kubik filed a petition for workers' compensation benefits and waiting-time penalties, attorney fees, and interest pursuant to Neb. Rev. Stat. § 48-125 (Reissue 1993). On November 14, Kubik filed a request for an independent medical examiner pursuant to Neb. Rev. Stat. § 48-120(6) (Reissue 1993). Union and St. Paul filed an objection to the request on November 16. In an order dated November 30, 1994, the Workers' Compensation Court denied Kubik's request for the independent medical exam.

A hearing was held on Kubik's petition on January 6, 1995. In an order dated February 6, 1995, the workers' compensation court reaffirmed its earlier ruling which denied Kubik's request for an independent medical examination. The court also awarded Kubik permanent partial disability benefits based on 7 percent disability to his left wrist and 8 percent to his right wrist. The court, however, denied Kubik's claim for penalties, attorney fees, and interest, finding that a reasonable controversy existed.

Kubik filed an application for review, and a three-judge review panel heard the matter on July 31, 1995. The review panel affirmed the trial court's judgment on August 25. This appeal follows.

ASSIGNMENTS OF ERROR

On appeal, Kubik asserts that the trial court erred by finding that Kubik was not entitled to waiting-time penalties, attorney fees, and interest and by denying Kubik's request for an independent medical examination.

STANDARD OF REVIEW

[1] The workers' compensation review panel may reverse or modify the findings, order, award, or judgment of the original hearing only on the grounds that the judge was clearly wrong on the evidence or the decision was contrary to law. Neb. Rev. Stat. § 48-179 (Reissue 1993); *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 541 N.W.2d 49 (1995); *Larson v. Hometown Communications, Inc.*, 248 Neb. 942, 540 N.W.2d 339 (1995).

[2] A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. Neb. Rev. Stat. § 48-185 (Reissue 1993); *Kerkman v. Weidner Williams Roofing Co.*, 250 Neb. 70, 547 N.W.2d 152 (1996); *Hull v. Aetna Ins. Co.*, 249 Neb. 125, 541 N.W.2d 631 (1996); *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996).

[3,4] Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Kerkman v. Weidner Williams Roofing Co., supra*; *Scott v. Pepsi Cola Co., supra*; *Larson v. Hometown Communications, Inc., supra.*

When testing the sufficiency of the evidence to support the factual findings of the trial court, the evidence is considered in the light most favorable to the successful party, and the successful party is given the benefit of every inference reasonably deducible from the evidence. *Monahan v. United States Check Book Co., ante p.* 227, 540 N.W.2d 380 (1995). See, also, *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991).

[5] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995).

ANALYSIS

[6,7] Kubik first asserts that the trial court should have awarded him waiting-time penalties in accordance with § 48-125. Section 48-125 authorizes a 50-percent penalty payment for waiting time where the employer fails to pay compensation after 30 days' notice of the disability and where no reasonable controversy exists regarding the employee's claim for benefits. *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). Whether a reasonable controversy exists regarding § 48-125 is a question of fact. *Kerkman v. Weidner Williams Roofing Co., supra*; *Leitz v. Roberts Dairy*, 239 Neb. 907, 479 N.W.2d 464 (1992).

[8,9] In *Mendoza*, the court set forth the following criteria to determine whether a reasonable controversy exists:

> [A] reasonable controversy may exist . . . (1) if there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) 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.

225 Neb. at 784-85, 408 N.W.2d at 288. See, also, *Kerkman v. Weidner Williams Roofing Co., supra*. In other words, to

avoid the payments assessable under § 48-125, the employer must have a reasonable basis in law or in fact for disputing the employee's claim and refraining from payment of compensation. *Kerkman v. Weidner Williams Roofing Co., supra*; *Mendoza v. Omaha Meat Processors, supra.*

In this instance, Union and St. Paul contend that the delay was justified because of their good faith efforts to settle Kubik's claim. In support of this conclusion, Union and St. Paul cite to *Powe v. City of New Orleans*, 346 So. 2d 886 (La. App. 1977). In *Powe*, the court held that an employer should not be penalized for making a good faith effort toward a lump-sum settlement, "particularly when the facts strongly imply a willingness on the part of all concerned to leave the matter open during the time when discussions are actively engaged in." *Id.* at 888.

The Nebraska Supreme Court addressed a similar issue in *Musil v. J.A. Baldwin Manuf. Co.*, 233 Neb. 901, 448 N.W.2d 591 (1989), where the employer's insurance carrier had offered a lump-sum settlement in lieu of paying compensation to the employee. The court, after noting that the settlement failed to take into account the total extent of the injury, held that the employee was entitled to waiting-time penalties, attorney fees, and interest under § 48-125.

In *Musil*, the court considered what constituted an "actual basis, in law or fact, for disputing the employee's claim." *Id.* at 905, 448 N.W.2d at 594. In so doing, the court quoted 3 Arthur Larson, The Law of Workmen's Compensation § 83.41(c) (1989), which stated:

> "If bona fide settlement negotiations accompany the nonpayment of compensation, this may purge the delay or refusal of unreasonableness, but the fact that some settlement offer has been made is not necessarily a defense. A question that has arisen in several jurisdictions is whether a penalty should apply when the employer admits liability for a lesser amount than that claimed, but pays nothing. *It is usually held that the employer should have paid at least the amount for which liability was undisputed, and that a penalty is therefore warranted.*"

(Emphasis supplied in *Musil.*) *Musil v. J.A. Baldwin Manuf. Co.*, 233 Neb. at 905-06, 448 N.W.2d at 594.

Further, the court cited to several cases for the proposition that although the total amount of compensation due may be in dispute, the employer's insurer nevertheless has a duty to promptly pay that amount which is undisputed, and the only legitimate excuse for delay of payment is the existence of genuine doubt from a medical or legal standpoint that any liability exists. See, *Holton v. F.H. Stoltze Land Lbr. Co.*, 195 Mont. 263, 637 P.2d 10 (1981); *Dufrene v. St. Charles Parish Police Jury*, 371 So. 2d 378 (La. App. 1979); *Bradley v. Mercer*, 563 P.2d 880 (Alaska 1977); *Berry v. Workmen's Comp. App. Bd.*, 276 Cal. App. 2d 381, 81 Cal. Rptr. 65 (1969); *Lethermon v. American Insurance Company*, 129 So. 2d 507 (La. App. 1961).

In this instance, the fact that St. Paul made a settlement offer by itself does not show the existence of an actual dispute as to liability. However, St. Paul and Union argue, and the trial court found, that other factors indicate the existence of a reasonable controversy which would excuse the delinquent payment. Specifically, the trial court found evidence that a reasonable controversy existed because (1) Kubik failed to respond to St. Paul's first letter of settlement, (2) the petition Kubik filed included "symptomology well beyond bilateral carpal tunnel," and (3) there was a question as to when maximum medical improvement was reached.

Although Kubik did not respond to St. Paul's first letter of settlement, there is nothing in the record which indicates that his silence was the result of a controversy regarding Union's liability. In fact, Kubik testified that he simply did not know how to respond to the letter and that he was not interested in settling the claim. Moreover, St. Paul's first letter of settlement indicates that there was no dispute as to the 5-percent permanent disability rating. Specifically, in the letter, St. Paul stated:

> Dr. Garvin has given you a 5% permanent physical impairment rating to each hand as a result of your carpal tunnel syndrome. He also indicates that you have reached a plateau in terms of your recovery. According to the

> Nebraska Workers' Compensation Statutes a hand is equal to 175 weeks of disability benefits; 5% of 175 is equal to 8.75 weeks times 2 equals 17.5 weeks at the rate of $255 per week for a total of $4,462.50. I am willing to add additional consideration in the amount of $187.50 for a total of $4,650 to conclude your claim. After you have had an opportunity to review these figures, please call me to discuss settlement.

In short, there is no evidence in the record to support the finding that Kubik's failure to respond to St. Paul's settlement offer was due to a controversy regarding St. Paul's liability in some degree.

The trial court also found that a reasonable controversy existed because Kubik alleged symptoms in his petition which were inconsistent with his actual diagnosis. St. Paul asserts that because Kubik failed to allege in his application for review that this specific finding was in error, he has waived his right to assert that this finding is incorrect. Indeed, § 48-179 provides that the "party or parties appealing for review shall be bound by the allegations of error contained in the application [for review] and will be deemed to have waived all others." However, paragraph 2 of Kubik's application for review asserts that "[t]he Court's findings of fact in Paragraph VII are in error because . . . [Kubik] was not disputing the only rating at the time . . . ." We find that this allegation is sufficient to assign as error the above finding by the trial court.

In his petition, Kubik alleged that the nature and extent of his injury was "bilateral carpal tunnel syndrome; ulnar neuritis, right elbow region; flexor tendinitis, right wrist; traumatic neuroma ulnar digital nerve, right thumb." However, Kubik failed to produce any diagnosis of an injury except for that of bilateral carpal tunnel syndrome. As a result, the trial court found, assuming Kubik had been consistent in his allegations as to the nature and extent of his injury, a reasonable controversy existed with respect to those injuries for which there was no diagnosis. However, while a dispute may have existed as to those described injuries which were not diagnosed, this does not necessarily indicate that there was a controversy as to the nature and extent of the injury that was diagnosed and undisputed. As was stated in *Musil v. J.A. Baldwin Manuf. Co.*, 233 Neb. 901, 905-06, 448 N.W.2d 591, 594 (1989), " '[T]he employer should have paid at least the amount for which liability was undisputed . . . .' " (Emphasis omitted.) The fact that Kubik alleged additional injuries for which there was no diagnosis does not support the finding that there was a dispute regarding the injury for which there was a diagnosis.

Finally, the trial court found that there was some question as to when Kubik had reached maximum medical improvement and what his permanency rating was. The record indicates that on September 3, 1992, Dr. Garvin noted that Kubik "has reached a plateau in terms of his recovery" and then assigned Kubik a 5-percent permanent physical impairment to each hand. However, in a workers' compensation medical report signed by Dr. Garvin on December 1, 1994, he stated that Kubik did not reach maximum medical improvement until December 1, 1994. In addition, Dr. Gammel, who examined Kubik on August 30, 1993, found that Kubik had reached maximum medical improvement and assigned him a 10-percent permanent physical impairment rating to his right hand and an 8-percent rating to his left hand.

Indeed, if Kubik had not reached maximum medical improvement until December 1, 1994, St. Paul would have had no obligation to begin payments for a permanent disability pursuant to Neb. Rev. Stat. § 48-121 (Reissue 1993) until that time. However, the record indicates that despite Dr. Garvin's statement of December 1, maximum medical improvement was in fact reached in September 1992. Dr. Garvin not only found in September 1992 that Kubik had "reached a plateau in terms of his recovery," but he also at that time assigned a *permanent* disability rating. Furthermore, while Kubik went back to see Dr. Garvin on four occasions between September 1992 and December 1994, the record does not show that Kubik was receiving any rehabilitation or that he was submitting to treatment, convalescing, or unable to work because of the injury. See *Uzendoski v. City of Fullerton*, 177 Neb. 779, 131 N.W.2d 193 (1964). In addition, there is no evidence that Kubik's condition was going to improve after September 1992 or that it did in fact improve. Therefore, the evidence supports the conclusion that Kubik reached maximum medical improvement in September 1992.

Moreover, the fact that Dr. Gammel later gave Kubik a higher permanent disability rating for his injury does not show that there was a dispute that Kubik had suffered *at least* a 5-percent disability rating. While there may have been a question as to whether Kubik was injured to a greater extent than the 5-percent disability rating, there is no evidence to support a finding that a dispute or reasonable controversy existed concerning the 5-percent disability rating. As a result, St. Paul does not have an excuse for not paying that undisputed amount within the 30-day timeframe established under § 48-125. Therefore, we find that the trial court was clearly wrong in not awarding Kubik a waiting-time penalty, attorney fees, and interest pursuant to § 48-125.

Kubik next argues that he was entitled to an independent medical examination because a dispute later resulted between the disability rating given by Dr. Gammel and the amount which St. Paul supplemented its earlier payment. However, the record shows that the only dispute which exists is that between the rating of the disability given by Dr. Garvin and the later higher rating given by Dr. Gammel. St. Paul simply paid the average between the two ratings. Section 48-120(6) provides in part:

> The Nebraska Workers' Compensation Court shall have the authority to determine the necessity, character, and sufficiency of any medical services furnished or to be furnished and shall have authority to order a change of physician, hospital, rehabilitation facility, or other medical services when it deems such change is desirable or necessary. Any dispute regarding medical, surgical, or hospital services furnished . . . may be submitted by the parties . . . for informal dispute resolution by a staff member of the compensation court . . . . In addition, any party may submit such a dispute for a medical finding by an independent medical examiner pursuant to section 48-134.01.

The clear language of this statute indicates that it was in the discretion of the trial court to determine the necessity, character, and sufficiency of any medical services furnished. Because both

Dr. Garvin and Dr. Gammel were physicians of Kubik's own choosing, there was no dispute between the two parties which an independent medical examiner needed to resolve. Therefore, we find that the trial court did not abuse its discretion in determining that the medical services furnished were sufficient to determine the extent of Kubik's injury.

CONCLUSION

Because the evidence does not support the conclusion that there was a dispute that Kubik was injured at least to the extent of his 5-percent disability rating, we find that the trial court erred in not awarding waiting-time penalties, attorney fees, and interest for St. Paul's failure to timely pay Kubik compensation to the extent of the undisputed 5 percent. In addition, the trial court did not abuse its discretion in determining that the medical services provided were sufficient and did not warrant the appointment of an independent medical examiner.

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

MICRO/MINI SYSTEMS, INC., DOING BUSINESS AS COMPUTERS BY MALONE, APPELLANT, V. MICHAEL BOYLE AND BOYLE & ASSOCIATES, P.C., APPELLEES.

MICRO/MINI SYSTEMS, INC., DOING BUSINESS AS COMPUTERS BY MALONE, APPELLANT, V. BOYLE & ASSOCIATES, P.C., APPELLEE.

552 N.W.2d 308

Filed July 9, 1996. Nos. A-95-066, A-95-776.

1. **Directed Verdict: Proof: Appeal and Error.** In considering an appeal from an order granting a motion for a directed verdict at the close of the plaintiff's case, an appellate court must determine whether the cause of action was proved and in so doing must consider the plaintiff's evidence as true and give the plaintiff the benefit of reasonable conclusions deducible from that evidence.
2. **Principal and Agent: Contracts: Liability.** An agent, acting for a disclosed principal, is not ordinarily liable for the principal's contract.

3. ____: ____: ____. An agent who contracts on behalf of a disclosed principal, in the absence of some other agreement to the contrary or other circumstances showing that the agent has expressly or impliedly incurred or intended to incur personal responsibility, is not liable to the other contracting party.
4. **Principal and Agent: Corporations: Contracts: Liability: Proof.** It is the agent's duty to disclose his capacity as agent of a corporation if he is to escape personal liability for contracts made by him, and the agent bears the burden of proof of showing that he was purchasing in his corporate, not individual, capacity.
5. **Judgments: Jurisdiction: Appeal and Error.** When no factual dispute is involved, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the issue.
6. **Jurisdiction: Appeal and Error.** The issue of subject matter jurisdiction may be raised sua sponte by an appellate court.
7. **Parties: Final Orders: Appeal and Error.** When a party defendant is dismissed during trial, the order of dismissal is appealable.
8. **Jurisdiction: Appeal and Error.** An appeal shall be deemed perfected and an appellate court shall have jurisdiction of the cause when the notice of appeal has been filed and the docket fee deposited.
9. **Courts: Jurisdiction: Appeal and Error.** Lower courts are divested of subject matter jurisdiction over a particular case when an appeal of that case is perfected.
10. **Jurisdiction: Appeal and Error.** Any order made by the district court after the vesting of jurisdiction in an appellate court is void and of no effect. The district court loses jurisdiction the instant an appeal is perfected.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Judgment in No. A-95-066 reversed, and cause remanded for further proceedings. Appeal in No. A-95-776 dismissed, and cause remanded with directions.

Philip J. Lee for appellant.

Patrick M. Flood and Scott A. Meyerson, of Hotz & Weaver, for appellees.

HANNON, SIEVERS, and MUES, Judges.

HANNON, Judge.

Micro/Mini Systems, Inc. (Micro), sued Michael Boyle (Boyle) and Boyle & Associates, P.C. (Boyle P.C.), for payment on a computer system and related services supplied by the former pursuant to an agreement negotiated by Boyle. On December 15, 1994, at the conclusion of Micro's case in chief, the trial court granted Boyle's motion for a directed verdict, but denied a similar motion by Boyle P.C. The court then resumed the trial between the remaining parties, but later recessed it until February 1, 1995. The court rendered its decision, finding against Micro on its petition and against Boyle P.C. on its cross-petition on May 4. A motion for new trial was denied on June 14. In the meantime, on January 13, Micro appealed the court's action of dismissing the case as to Boyle by filing a notice of appeal (case No. A-95-066). Micro also later appealed the May 4 order (case No. A-95-776). The appeals have been consolidated.

The trial court granted Boyle a directed verdict because it concluded that any liability the defendants might have would be that of the principal, Boyle P.C. By its first appeal, Micro maintains that this finding was wrong, and by its second appeal, it maintains that the trial court did not have jurisdiction to finish the trial after the first appeal was perfected. We conclude that the evidence would support a finding that Boyle made the contract with Micro without disclosing he was an agent for Boyle P.C., or for Boyle's wife, Anne Boyle, and thus could be liable as an undisclosed agent. We also conclude that the first appeal deprived the trial court of the jurisdiction to finish the trial between the remaining parties. We therefore reverse the judgment and remand the cause in case No. A-95-066 for further proceedings, and we dismiss the appeal in case No. A-95-776 and remand the cause with directions to the district court to vacate its judgment of dismissal and to continue the trial, or commence a new trial.

Because an understanding of the facts of the case is necessary to understand our conclusion on the jurisdictional issues, we will depart from the usual order and consider the substantive question before we consider the jurisdictional questions.

CASE NO. A-95-066: DIRECTED VERDICT

Standard of Review.

[1] In considering an appeal from an order granting a motion for a directed verdict at the close of the plaintiff's case, an appellate court must determine whether the cause of action was proved and in so doing must consider the plaintiff's evidence as true and give the plaintiff the benefit of reasonable conclusions deducible from that evidence. *Russell v. Norton*, 229 Neb. 379,

427 N.W.2d 762 (1988); *D.S. v. United Catholic Soc. Servs.*, 227 Neb. 654, 419 N.W.2d 531 (1988). A trial court should direct a verdict, as a matter of law, only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of all inferences which can be reasonably drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the judgment is made, the case may not be decided as a matter of law. *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992); *Leonard v. Wilson*, 238 Neb. 1, 468 N.W.2d 604 (1991); *Carnes v. Weesner*, 229 Neb. 641, 428 N.W.2d 493 (1988).

Summary of Evidence.

When considered in the light most favorable to Micro, the evidence shows as follows:

Micro is a corporation owned by John Malone and his wife. Malone personally negotiated the sale of a computer system with Boyle. During all times relevant to this case, Boyle was an attorney who practiced law through Boyle P.C. His wife, Anne Boyle, operated a collection agency called Universal Revenue. The record does not show the legal form of the organization of Universal Revenue. The law practice and the collection agency were operated in one suite of offices, and apparently the clerical work for both the law office and the collection agency was done in the same room.

During February 1992, Boyle inquired of Malone about the feasibility of replacing an existing computer system. Boyle told him "he had just acquired a company that was involved in collections and that he had a computer system that was unsatisfactory and difficult to use." After several discussions, Malone submitted two proposals to Boyle in writing. The proposal document does not contain the name of any addressee, but the body of the document contains the statements, "I want to emphasize, Mike, that . . . I believe this would make a suitable network for your use . . . . I concluded that your operation is nicely confined in its scope," and similar statements indicating it was directed to Boyle. Malone testified that when he talked to Boyle, Boyle's responses were to the effect that " '[a]ll I need is . . . I just need . . . .' " Malone testified that he was not aware of the different corporate structures.

After several conversations between Micro employees, Boyle, Anne Boyle, and employees of Boyle P.C. and the collection agency, it was agreed that Micro would provide a computer system in accordance with one of Micro's proposals. At that time, the system was to be for the law business, but the collection agency would have access to it for its work. Part of the agreement involved designing the system so that "Anne Boyle" would have access to it.

On February 29, 1992, prior to the delivery of the hardware and services, Micro sent an invoice, exhibit 2, addressed to "Boyle & Associates" and "Mike Boyle." This invoice lists the labor, services, warranties, and hardware which Malone understood Micro was to supply, and it showed a total price of $27,667.15, $14,000 of which was for labor and programming, and the balance for hardware.

Micro delivered the hardware and began installing and programming the new computer system sometime in March. Problems developed. Boyle P.C.'s Wang computer system "crashed" before the information on it could be transferred to the new system, and this necessitated additional hours of programming. In addition, problems developed in adapting the system so it could be used by the collection agency. Malone testified that the nature of the agreement broadened, and the majority of the work focused on running the day-to-day operations of the collection agency. Micro's evidence would establish that at least by August, if not before, Micro knew the collection agency was operated by Anne Boyle. There is no evidence to establish the owner or the legal organization of the collection agency that was operated under the name Universal Revenue, or Universal Revenue Service, and at some time, Uni-Phy. Micro's evidence is to the effect that the problems of making the computer system available to the collection agency led to cost overruns and delays.

On June 12, Malone wrote a letter to Boyle addressed to "Mike Boyle" and "Boyle & Associates," and on the same date, Micro sent another invoice addressed to "Boyle & Associates" and "Mike Boyle." On a Monday in June, Malone told Boyle to pay, or he would not get his computer back, because at that time, Boyle had made only his initial payment, and that payment was less than the agreed-upon 25 percent. Malone testified that Boyle always discussed payments in terms of "Anne and I." At one point, Boyle told Malone that he and Anne Boyle were having financial trouble and needed to be able to pay the balance in three monthly payments. Malone told him he understood and told him he could pay the amount in four monthly payments. On June 15, Edward Malone, who was a business manager for Micro, and Boyle had a meeting in Edward Malone's office. Boyle gave Edward Malone a payment of $6,000 and a handwritten note stating, "I will talk to Ed about paying off the balance if I am able to arrange financing . . . ." The document is signed "Boyle & Associates, P.C. by Mike Boyle."

On August 24, 1992, Edward Malone received a faxed memorandum from Boyle which outlined all of the problems that Boyle's companies were experiencing with the computer system. The cover sheet has "Boyle & Associates, P.C." on it, and the memorandum states, "FROM: Michael BoyLe [sic]." This is the second time the record shows the use of "P.C." in connection with Boyle & Associates.

Obviously, the parties had disputes about payment by Boyle or Boyle P.C. of the balance due and about counterdemands by the defendants. These issues will not be summarized because they are beyond the issues of this appeal. The evidence would establish that a great deal of extra work, service, and equipment was supplied and that much of it was for the collection agency.

Micro alleges that after payment of $22,000, Boyle and Boyle P.C. owe a balance of $29,185.

Discussion.

After Micro rested, the defendants moved for directed verdict. The court stated, "There's an excellent reason why . . . we incorporate and that is to save ourselves from personal liability. And — I can only assume, I guess, that's why Mr. Boyle did it." The court then dismissed the action as to Boyle personally, finding that there was no testimony that Boyle personally obligated himself.

Micro argues at the outset that there is no evidence regarding the fact that Boyle & Associates is a professional corporation. However, Micro's petition alleges that "Boyle & Associates, P.C. is believed to be a Nebraska Professional Corporation," and in their answer, the defendants admit this allegation. Thus, this fact is deemed admitted. There is no similar allegation about Universal Revenue.

[2-4] Nebraska courts recognize the general rule that an agent, acting for a disclosed principal, is not ordinarily liable for the principal's contract. *Purbaugh v. Jurgensmeier*, 240 Neb. 679, 483 N.W.2d 757 (1992); *McGowan Grain v. Sanburg*, 225 Neb. 129, 403 N.W.2d 340 (1987). It is a fundamental rule that an agent who contracts on behalf of a disclosed principal, in the absence of some other agreement to the contrary or other circumstances showing that the agent has expressly or impliedly incurred or intended to incur personal responsibility, is not liable to the other contracting party. *Purbaugh, supra*; *Cargill Leasing Corp. v. Mueller*, 214 Neb. 569, 335 N.W.2d 277 (1983); *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981). In *Purbaugh, supra*, the court cited the following proposition from 19 C.J.S. *Corporations* § 540 at 169 (1990) with approval: "[I]t is the agent's duty to disclose his capacity as agent of a corporation if he is to escape personal liability for contracts made by him, and the agent bears the burden of proof of showing that he was purchasing in his corporate, not individual, capacity."

The record shows that by sometime in early March 1992, John Malone and Boyle agreed that Micro would sell a computer system to Boyle, and Micro commenced delivery of the system. The contract was necessarily made by that time. Micro's evidence shows that its officials knew that Boyle did business under the name of "Boyle & Associates." There is no evidence that at the time delivery was commenced, any Micro official had any notice that Boyle & Associates was a professional corporation. The Legislature has provided in Neb.

Rev. Stat. § 21-2206 (Reissue 1991) that a professional corporation shall have the words "professional corporation" or "P.C." as part of its name. With regard to Universal Revenue, Neb. Rev. Stat. § 21-2007 (Reissue 1991) requires a corporation to have in its name the word "corporation, company, incorporated, or limited, or . . . an abbreviation of one of such words." The reason for these statutes is obvious.

However, even if Boyle P.C. had used the appropriate corporate name, it is doubtful that Boyle could avoid personal liability as a matter of law in the face of the various statements he made to Malone, as summarized above, because these statements certainly indicate his personal interest rather than representation of a corporate interest. The evidence shows that in June and August, Micro supplied many extra services to make the computer system accessible and useable by the collection agency. Boyle's statement that he had recently acquired a collection agency, the initial requirement that the system was to be accessible and useable by the collection agency, and the fact that he never objected to being billed for services supplied to the collection agency upon the request of Anne Boyle would at least prevent a directed verdict on the issue of Boyle's liability for services that might have been supplied to the collection agency as opposed to the law practice. In addition, the evidence is clear that Boyle negotiated for at least some services for the collection agency. His wife was present at least at some of the negotiations in February and March, but there is no evidence that they gave any indication that Boyle was not the owner of the collection agency. We therefore conclude that the trial court erred in granting the motion for a directed verdict and dismissing Boyle as a defendant.

JURISDICTIONAL QUESTIONS

Standard of Review.

[5] When no factual dispute is involved, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the issue. *Jones v. State*, 248 Neb. 158, 532 N.W.2d 636 (1995); *K N Energy, Inc. v. Cities of Broken*

Bow et al., 248 Neb. 112, 532 N.W.2d 32 (1995); *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994).

[6] While none of the parties raise the issue of whether the order in case No. A-95-066 is a final, appealable order, the issue of subject matter jurisdiction may be raised sua sponte by an appellate court. *Scherbak v. Kissler*, 245 Neb. 10, 510 N.W.2d 318 (1994); *In re Interest of Kelly D.*, 3 Neb. App. 251, 526 N.W.2d 439 (1994). When a lower court lacks power, that is, subject matter jurisdiction, to adjudicate merits of a claim, issue, or question, an appellate court also lacks power to determine the merits of the claim, issue, or question presented to the lower court. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994); *Knerr v. Swigerd*, 243 Neb. 591, 500 N.W.2d 839 (1993); *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986); *Glup v. City of Omaha*, 222 Neb. 355, 383 N.W.2d 773 (1986). However, although an extrajurisdictional act of a lower court cannot vest an appellate court with jurisdiction to review or evaluate an evidentiary determination involved in such act, an appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power to enter the judgment or final order sought to be reviewed. *In re Interest of J.T.B. and H.J.T., supra*; *In re Interest of L.D. et al., supra*.

Discussion.

The posture of these appeals raises two jurisdictional questions: One, is the order dismissing the case as to Boyle during the middle of the trial appealable? Two, if the answer to that question is in the affirmative, does the appeal by Micro on the claim against Boyle divest the district court of jurisdiction to hear and determine the remainder of the case between Micro and Boyle P.C.?

We note that the jurisdictional problems in this case cannot arise in the federal courts or the states that follow the Federal Rules of Civil Procedure, because rule 54(b) provides:

> [W]hen multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express

> determination that there is no just reason for delay and upon an express direction for the entry of judgment.

The rule goes on to provide that in the absence of such a determination, an order is not final as to any of the parties.

Neb. Rev. Stat. § 25-1911 (Reissue 1995) provides in part that "[a] judgment rendered or final order made by the district court may be reversed, vacated, or modified," and under Neb. Rev. Stat. § 25-1902 (Reissue 1995), a judgment dismissing Boyle as a defendant would surely be a final order. Under Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1994), the appeal must be perfected "within thirty days after the rendition of such judgment or decree or the making of such final order." These statutes are clear and do not contemplate the problems provided for in rule 54 of the Federal Rules of Civil Procedure.

Micro relies upon *Green v. Village of Terrytown*, 188 Neb. 840, 199 N.W.2d 610 (1972) (*Green I*). In *Green I*, the Nebraska Supreme Court held that an order granting a summary judgment dismissing one defendant from the case was appealable and that the plaintiff, who failed to appeal from that order within 30 days, lost its right to appeal. In so holding, the court reasoned as follows:

> [A] paramount consideration is to be liberal in permitting appeals, but, on the other hand . . . piecemeal or successive appeals are not desirable. It would appear there is a further consideration, namely that where there are multiple defendants and the action is dismissed as to one defendant, that defendant no longer has a voice in the determination of the litigation and if the remaining parties permit the litigation to drag on for months or years, he has no way of bringing an end to the litigation or ascertaining whether or not it has been finally determined as to him. This is a very important consideration in determining whether or not such an order of dismissal is a "final order."

Id. at 841, 199 N.W.2d at 611. See, also, *Maurer v. Harper*, 207 Neb. 655, 300 N.W.2d 191 (1981).

[7] The only distinction between *Green I* and this case is that Green's action against Terrytown was dismissed by a motion for summary judgment (see *Green v. Village of Terrytown*, 189

Neb. 615, 204 N.W.2d 152 (1973) (*Green II*)), whereas the action against Boyle was dismissed during the trial. We have been unable to find any case which considers the rights of appeal as to a defendant dismissed during trial. We realize that in the usual case, a trial will be concluded before a plaintiff must file a notice of appeal as to any defendant dismissed during trial, and that a plaintiff could effectively terminate a jury trial by quickly appealing the dismissal of one defendant. However, such an action by the plaintiff carries with it the sanction of delaying the plaintiff's relief from the other defendants, and a plaintiff, in the position Micro found itself in, can seek to avoid the problem by filing a motion for new trial. We conclude that the rationale for the rule announced in *Green I* is applicable to the appeal in case No. A-95-066, and when a party defendant is dismissed during trial, the order of dismissal is appealable.

Micro contends that the trial court did not have jurisdiction over the issues in case No. A-95-776 because it was divested of its jurisdiction when Micro appealed in case No. A-95-066. Boyle P.C. relies upon 4 Am. Jur. 2d *Appellate Review* § 220 (1995) and the cases *Lane v. Messer*, 689 P.2d 1333 (Utah 1984), and *State ex rel Gattman v. Abraham*, 302 Or. 301, 729 P.2d 560 (1986), for the proposition that when an appeal is taken from a final judgment as to fewer than all parties, the remainder of the action in the trial court is not affected. However, the cases themselves show that the statutory rules of both forums are substantially similar to Fed. R. Civ. P. 54(b). Furthermore, in *Lane, supra*, the appeal was from the granting of a motion for summary judgment to a defendant, not an appeal from a directed verdict entered during trial, and *Lane* is thus clearly in conflict with *Green I*.

[8-10] Section 25-1912(3) provides in significant part: "[A]n appeal shall be deemed perfected and the appellate court shall have jurisdiction of the cause when such notice of appeal has been filed and such docket fee deposited . . . ." Insofar as we can find, Nebraska cases have consistently held "lower courts are divested of subject matter jurisdiction over a particular case when an appeal of that case is perfected." *Flora v. Escudero*, 247 Neb. 260, 264, 526 N.W.2d 643, 646 (1995). The Supreme

Court recently held that the district court was without jurisdiction to award attorney fees while an opinion was pending. *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995). In *Swain Constr. v. Ready Mixed Concrete Co., ante* p. 316, 542 N.W.2d 706 (1996), Judge Miller-Lerman reviewed the Nebraska cases and concluded the rule is that after an appeal is perfected, the trial court is divested of jurisdiction over the case until the appeal is concluded. Additionally, "[a]ny order made by the district court after the vesting of jurisdiction in the Supreme Court is void and of no effect. The district court lost jurisdiction the instant the appeal was perfected." *Nuttleman v. Julch*, 228 Neb. 750, 756, 424 N.W.2d 333, 338 (1988) (holding district court was without authority to dismiss defendants' counterclaims after plaintiff perfected her appeal as to earlier dismissal of plaintiff's ejectment petition).

We conclude that the trial court lost its jurisdiction upon Micro's appeal on January 13, 1995, and after that date it was without jurisdiction to enter the order dismissing Micro's action against Boyle P.C.

CONCLUSION

We conclude that the order dismissing Boyle during trial is a final, appealable order which was properly appealed. With regard to such appeal, we conclude that the trial court erred in directing a verdict in favor of Boyle. Additionally, as a result of this appeal, we conclude that the trial court was divested of jurisdiction, that the order dismissing Boyle P.C. subsequent to the first appeal was void, and that this court lacked jurisdiction to hear the merits of that appeal. We direct the trial court to vacate its order of dismissal and to continue the trial, or commence a new one.

JUDGMENT IN NO. A-95-066 REVERSED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

APPEAL IN NO. A-95-776 DISMISSED, AND CAUSE REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. RAYMOND D. FLANAGAN, APPELLANT.

553 N.W.2d 167

Filed July 23, 1996. No. A-95-577.

1. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate 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 it observed the witnesses.
2. **Motions to Suppress: Courts: Records.** It is a requirement for district courts to articulate in writing or from the bench their general findings when granting or denying a motion to suppress.
3. **Arrests: Search and Seizure: Motor Vehicles.** An inventory search is permissible after an arrest where the search is preceded by lawful custody of the vehicle and where the search is conducted pursuant to standardized inventory criteria or established routine.
4. **Police Officers and Sheriffs: Search and Seizure: Intent.** In the context of administrative and inventory searches, ulterior motives of an officer do not invalidate police conduct that is objectively justifiable.
5. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.
6. **Sentences.** In imposing a sentence, a judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

John C. Vanderslice for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges.

MILLER-LERMAN, Chief Judge.

Raymond D. Flanagan appeals his convictions and the sentences imposed by the district court for Platte County for possession of a controlled substance with intent to deliver, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1994), a Class III felony; possession of a controlled substance, in violation of § 28-416(3), a Class IV felony; driving while under the influence of alcoholic liquor, second offense, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1993), a Class W misdemeanor; and no proof of financial responsibility, in violation of Neb. Rev. Stat. § 60-570 (Reissue 1993), a Class II misdemeanor. Flanagan asserts that the district court erred in overruling his motion to suppress evidence seized during a search of his vehicle and in imposing an excessive sentence as to the possession of a controlled substance conviction. For the reasons set forth below, we affirm the judgment of the district court.

BACKGROUND

Early in the morning of August 12, 1994, Columbus police officer Charles Brooks noticed a vehicle with a loud muffler traveling westbound on 8th Street. Brooks, traveling eastbound on the same street, looking at his rearview mirror, observed the vehicle cross over the centerline. After making a U-turn, Brooks stopped behind the vehicle as it waited at a red light. Flanagan, the driver of the vehicle, appeared to be preoccupied with something in the car and sat through a green light. After Flanagan proceeded through the next green light, Brooks noticed that the right wheels of Flanagan's car went off of the pavement. Brooks then stopped Flanagan and subsequently arrested him for driving while under the influence of alcoholic liquor and for no proof of financial responsibility.

Officer Gregory Sealock searched Flanagan for weapons and personal belongings after the arrest at the scene. He discovered a round object in Flanagan's pocket, which, it was later determined, contained methamphetamine. After Flanagan was taken from the scene by Sealock, Brooks began taking an inventory of the contents of Flanagan's vehicle, during which time he discovered a brown paper bag in a yellow plastic clothes hamper in the backseat. Inside the paper bag were three 1-gallon size Ziploc baggies, each of which was later determined to contain marijuana.

Prior to trial, Flanagan filed a motion to suppress evidence seized from his person and from his vehicle and any other evidence obtained as a result of his detention and subsequent arrest. The trial court denied Flanagan's motion. The trial court made no specific findings regarding the basis for its denial.

Flanagan's case was tried to a jury. Flanagan objected to the admission of the challenged evidence at trial. He was convicted on all four counts and later sentenced as follows: 3 to 5 years' imprisonment on Count I, possession of a controlled substance with intent to deliver; 1 to 3 years' imprisonment on Count II, possession of a controlled substance; 45 days in jail, a fine of $500, and his driver's license to be suspended and revoked for 1 year following his release from the Nebraska Department of Correctional Services on Count III, driving while under the influence of alcoholic liquor. On Count IV, no proof of financial responsibility, Flanagan was fined $100.

ASSIGNMENTS OF ERROR

On appeal, Flanagan complains of the denial of his suppression motion only with regard to the search of his vehicle and the resultant seizure of the marijuana. He also argues that his sentence on Count II is excessive.

ANALYSIS

Motion to Suppress.

[1] A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate 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 it observed the witnesses. *State v. Osborn*, 250 Neb. 57, 547 N.W.2d 139 (1996).

[2] We note that in *Osborn*, released after the date of Flanagan's trial, the Nebraska Supreme Court stated that it is a requirement for district courts to articulate in writing or from the bench their general findings when granting or denying a motion to suppress. The record in this case does not contain the basis of the trial court's finding in overruling the motion to suppress. Following our review, we conclude that the trial court properly denied the motion to suppress and that this appeal may

be resolved on the basis that the contraband was seized as a result of a permissible inventory search.

[3] An inventory search is permissible after an arrest where the search is preceded by lawful custody of the vehicle and where the search is conducted pursuant to standardized inventory criteria or established routine. *Florida v. Wells*, 495 U.S. 1, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990); *Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987); *Illinois v. Lafayette*, 462 U.S. 640, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983); *South Dakota v. Opperman*, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976); *State v. Filkin*, 242 Neb. 276, 494 N.W.2d 544 (1993).

Excerpts from the Columbus Police Department policy manual admitted into evidence regarding the towing, impounding, and inventorying of vehicles provide as follows:

> The policy of the Columbus Police Department requires that when a driver of a vehicle is taken into custody[,] the vehicle must be secured since the owner/driver is no longer free to care for his property. The driver/owner will be given an opportunity to state his preference on the disposition of his vehicle. He must be able to make an intelligent and knowing decision immediately; and the requested action must be able to be accomplished in a reasonable amount of time. Normally, a request to wait until another party can respond to take custody of the vehicle will be denied because the officer cannot be detained for extended periods. The option to leave the vehicle parked at the scene will be weighed against the safety of the vehicle and the probability of property loss if so parked. Further, no vehicle will be left where it will be illegally parked.
>
> . . . .
>
> 4. Towing Situations:
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> . . . .
>
> f. Unattended Traffic Hazard/Violation of Law: Officers may tow any motor vehicle found on the public street or grounds unattended by the owner/operator that constitutes a traffic hazard or is parked in such a manner as to be in violation of the law.

. . . .

6. Towing Procedure

. . . .

c. Inventory: When a vehicle, per owner's request, is not towed nor impounded, there is no authority for an inventory of the vehicle and contents. . . .

. . . .

8. Impound/Recovery Report: The vehicle impound/recovery report is to be completed on all vehicles towed or impounded at the request of a Police Officer for the purpose of establishing protective custody of the vehicle and any property in the vehicle. . . .

a. In all cases where a vehicle is towed/impounded an impound/recovery report will be completed, along with a complete vehicle inventory.

. . . .

d. Instructions for vehicle inventory.

1. The inventory should be conducted in the presence of a witness when practicable.

2. The interior of the vehicle should be carefully examined, including under the seats, the trunk, and all compartments, to determine if items of value are present. All containers that can be easily opened found in the vehicle should be opened.

Flanagan argues generally that the department policy was not followed and that the search was improper under *State v. Filkin, supra*. In particular, Flanagan argues that the department policy was not followed because he was not given the opportunity to state his preference on the disposition of his vehicle. We do not agree. At the suppression hearing, Brooks stated that Flanagan wanted to drive the vehicle home "from the very beginning of the stop." This expression of preference meets the department policy, and under the circumstances, Brooks' refusal to let Flanagan drive the vehicle home was justified.

Our review of the record shows that the department policy states that the driver/owner must be able to make "an intelligent and knowing decision immediately." At the suppression hearing, Brooks testified that he believed Flanagan "to be intoxicated and not capable of making a decision that wouldn't leave me liable for his vehicle . . . ."

It is apparent from the record that the trial judge found Brooks' testimony credible and that such testimony amounted to Brooks' assessment that Flanagan's proposal that he drive his vehicle home was not feasible and, furthermore, that Flanagan was not able to make an intelligent and knowing decision. Under established routine, such conclusion justifies towing the vehicle and an attendant inventory search. Under such circumstances, the department policy was not violated.

Flanagan directs our attention to that portion of the policy which provides that "[w]hen a vehicle, per owner's request, is not towed nor impounded, there is no authority for an inventory of the vehicle and contents." Flanagan argues that by not allowing him to make arrangements for his vehicle that would preclude towing, Brooks "essentially 'authorized' himself to conduct an inventory" of the vehicle. Brief for appellant at 29. Thus, according to Flanagan, the towing and inventory search were merely pretexts to search the vehicle for drugs. In this connection, Flanagan points to evidence that Brooks had previous contacts with Flanagan in another drug case.

We have reviewed the record and find no evidence to indicate that Brooks, who was following standardized procedures, was acting in bad faith or for the sole purpose of investigation. Rather, the evidence indicates and the trial court apparently so determined that Brooks believed the police department was potentially responsible for the vehicle and its contents and, accordingly, took steps to secure the property.

[4] Furthermore, the U.S. Supreme Court has recently iterated, in the context of administrative and inventory searches, that ulterior motives of an officer do not invalidate police conduct that is objectively justifiable. *Whren v. U.S.*, ____ U.S. ____, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996).

Flanagan asserts that the department policy was impermissibly flexible. We disagree. Any discretion afforded the Columbus police was exercised in light of standardized criteria related to the feasibility and appropriateness of parking and locking a vehicle or arranging for a third party to drive it rather than impounding it. See *Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987).

Finally, Flanagan claims that the location of his vehicle did not present a traffic hazard. At the suppression hearing, Brooks testified that Flanagan's vehicle was not parked in a no-parking area and that he would not have towed it if he had seen someone else parked there. However, Brooks also testified that several inches of the vehicle remained on the driving portion of the road and that he was concerned that it posed a "potential," although not a "serious," hazard to other drivers. The decision to tow the vehicle in such a situation comports with the department policy.

Because the search of Flanagan's vehicle was a permissible inventory search, the trial court was correct in overruling Flanagan's motion to suppress the evidence obtained from the vehicle. Flanagan's first assignment of error is without merit.

Excessive Sentence.

Flanagan was sentenced to 3 to 5 years' imprisonment on the possession with intent to deliver a controlled substance conviction; 1 to 3 years' imprisonment on the possession of a controlled substance conviction; 45 days in jail, a fine of $500, and his driver's license to be suspended and revoked for 1 year following his release from the Nebraska Department of Correctional Services for the driving while under the influence of alcoholic liquor, second offense, conviction; and fined $100 on the no proof of financial responsibility conviction. Flanagan argues that because his conviction related to the marijuana should be overturned, his sentence related to his possession of methamphetamine should be modified. Because his first assignment of error was found to be without merit, this argument also fails. Flanagan also asserts that in sentencing him, the district court obviously overlooked his many positive qualities. In this regard, Flanagan indicates that he has a good employment history and provides support for his children.

[5,6] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Moore, ante* p. 564, 547 N.W.2d 159 (1996). In imposing a sentence, a judge should consider the defendant's age, mentality, education, experience, and social and cultural

background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *Id.*

The record reflects that Flanagan has prior convictions for drug-related offenses and for driving while under the influence of alcoholic liquor. He has undergone drug treatment and relapsed. According to the presentence investigation report, Flanagan is thousands of dollars in arrears in child support. Given Flanagan's history, the trial court did not abuse its discretion in the sentence imposed, which was within statutory limits.

Because we find that (1) the trial court did not err in admitting evidence obtained from the search of Flanagan's vehicle and (2) there was no abuse of discretion in the sentence imposed on Flanagan, the rulings and judgment of the trial court are affirmed.

AFFIRMED.

PSB CREDIT SERVICES, INC., A MINNESOTA CORPORATION, APPELLANT, V. BARRY RICH AND CAROL RICH, HIS WIFE, ET AL., APPELLEES.

552 N.W.2d 58

Filed July 23, 1996. No. A-95-1130.

1. **Limitations of Actions: Appeal and Error.** The determination of which statute of limitations applies is a question of law, and the appellate court must decide the issue independently of the conclusion reached by the trial court.
2. **Trusts: Deeds: Limitations of Actions.** When a trust deed secures a promise in writing, a trustee's sale of the property secured by the trust deed must be made within the time period prescribed by law for the commencement of an action on the underlying promise secured by the trust deed, which, by Neb. Rev. Stat. § 25-205(1) (Reissue 1995), is 5 years from maturity.

3. **Mortgages: Limitations of Actions.** A cause of action on a mortgage accrues, and must be brought, within 10 years of the date the debt secured by the mortgage matures, unless a payment has been made thereon or the statute of limitations has otherwise been tolled.
4. **Statutes.** When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain a statute's meaning.
5. **Foreclosure: Real Estate: Trusts: Deeds: Limitations of Actions.** If a creditor elects to judicially foreclose on the real property pledged under a deed of trust, the applicable 10-year statute of limitations is found in Neb. Rev. Stat. § 25-202 (Reissue 1995).

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed.

Michael G. Lessmann and Bruce R. Gerhardt, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellant.

Donald E. Girard, of Girard and Stack, P.C., for appellees.

HANNON, SIEVERS, and MUES, Judges.

SIEVERS, Judge.

This appeal raises the first impression issue of whether the time for commencement of an action to foreclose on real property under a deed of trust is governed by the 5-year statute of limitations under Neb. Rev. Stat. § 76-1015 (Reissue 1990) or by the 10-year statute of limitations under Neb. Rev. Stat. § 25-202 (Reissue 1995).

FACTUAL BACKGROUND

On May 25, 1984, Helen M. Elander executed and delivered to American Security Bank of North Platte, Nebraska (Bank), a promissory note in the amount of $250,000. On the same day, as security for this debt, Elander, both individually and as a trustee, executed and delivered to the Bank a deed of trust on real property she owned in Lincoln County, Nebraska. This deed of trust was filed with the register of deeds of Lincoln County on May 29, 1984. On May 30, 1985, Elander and others executed and delivered to the Bank a renewal promissory note in the amount of $260,000, which was payable in 176 days, on November 22, or upon demand.

The last payment under the promissory note held by the Bank was made on April 27, 1987. The trustee under the deed of trust filed a notice of default under trust deed, which was recorded with the register of deeds on April 27, 1994.

On October 30, 1987, the Federal Deposit Insurance Corporation took possession of and title to all assets of the Bank, and on June 3, 1994, PSB Credit Services, Inc. (PSB), purchased the Elander deed of trust and the indebtedness secured thereby. No issues are raised concerning how PSB came to be the creditor.

On March 13, 1995, nearly 8 years after the last payment on the note, PSB filed a petition of foreclosure against the appellees (claimants), electing, pursuant to Neb. Rev. Stat. § 76-1005 (Cum. Supp. 1994), to foreclose the Elander deed of trust in the manner provided by law for the foreclosure of mortgages on real property.

The claimants filed a demurrer to PSB's amended petition, alleging that the action was barred by the statute of limitations. The district court sustained the demurrer, holding that the 5-year statute of limitations provided for in the Nebraska Trust Deeds Act controlled. The district court dismissed the petition as time barred. PSB now appeals.

STANDARD OF REVIEW

[1] The determination of which statute of limitations applies is a question of law, and the appellate court must decide the issue independently of the conclusion reached by the trial court. *Central States Resources v. First Nat. Bank*, 243 Neb. 538, 501 N.W.2d 271 (1993).

DISCUSSION

Under the Nebraska Trust Deeds Act, Neb. Rev. Stat. § 76-1001 et seq. (Reissue 1990, Cum. Supp. 1994, & Supp. 1995), if the trustor defaults on the obligation secured by the trust deed, the beneficiary has two alternative methods of enforcement of the underlying debt: nonjudicial sale by the trustee or judicial sale as in a mortgage foreclosure. See § 76-1005. Section 76-1005 provides:

> A power of sale may be conferred upon the trustee which the trustee may exercise and under which the trust

> property may be sold in the manner provided in the Nebraska Trust Deeds Act after a breach of an obligation for which the trust property is conveyed as security, *or at the option of the beneficiary a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property*. The power of sale shall be expressly provided for in the trust deed.

(Emphasis supplied.)

The first alternative allows the trustee to sell the pledged property pursuant to a power of sale provided for in the trust deed. The second alternative allows the beneficiary of a trust deed, when the trustor has defaulted on the underlying obligation, to foreclose on the property named in the trust deed in the same manner as the law provides for the foreclosure of mortgages on real property. The statute gives the creditor the choice. PSB chose to use the foreclosure option.

[2] The Nebraska Trust Deeds Act makes it clear that if the trustee elects to sell the property pledged under the trust deed pursuant to the power of sale, the trustee must sell the property within the time period provided by law for the commencement of an action on the underlying obligation. § 76-1015. When a trust deed secures a promise in writing, as in this case, a trustee proceeding via a nonjudicial sale is required to sell the property under the trust deed within 5 years of the date an action on the underlying promise would have to be commenced. Neb. Rev. Stat. § 25-205(1) (Reissue 1995).

The Nebraska Trust Deeds Act does not, however, contain a specific statute of limitations in the event that a beneficiary exercises the statutory option to foreclose on the property pledged by the trust deed. The claimants argue, and the district court found, that § 76-1015 also controls in such a case.

[3] PSB asserts, however, that the controlling statute of limitations is found at § 25-202, which provides that the statute of limitations applicable to an action for the foreclosure of mortgages on real property is 10 years after the cause of action has accrued. A cause of action on a mortgage accrues, and must be brought, within 10 years of the date the debt secured by the mortgage matures, unless a payment has been made thereon or the statute of limitations has otherwise been tolled. *Vanice v.*

Oehm, 247 Neb. 298, 526 N.W.2d 648 (1995). Here, the promissory note matured on November 22, 1985. The Bank, however, received payment after maturity, on April 27, 1987, which tolled the running of the 10-year statute of limitations. See *Vanice v. Oehm, supra*. In any event, PSB filed its petition to foreclose the Elander deed of trust on March 13, 1995, well within the 10-year statute of limitations, irrespective of the tolling of the statute of limitations by the payment on April 27, 1987.

[4] When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain a statute's meaning. *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994); *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993); *State v. Crowdell*, 234 Neb. 469, 451 N.W.2d 695 (1990). Section 76-1015 provides that "[t]he *trustee's sale of property under a trust deed* shall be made within the period prescribed by law for the commencement of an action on the obligation secured by the trust deed." (Emphasis supplied.) Section 76-1015 thus clearly applies only to the sale of property by a trustee under a deed of trust. This case, however, does not involve a sale by a trustee under a deed of trust.

Had PSB elected to sell the property under the power of sale provided for in the trust deed, the 5-year limitation period from § 25-205, which § 76-1015 incorporates by reference, would have applied. However, PSB chose the second alternative provided by § 76-1005 and elected to foreclose on the trust deed in the manner provided by law for the foreclosure of mortgages on real property. In Nebraska, it is the court which has the power to decree a sale of the mortgaged premises upon the filing of a petition for foreclosure in order to discharge the amount due. Neb. Rev. Stat. § 25-2138 (Reissue 1995). Sales of mortgaged premises are made by a sheriff, acting in his official capacity, or some other person authorized by the court where the premises are situated. Neb. Rev. Stat. § 25-2144 (Reissue 1995). Importantly, Nebraska law provides for court confirmation of a mortgage foreclosure sale, provided that the sale is in conformity with chapter 25 and that the property is sold for "fair value" or "a subsequent sale would not realize a greater amount." Neb. Rev. Stat. § 25-1531 (Reissue 1995). These protections for the debtor who has pledged his or her property are not part of a sale by a trustee under a trust deed.

A sale of property by a trustee under a deed of trust is done in an informal, nonjudicial manner. A foreclosure of a mortgage, however, is done formally, through the court, with numerous procedural and substantive protections for the debtor. The claimants' assertion that the statute of limitations set forth in § 76-1015 was intended by the Legislature to apply to each alternative method of selling the real property under a trust deed is simply unsupported by the clear and unambiguous language of the statute, which specifically limits its applicability to a "trustee's sale of property under a trust deed." We hold that the 10-year statute of limitations for foreclosure of mortgages controls the time for commencement of an action for the foreclosure upon property secured by a trust deed when the trustee elects to proceed under the mortgage foreclosure statutes. Obviously, such an election by the creditor "transforms" a trust deed into a mortgage for all intents and purposes. The consequences of the transformation by the creditor's election include greater procedural and substantive protections for the debtor, but the "tradeoff" is a longer statute of limitations for the creditor.

[5] The claimants here support their argument for the 5-year statute of limitations by heavy reliance upon *Sports Courts of Omaha, supra*, which held that the Nebraska Trust Deeds Act's *specific* limitation of 3 months for commencement of a deficiency action would bar an action for deficiency filed 4 years after the liquidation of the security under the trust deed. From *Sports Courts of Omaha*, the claimants draw the conclusion that the Nebraska Supreme Court has considered "the Nebraska Trust Deeds Act [as] an independent act which provides a specific statutory plan to obtain performance of an obligation" and that "it would seem to naturally follow that the statute of limitations provided at § 76-1015 of five years . . . would control over the general 10 year statute of limitations provided in the general mortgage foreclosure statute." Brief for appellees at 29. We disagree. If one can foreclose a trust deed "in the manner provided by law for the foreclosure of mortgages

on real property," such foreclosure naturally includes the right to do so at any time within 10 years of the accrual of the cause of action—in the absence of a specific statutory limitation on such foreclosure emanating from the trust deed. An example of a specific limitation is found in the Utah Code Ann. § 57-1-34 (1994):

> The trustee's sale of property under a trust deed shall be made, or an action to foreclose a trust deed as provided by law for the foreclosure of mortgages on real property shall be commenced, within the period prescribed by law for the commencement of an action on the obligation secured by the trust deed.

Our statute allowing "transformation" of a trust deed into a mortgage is not so specifically limited. We therefore hold that the 10-year statute of limitations applicable to mortgage foreclosures controls the time for commencement of an action to foreclose on real property under a deed of trust. The dismissal of the petition by the district court is reversed.

REVERSED.

EUGENE J. HYNES, APPELLEE, V. KELLY MICHAEL HOGAN, APPELLANT.

553 N.W.2d 162

Filed July 23, 1996. No. A-95-1337.

1. **Demurrer: Pleadings: Appeal and Error.** A demurrer which challenges the sufficiency of the allegations is a general demurrer, and in an appellate court's review of a ruling on such demurrer, the court is required to accept as true all facts which are well pled and proper and reasonable inferences of law and fact which may be drawn therefrom, but not conclusions of the pleader.
2. **Demurrer: Pleadings.** In ruling on a demurrer, the petition is to be construed liberally; if as so construed, the petition states a cause of action, the demurrer is to be overruled.
3. **Quo Warranto: Public Officers and Employees.** Quo warranto affords no relief for official misconduct of a public officer.

4. **Statutes: Legislature: Intent: Appeal and Error.** In ascertaining the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
5. **Demurrer: Pleadings.** If from the facts stated in the petition it appears that the plaintiff is entitled to any relief, a general demurrer will not lie.
6. ____: ____. In considering a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
7. ____: ____. After a demurrer is sustained, an opportunity to amend the petition should be granted unless there is no reasonable possibility that the plaintiff will, by amendment, be able to state a cause of action.

Appeal from the District Court for Garden County: BRIAN SILVERMAN, Judge. Reversed and remanded for further proceedings.

Kelly Michael Hogan, pro se.

Edward D. Steenburg for appellee.

HANNON, SIEVERS, and MUES, Judges.

MUES, Judge.

Kelly Michael Hogan appeals from the decision of the district court for Garden County which found Hogan, the Garden County Attorney, guilty of official misconduct pursuant to Neb. Rev. Stat. § 23-2001(7) (Reissue 1991) and declared the office of county attorney vacant.

STATEMENT OF FACTS

In November 1994, Kelly Michael Hogan was elected to the office of Garden County Attorney. Hogan's opponent in the election, Eugene J. Hynes, is the appellee in this action. At the time of the election, Hogan resided in Ogallala, Nebraska, in Keith County, where he had a private law practice. Hogan lived with his son, Cory, who was a senior at Ogallala High School and was scheduled to graduate in May 1995.

Prior to being sworn in as the Garden County Attorney in January 1995, Hogan leased a house in Garden County, established telephone service in his name at the house, changed his voter registration to Garden County, renewed his driver's license in Garden County, and moved his private law practice to Oshkosh, Nebraska, which is located in Garden County. In March 1995, when the registration became due on his motor vehicle, Hogan registered his motor vehicle in Garden County. In addition, Hogan used his Garden County mailing address on his 1994 income tax return and on his son's federal student aid application, both prepared after January 1995.

Lori Zeilinger, the Perkins County Attorney, testified that at a court appearance on March 17, 1995, Hogan stated that he had not yet moved to Oshkosh. In addition, a report received into evidence from Sharon Stumpf, a private investigator, showed that as of March 20, Hogan was still staying at his Ogallala residence. The Garden County Sheriff, Kit Krause, testified that until April, Hogan had not provided him with a personal telephone number in Garden County. Before that time, Krause would normally reach Hogan during nonbusiness hours by phoning his home in Ogallala. Hogan's neighbor in Ogallala, Gary Krajewski, testified that he observed Hogan's vehicle at the Ogallala residence from time to time from January until sometime in March. Rex Wheeler, a law enforcement officer from Garden County, testified that on a morning in March or April, Wheeler went to Hogan's Oshkosh residence to pick up Hogan because Hogan's vehicle was snowed in.

Hogan does not dispute that he continued to maintain his home in Ogallala and that he primarily spent his nights at the Ogallala house until March 1995, when this action was filed. After the lawsuit was filed, Hogan spent 3 to 4 days a week in Oshkosh. Hogan testified that he planned to stay in Ogallala until May, when his son graduated from high school. Hogan is the sole custodian of his son. Further, Hogan testified that it was his intent to permanently reside in Garden County.

On March 21, 1995, Hynes filed a complaint for removal, alleging that Hogan had continued to reside in Ogallala, Keith County, in violation of Neb. Rev. Stat. § 23-1201.01 (Cum. Supp. 1994). Further, Hynes alleged that by continuing to reside in Keith County, Hogan was guilty of official misconduct pursuant to Neb. Rev. Stat. § 28-924 (Reissue 1995), and that

Hogan's office should therefore be declared vacant pursuant to Neb. Rev. Stat. § 32-560 (Cum. Supp. 1994). Hogan filed a demurrer to the petition, alleging that Hynes had failed to follow the proper procedure to remove a public official under the circumstances. Specifically, Hogan stated that the proper procedure under the circumstances was a quo warranto action pursuant to Neb. Rev. Stat. § 25-21,122 (Reissue 1995) and alleged that Hynes failed to fulfill the requirements necessary to initiate such an action. In addition, Hogan alleged that Hynes failed to allege facts sufficient to constitute official misconduct pursuant to § 28-924.

Trial was held on Hynes' complaint on May 25, 1995. In a journal entry dated June 7, 1995, the court found that Hogan was in violation of § 23-1201.01 and that his actions constituted official misconduct pursuant to § 23-2001. Thereupon, the court declared the office of Garden County Attorney vacant and ordered that a copy of the judgment be entered upon the election book. On June 15, Hogan filed a motion for new trial. The court overruled the motion on November 7. Hogan timely appeals from this order.

ASSIGNMENTS OF ERROR

On appeal, Hogan alleges that the district court erred by (1) failing to sustain Hogan's demurrer, (2) failing to apply the correct standard of proof to the evidence, (3) failing to require Hynes to initiate a quo warranto proceeding, (4) failing to find that Hogan was a resident of Garden County, and (5) finding that Hogan's failure to reside in Garden County constituted official misconduct under § 28-924.

STANDARD OF REVIEW

[1,2] A demurrer which challenges the sufficiency of the allegations is a "general demurrer," and in an appellate court's review of a ruling on such demurrer, the court is required to accept as true all facts which are well pled and proper and reasonable inferences of law and fact which may be drawn therefrom, but not conclusions of the pleader. *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994); *Curtice v. Baldwin Filters Co., ante p.* 351, 543 N.W.2d 474 (1996). In ruling on a demurrer, the petition is to be construed liberally; if as so

construed, the petition states a cause of action, the demurrer is to be overruled. *Proctor v. Minnesota Mut. Fire & Cas.*, 248 Neb. 289, 534 N.W.2d 326 (1995).

DISCUSSION

Hogan first asserts as error the district court's failure to sustain his demurrer to Hynes' complaint for removal. Preliminarily, although Neb. Rev. Stat. § 23-2001 et seq. (Reissue 1991) does not specify that a demurrer is an available pleading in removal proceedings, § 23-2006 provides that a defendant "may move to reject the complaint upon any ground rendering such motion proper . . . ." Further, § 23-2003 states that "[t]he proceedings shall be as nearly like those in other actions as the nature of the case admits . . . ." We therefore construe Hogan's demurrer as a proper pleading in this matter and treat it as we would any demurrer under our rules of civil procedure. Specifically, Hogan contends that Hynes' complaint for removal failed to allege a cause of action for removal from office based upon official misconduct. Hogan argues that his alleged failure to reside within Garden County at most caused him to be ineligible to serve as county attorney, but did not constitute official misconduct.

Section 23-2001 provides that "[a]ll county officers may be charged, tried, and removed from office . . . for (1) habitual or willful neglect of duty, (2) extortion, (3) corruption, (4) willful maladministration in office, (5) conviction of a felony, (6) habitual drunkenness, or (7) *official misconduct as defined in section 28-924.*" (Emphasis supplied.) Section 28-924 states in part that "[a] public servant commits official misconduct if he knowingly violates any statute or lawfully adopted rule or regulation *relating to his official duties.*" (Emphasis supplied.)

Hynes alleges that Hogan's failure to reside in Garden County is a knowing violation of § 23-1201.01. We note that subsequent to this action, the Nebraska Legislature amended § 23-1201.01 to provide that a county attorney serving in a county which does not have a city of the metropolitan, primary, or first class may reside in an adjoining Nebraska county. See § 23-1201.01 (Supp. 1995). However, § 23-1201.01 as it was in effect at the time of this action provides in part that "a county attorney shall reside in the county in which he or she holds office." It is Hogan's assertion that even if Hynes' allegation that Hogan knowingly violated § 23-1201.01 were true, this violation did not "relat[e] to his official duties" and therefore did not constitute official misconduct; thus, the removal authorized by § 23-2001 is not available. Specifically, Hogan argues that residency is merely a qualification for the job of county attorney, and does not "relat[e] to his official duties."

[3] In *State v. Jones*, 202 Neb. 488, 490, 275 N.W.2d 851, 853 (1979), the court found that a Cherry County commissioner was not a resident of Cherry County, in violation of "[Neb. Rev. Stat. §] 23-150, R. R. S. 1943, [which] provide[d]: 'The commissioners shall have the qualifications of electors, and shall be residents of their respective districts.' " In so finding, the court held that the commissioner "ceased to be a resident and qualified elector of Cherry County" and therefore affirmed the order vacating the commissioner's office. 202 Neb. at 493, 275 N.W.2d at 854. This was a quo warranto action. Quo warranto affords no relief for official misconduct of a public officer. See *State, ex rel. Johnson, v. Consumers Public Power District*, 143 Neb. 753, 10 N.W.2d 784 (1943). Thus, while the court in *State v. Jones, supra*, did not discuss whether the commissioner's violation of the residency requirement constituted official misconduct, it is implicit in the court's affirmation of the quo warranto procedure that the residency violation was not deemed to be official misconduct.

Although the term "official misconduct" found in § 23-2001, as defined in § 28-924, has not been construed by either the Nebraska Supreme Court or this court, it has been stated that

> mere misconduct while in office, not constituting official misconduct, is not sufficient ground for removal of a prosecuting attorney, and that in order to warrant removal from office, the act of malfeasance must have a direct relation to, and be connected with, the performance of official duties, and the *conduct charged must be something that the officer did in his official capacity*.

(Emphasis supplied.) 27 C.J.S. *District and Prosecuting Attorneys* § 7(3) at 636 (1959). See, also, 63A Am. Jur. 2d *Prosecuting Attorneys* § 17 (1984).

Hogan's alleged failure to reside in Garden County was not an act performed in his "official capacity" as county attorney, nor can it be characterized as relating to the performance of an "official" duty. The duties of a county attorney are outlined in Neb. Rev. Stat. § 23-1201 (Reissue 1991) and include such things as preparing, signing, verifying, and filing complaints; consulting with victims prior to reaching plea agreements with defendants; prosecuting or defending, on behalf of the state or county; filing annual inventory statements; and reporting the final disposition of all criminal cases. Section 23-1201 does not include within the duties of a county attorney the requirement that a county attorney reside within the county being served. Moreover, § 28-924 provides that to constitute official misconduct, the violation must be of a statute, rule, or regulation *relating to* a public servant's official duties.

[4] In ascertaining the meaning of a statute, we must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being our duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Koterzina v. Copple Chevrolet*, 249 Neb. 158, 542 N.W.2d 696 (1996); *Becker v. Nebraska Acct. & Disclosure Comm.*, 249 Neb. 28, 541 N.W.2d 36 (1995). Webster's Third New International Dictionary, Unabridged 1916 (1993) defines "relate" in relevant part as follows: "to show or establish a logical or causal connection between . . . to be in relationship . . . ."

We do not find a "connection" between the residency requirement and the official duties of the county attorney, such as to establish that a violation of the residency statute constitutes official misconduct. Rather, as was the case in *State v. Jones*, 202 Neb. 488, 275 N.W.2d 851 (1979), residing in the county being served is a qualification to holding the office of county attorney. Indeed, Hynes concedes at oral argument that the position does not prohibit a private law practice conducted in a different county, a fact which effectively defuses an argument that county residence is considered necessary to the performance of that position. In light of this, we find that the allegation that Hogan failed to reside in Garden County is insufficient to charge official misconduct and that Hynes' complaint for removal, even when construed liberally, failed to state a cause of action under § 23-2001.

[5] However, this does not end our analysis. If from the facts stated in the petition it appears that the plaintiff is entitled to any relief, a general demurrer will not lie. *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995); *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993). Hogan's demurrer essentially concedes that the quo warranto proceeding envisioned and authorized by Neb. Rev. Stat. § 25-21,121 et seq. (Reissue 1995) could accomplish the result sought by Hynes' lawsuit if in fact Hogan was found to have violated the residency requirement as alleged.

Pertinent provisions of the quo warranto statutes require that an information be filed by the Attorney General or by the county attorney of the proper county against any person unlawfully holding or exercising a public office. Any elector may file the information if the county attorney refuses to do so within 10 days after being notified in writing by an elector that a person unlawfully holds or exercises a public office. In that event, the person filing is required to file a bond of not less than $500 conditioned upon prosecution of the action without delay and payment of all costs, including a reasonable attorney fee to the person against whom the information is filed, if the action is unsuccessful. Attorney fees are to be fixed by the court and taxed as costs. Hynes' petition contains no allegation that he notified the county attorney in writing about filing an information, that the county attorney refused to file the information, or that Hynes filed the appropriate bond.

[6] In considering a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *SID No. 57 v. City of Elkhorn, supra*; *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995); *Dalition v.*

Langemeier, 246 Neb. 993, 524 N.W.2d 336 (1994); *First Nat. Bank in Morrill v. Union Ins. Co.*, 246 Neb. 636, 522 N.W.2d 168 (1994).

Even if we were to liberally construe the petition as one seeking quo warranto relief under § 25-21,121, we would find that the demurrer should have been sustained, since the allegations necessary for quo warranto relief were not presented.

We conclude that Hogan's first assignment of error is therefore meritorious. Hynes' petition failed to state a cause of action under either the removal statute or quo warranto. Hogan's demurrer was valid, and the district court erred in not sustaining it. Therefore, it is unnecessary to address the balance of Hogan's assigned errors. However, we must address one remaining issue.

[7] The law is firmly established that after a demurrer is sustained, an opportunity to amend the petition should be granted unless there is no reasonable possibility that the plaintiff will, by amendment, be able to state a cause of action. *Gallion v. Woytassek*, 244 Neb. 15, 504 N.W.2d 76 (1993). Based on our discussion above, there is no reasonable possibility that Hynes will, by amendment, be able to state a cause of action for removal based on Hogan's alleged official misconduct, so long as the sole basis for the official misconduct is Hogan's alleged violation of § 23-1201.01. Noncompliance with § 23-1201.01 does not constitute official misconduct as defined in § 28-924 so as to authorize removal of a county attorney pursuant to § 23-2001(7). Whether other facts might be alleged to bring into play one or more of the remaining six subsections of § 23-2001, we, of course, have no way of knowing. Similarly, whether other facts might be alleged in good faith which, if proven, constitute official misconduct under §§ 23-2001(7) and 28-924 is an unknown.

As to the quo warranto matter, Hynes' alleged status as a resident of Garden County is obviously insufficient to authorize him to bring such proceeding. See § 25-21,122. Yet, we are in no position to measure the likelihood of Hynes' making good faith allegations sufficient to meet the varied and sundry requirements of the quo warranto statutes, only a few of which we have referenced above.

The law is clear that if any reasonable possibility exists to cure the defects which render a plaintiff's petition demurrable for failure to state a cause of action, leave to amend should be granted. *Gallion v. Woytassek, supra.* Thus, Hynes must be granted such leave.

CONCLUSION

Hynes' complaint, whether construed as one for removal or in quo warranto, did not allege facts sufficient to state a cause of action. The district court erred in not sustaining Hogan's demurrer and in proceeding to trial on Hynes' complaint. The judgment of removal is reversed and the matter remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SARAH DUTTON, APPELLANT, V. BEVERLEE J. TRAVIS, APPELLEE.

551 N.W.2d 759

Filed July 30, 1996. No. A-95-414.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Negligence: Proof.** Under the current standard, to obtain summary judgment on the issue of contributory negligence, the defendant has the burden to prove, under the facts viewed most favorably to the plaintiff, that the contributory negligence of the plaintiff is equal to or greater than the negligence of the defendant as a matter of law.

4. **Pedestrians: Highways: Right-of-Way.** A pedestrian crossing a street between intersections is held to a higher standard of care than one crossing at a crosswalk where the pedestrian is afforded the right-of-way.
5. **Motor Vehicles: Pedestrians: Highways: Right-of-Way.** When crossing a street at a point not within a crosswalk, a pedestrian is required to yield the right-of-way to all vehicles on that roadway.
6. **Pedestrians: Highways.** A pedestrian who crosses a street between intersections is required to keep a constant lookout for his or her own safety in all directions of anticipated danger.
7. **Motor Vehicles: Pedestrians: Highways: Juries.** Where a pedestrian looks but does not see an approaching automobile, sees it and misjudges its speed or its distance from him or her, or for some reason concludes that he or she could avoid injury to himself or herself, a jury question is usually presented.
8. **Pedestrians: Highways: Testimony.** Even if a plaintiff testified that he or she did look before crossing the street, it is implied that the plaintiff looked in such a manner that he or she would see that which was in plain sight unless some reasonable excuse for not seeing was shown.
9. **Motor Vehicles: Pedestrians: Highways: Right-of-Way.** Between intersections, an automobile has the right-of-way over pedestrians, and the driver of an automobile has the right to assume that pedestrians will observe this rule. The driver is not required to anticipate that a pedestrian will violate this rule.

Appeal from the District Court for Chase County: JOHN J. BATTERSHELL, Judge. Reversed and remanded for further proceedings.

George M. Zeilinger for appellant.

William M. Wroblewski, of Kay & Kay, for appellee.

HANNON, SIEVERS, and MUES, Judges.

MUES, Judge.

Sarah Dutton brought a negligence action against Beverlee J. Travis, seeking damages for personal injuries arising out of an automobile-pedestrian accident. The district court for Chase County granted summary judgment in favor of Travis, finding Dutton contributorily negligent as a matter of law. Dutton appeals from that decision.

STATEMENT OF FACTS

On May 29, 1992, between approximately 8 and 8:30 a.m. in Imperial, Nebraska, Sarah Dutton left her house, located on the south side of 12th Street, with the intention to cross the street and go to her neighbor's house. Dutton, who was 78 years old at the time of the accident, was going to visit her neighbor, Terri L. Commins, so that Commins could read to Dutton an entry in an address book which Dutton could not read.

Dutton testified in her deposition that when she came to her mailbox, located on the edge of her lawn next to 12th Street, she stopped and looked left (west) and right (east) along 12th Street, did not see any traffic, and proceeded to cross the street. Dutton stated that the weather was nice, the sun was shining, and there were no obstacles blocking her view of the road. Dutton stated that her mailbox is located approximately half a block from the intersection of 12th and Park Streets. According to Dutton, although she wore glasses, her eyesight was good, and she had problems only with close reading.

Shortly after Dutton entered the street, she was struck by an automobile driven by Beverlee J. Travis. Travis testified in her deposition that just before the collision she had left the Colonial Kitchen parking lot located approximately two blocks (apparently west) from Dutton's house and was driving east on 12th Street. When Travis first saw Dutton, Travis' vehicle either was in the middle of the first intersection west of the block in which Dutton lives or was just entering into that block, and Dutton was standing beside her mailbox. Travis assumed that Dutton was mailing something. Travis also assumed that Dutton would not be crossing the street by herself, because Travis knew Dutton and was aware that Dutton did not have good eyesight. Specifically, Travis testified that she was aware that Dutton had poor eyesight because of a previous incident where it had been necessary for Travis to actually take Dutton's hand and tell Dutton who she was before Dutton was able to recognize her.

Travis testified that after observing Dutton by her mailbox, Travis looked into her rearview mirror "for a second," and when she looked back at the road, Dutton was directly in front of her car by the hood ornament, approximately in the middle of Travis' lane of traffic. Travis, who stated she was traveling approximately 10 to 15 m.p.h., then swerved to the left and hit her brakes. The bumper on the passenger side of Travis' car hit Dutton's left side, forcing Dutton onto the hood of the car and then against the windshield and back to the ground. Travis' vehicle stopped east of Dutton's mailbox.

As a result of the accident, Dutton's left leg was broken. Dutton does not recall anything about the accident. Travis stated that had Dutton been a small child, "I probably never would have taken my eyes off of [her]." Travis also stated that there was nothing obstructing her view.

In an affidavit, Dutton's neighbor, Commins, stated that on the morning of May 29, 1992, after receiving a telephone call from Dutton advising Commins that she was coming over to Commins' house, she looked out her living room window and saw Dutton by the mailbox. After looking down to clear clothing and papers from her couch, Commins again looked toward 12th Street and saw Dutton rolling off of Travis' car. Dannie Mickelson, an insurance adjuster who investigated the accident, stated in an affidavit that the distance from the Colonial Kitchen parking lot to Dutton's mailbox was 446 feet. From the mailbox to the intersection to the east was 75 feet.

On October 6, 1994, Dutton filed a petition in the district court for Chase County alleging that Travis' negligence had been the direct and proximate cause of injuries to Dutton. Travis filed an answer denying the allegations in Dutton's petition and asserting that Dutton's own negligence was the direct and proximate cause of her injuries. Further, Travis alleged that if she was negligent, Dutton was contributorily negligent to such an extent as to bar her recovery as a matter of law. Travis then filed a motion for summary judgment on February 22, 1995.

A hearing on the motion for summary judgment was held on March 10, 1995, at which the court received the depositions of Dutton and Travis and the affidavits of Commins and Mickelson. In an order dated March 22, 1995, the district court found that there were no material questions of fact. Further, the court found that Dutton was contributorily negligent and that Dutton's negligence was more than slight and equal to or greater than the negligence of Travis. Accordingly, the court granted Travis' motion for summary judgment. Dutton timely appeals from this order.

ASSIGNMENTS OF ERROR

On appeal, Dutton asserts that the district court erred in determining that Dutton's negligence was equal to or greater than Travis' negligence and in granting Travis' motion for summary judgment.

STANDARD OF REVIEW

[1] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Shipley v. Baillie*, 250 Neb. 88, 547 N.W.2d 711 (1996); *Schiffern v. Niobrara Valley Electric*, 250 Neb. 1, 547 N.W.2d 478 (1996).

[2] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Shipley v. Baillie, supra.*

ANALYSIS

Dutton argues that the district court erred in finding that she was contributorily negligent as a matter of law so as to bar her from recovery. The law in Nebraska on contributory negligence has changed in recent years. Under the present law, in any action accruing after February 8, 1992, a plaintiff's contributory negligence "diminish[es] proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence," but does not bar recovery unless the plaintiff's contributory negligence is equal to or greater than the defendant's. Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995). This modified comparative negligence statute, with its equal-fault bar, replaces the previous standard, under which a plaintiff would be barred from recovery as a matter of law if his or her contributory negligence was more than slight or the defendant's negligence was less than gross in comparison. Neb. Rev. Stat. § 25-21,185 (Reissue 1995).

Under the former standard,

> to obtain summary judgment on the issue of contributory negligence, the defendant has the burden of proving, under the facts viewed most favorably to the plaintiff, that (1) the plaintiff's contributory negligence was more than slight as

> a matter of law or (2) the defendant's negligence was not gross in comparison to the plaintiff's negligence as a matter of law. *John v. ∞ (Infinity) S Development Co.*, 234 Neb. 190, 450 N.W.2d 199 (1990).

Schiffern v. Niobrara Valley Electric, 250 Neb. at 7-8, 547 N.W.2d at 483.

[3] Under the current standard, to obtain summary judgment on the issue of contributory negligence, the defendant has the burden to prove, under the facts viewed most favorably to the plaintiff, that the contributory negligence of the plaintiff is equal to or greater than the negligence of the defendant as a matter of law. § 25-21,185.09.

Neither party adduced evidence on matters which one might reasonably expect in such a case, such as the width of 12th Street at the point in question, the number of lanes it contained, the distance from Travis' car to Dutton at the time Travis first observed her, the presence or absence of skid marks at the accident scene, the distance east of the mailbox that Travis' vehicle came to rest following the collision, the direction Dutton was facing (south toward her mailbox or north toward 12th Street) when Travis first observed her, or the posted speed limits, if any, on 12th Street. Nevertheless, the evidence offered shows that Dutton crossed 12th Street between intersections, and a reasonable inference is that no crosswalk existed at this point on 12th Street. She testified that she looked both ways, but failed to see any traffic, despite the lack of any obstacle blocking her view.

[4,5] Several principles have been articulated with respect to motor vehicle-pedestrian collisions under the previous slight/gross standard. For example, the Nebraska Supreme Court has held that when a pedestrian in a place of safety

> "sees or could have seen the approach of a moving vehicle in close proximity to him or her and suddenly moves from the place of safety into the path of such vehicle and is struck, such conduct constitutes contributory negligence more than slight as a matter of law and precludes recovery."

Hennings v. Schufeldt, 222 Neb. 416, 421, 384 N.W.2d 274, 278 (1986) (quoting *Gerhardt v. McChesney*, 210 Neb. 351, 314

N.W.2d 258 (1982)). See, also, Neb. Rev. Stat. § 60-6,153(2) (Reissue 1993) (no pedestrian shall suddenly leave curb or other place of safety and walk into path of vehicle which is so close that it is impossible for driver to stop). Also, a pedestrian crossing a street between intersections is held to a higher standard of care than one crossing at a crosswalk where the pedestrian is afforded the right-of-way. *Hennings v. Schufeldt, supra*; *Gerhardt v. McChesney, supra*. When crossing a street at a point not within a crosswalk, a pedestrian is required to yield the right-of-way to all vehicles on that roadway. Neb. Rev. Stat. 60-6,154(1) (Reissue 1993).

[6] In addition, the court has held that a pedestrian who crosses a street between intersections is required to keep a constant lookout for his or her own safety in all directions of anticipated danger. See, e.g., *Hennings v. Schufeldt, supra*; *Gerhardt v. McChesney, supra*; *Hrabik v. Gottsch*, 198 Neb. 86, 251 N.W.2d 672 (1977). Under the previous slight/gross standard, a plaintiff who failed to keep such a lookout was ordinarily guilty of negligence to such a degree that recovery was barred as a matter of law. *Hennings v. Schufeldt, supra.*

[7,8] Dutton's testimony is that she looked both ways before crossing the street. She did not see Travis' vehicle, although there were no obstructions in her line of sight, and no reasonable explanation for Dutton's failure to see Travis is given. Travis' speed was 10 to 15 m.p.h., the weather was "nice," and the sun was shining. Where a pedestrian looks but does not see an approaching automobile, or sees it and misjudges its speed or its distance from him or her, or for some reason concludes that he or she could avoid injury to himself or herself, a jury question is usually presented. *Hennings v. Schufeldt, supra.* However, as stated in *Hennings*: " ' "[T]he foregoing rule does not mean that a mere statement by the injured person, that he looked in the direction from which he was struck is sufficient of itself to insure a consideration of his case by a jury. . . ." ' " 222 Neb. at 422, 384 N.W.2d at 278 (quoting from *Merritt v. Reed*, 186 Neb. 561, 185 N.W.2d 261 (1971)). Even if a plaintiff testified that he or she did look before crossing the street, it is implied that the plaintiff looked in such a manner that he or she would see that which was in

plain sight unless some reasonable excuse for not seeing was shown. *Hennings v. Schufeldt, supra*; *Merritt v. Reed, supra*; *Trumbley v. Moore*, 151 Neb. 780, 39 N.W.2d 613 (1949). Based on the foregoing authority, it appears that Dutton's actions likely constituted contributory negligence as a matter of law under the slight/gross standard. A threshold question is whether the same result obtains under Nebraska's "modified" comparative negligence law. We conclude that it does not.

As stated previously, under the new standard, a plaintiff is not barred from recovery unless the plaintiff's share of negligence is equal to or greater than the defendant's. Under the slight/gross standard, a plaintiff was barred from recovery as a matter of law if his or her contributory negligence was more than slight. See *Schiffern v. Niobrara Valley Electric*, 250 Neb. 1, 547 N.W.2d 478 (1996). The Nebraska Supreme Court has held that the slight/gross standard does not contemplate translating negligence into a mathematical ratio and that such a rule would not further the administration of justice. See, *Hausse v. Kimmey*, 247 Neb. 23, 524 N.W.2d 567 (1994); *Stack v. Sobczak*, 243 Neb. 78, 497 N.W.2d 374 (1993) (White, J., dissenting); *Nickal v. Phinney*, 207 Neb. 281, 298 N.W.2d 360 (1980); *Burney v. Ehlers*, 185 Neb. 51, 173 N.W.2d 398 (1970). Moreover, it has refused to adopt a rule that contributory negligence of more than a certain percentage will bar recovery as a matter of law. *Stack v. Sobczak, supra* (citing *Nickal v. Phinney, supra*). Nevertheless, the Supreme Court has determined that where a jury's special verdict reduced a plaintiff's damages for the plaintiff's contributory negligence by 40 percent, it was "self-evident" that the jury had found the plaintiff to have been guilty of more than slight negligence, which defeated the plaintiff's right of recovery. *Stack v. Sobczak, supra*. See also, *Guerin v. Forburger*, 161 Neb. 824, 74 N.W.2d 870 (1956) (reduction of 45 percent of plaintiff's recovery by jury showed that plaintiff was more than slightly negligent).

Preexisting Nebraska law was that a plaintiff who was more than slightly negligent could recover nothing. While the former slight/gross statute did not contemplate translating negligence into a mathematical ratio, *Stack* and *Guerin* suggest that a plaintiff's negligence of 40 percent or greater of the total negligence constitutes negligence more than slight as a matter of law and defeats any recovery. Under Nebraska's revised law, a plaintiff is not barred from recovery unless his or her negligence is equal to or greater than the negligence of the defendant. § 25-21,185.09. Thus, under the new law, a plaintiff can recover even if his or her percentage share of negligence is 49 percent. Therefore, the determination that a plaintiff's negligence was more than slight as a matter of law under the slight/gross standard does not automatically translate into a finding that the same plaintiff's right to recovery would be barred under § 25-21,185.09. The rules have changed. Precedent under the old standard is not dispositive.

To uphold the district court's grant of summary judgment would require a finding that the evidence viewed in a light most favorable to Dutton creates no genuine issue of material fact and that such evidence compels a finding that Dutton's negligence was at least equal to the negligence of Travis as a matter of law. We cannot so find.

In this instance, viewing the evidence in a light most favorable to Dutton, the record shows that Dutton was standing on the roadway in front of her mailbox when Travis first observed her. Travis testified that she assumed Dutton was located where she was in order to place whatever was in her hands in the mailbox and that she did not anticipate that Dutton would cross the street by herself, because Travis was aware of how bad Dutton's eyesight was. Travis then looked away from the roadway and into her rearview mirror for an unspecified amount of time, and when she looked up, Dutton was in the middle of Travis' lane of traffic, directly in front of Travis' hood ornament. While there is no direct evidence as to the length of the block in question, construing the evidence most favorably to Dutton, the mailbox was located approximately in the middle of the block, and Travis testified that she first saw Dutton when Travis' vehicle was in the intersection west of the block in which Dutton's mailbox was located or just entering the block. Travis knew that Dutton's eyesight was "real bad." Travis then glanced away from the roadway and into her rearview mirror. She next looked ahead and observed Dutton directly in front of her car, swerved, and applied her brakes. Her vehicle came to rest an undetermined distance east of the mailbox, the point at which Dutton crossed 12th Street.

[9] Travis correctly posits the maxim that between intersections, an automobile has the right-of-way over pedestrians, and the driver of an automobile has the right to assume that pedestrians will observe this rule. The driver is not required to anticipate that a pedestrian will violate this rule. *Jarosh v. Van Meter*, 171 Neb. 61, 105 N.W.2d 531 (1960). Nevertheless, Neb. Rev. Stat. § 60-6,109 (Reissue 1993) provides:

> Notwithstanding the other provisions of the Nebraska Rules of the Road, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give an audible signal when necessary and shall exercise proper precaution upon observing any child or obviously confused or incapacitated person upon a roadway.

The foregoing statute implicitly recognizes that a higher duty devolves upon a driver observing a pedestrian who is prone to act in an unpredictable manner due to immaturity, confusion, or incapacity. That Travis was personally familiar with Dutton's age and poor eyesight is without dispute. That Travis observed her at the mailbox is undisputed. While the evidence is unclear as to exactly where Dutton was when Travis first observed her, the reasonable inference is that she was on the edge of the roadway, off of the curb, but not yet in Travis' lane of travel. For Travis to then look away from Dutton and not look back again until just immediately before the impact, which occurred at a point approximately one-half block later, is clearly evidence of negligence, at least in the context of a motion for summary judgment. Travis' statement that had Dutton been a small child, she probably never would have taken her eyes off her, is telling. Travis' personal knowledge of Dutton's age and eyesight compelled Travis to take "proper precaution" under § 60-6,109. By looking away for a period sufficient for the car to travel the distance it did, Travis failed to maintain a proper lookout and to exercise due care under § 60-6,109. See, e.g., *State v. Mattan*, 207 Neb. 679, 300 N.W.2d 810 (1981). At least this is certainly so when we view the evidence most favorably to Dutton, as we must do.

The evidence presented at the summary judgment hearing leaves unsettled issues of fact material to determining the negligence of the parties and their respective percentages of negligence. Thus, there are genuine issues of material fact and the inferences to be drawn from the facts as to whether Dutton's negligence barred her recovery as a matter of law.

CONCLUSION

Although the evidence shows that Dutton attempted to cross a roadway between intersections without properly yielding to oncoming traffic, the evidence also shows that Travis failed to keep a proper lookout and thus failed to exercise due care upon observing Dutton next to the road. In viewing the evidence in a light most favorable to Dutton, we find that there is a genuine issue of material fact as to whether Dutton's negligence was equal to or greater than the negligence of Travis under Nebraska's comparative negligence law. We therefore find that the district court erred in granting summary judgment in favor of Travis, and we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, v. ROBERT CASE, APPELLANT.

553 N.W.2d 167

Filed August 6, 1996. No. A-95-826.

1. **Indictments and Informations.** An information must apprise a defendant with reasonable certainty of the charges against him so that he may prepare a defense to the prosecution and be able to plead a judgment of conviction as a bar to a later prosecution for the same offense.
2. ____. An information which alleges the commission of a crime using the language of the statute which defines the crime is generally sufficient.
3. ____. When a defendant wishes to challenge the certainty and particularity of the information for the preparation of his defense, a motion to quash is the proper method of attack.

4. **Indictments and Informations: Waiver.** All defects which may be excepted to by a motion to quash are considered waived by a defendant who pleads the general issue.
5. **Indictments and Informations: Pretrial Procedure: Double Jeopardy.** The sufficiency of the information for double jeopardy purposes is not waived by pleading at arraignment and proceeding to trial without challenging the information.
6. **Constitutional Law: Sexual Assault: Indictments and Informations: Double Jeopardy: Time.** In the event a future prosecution is undertaken by the State against a defendant convicted of sexual assault, the defendant can plead that further prosecution based on a sexual assault during any time period set out in the information for the prosecution in which the defendant has been convicted is barred by the Double Jeopardy Clause of the U.S. Constitution because of the "blanket bar."
7. **Confessions: Proof.** The especially damning nature of a confession requires the State to prove that a statement was voluntary before it is admissible.
8. **Motions to Suppress: Confessions: Proof.** At a suppression hearing, the State has the burden to establish voluntariness by a preponderance of the evidence.
9. **Confessions: Appeal and Error.** A determination by the trial court that a statement was made voluntarily will not be disturbed on appeal unless the court's determination was clearly wrong.
10. **Rules of Evidence: Expert Witnesses: Appeal and Error.** The determination of whether a witness qualifies as an expert under Neb. Evid. R. 702 is a preliminary question of admissibility for the trial court under Neb. Evid. R. 104(1) and depends upon the factual basis or reality behind the witness' title or claim to expertise, and the trial court's determination will be upheld on appeal unless the court's finding is clearly erroneous.
11. **Rules of Evidence: Expert Witnesses.** If the trial court determines that a witness is qualified to provide an expert opinion pursuant to Neb. Evid. R. 702, the court must next determine whether the expert's opinion will assist the trier of fact.
12. **Trial: Rules of Evidence: Expert Witnesses: Appeal and Error.** The trial court's determination of whether an expert's opinion testimony will be helpful to the jury or assist the trier of fact in accordance with Neb. Evid. R. 702 is a determination involving the discretion of the trial court, whose ruling on the admissibility of an expert's testimony or opinion will be upheld on appeal unless the trial court abused its discretion.

Appeal from the District Court for Burt County: DARVID D. QUIST, Judge. Affirmed.

John D. Feller, of Feller Law Office, P.C., for appellant.

Don Stenberg, Attorney General, and Barry Waid for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges.

IRWIN, Judge.

I. INTRODUCTION

Appellant, Robert Case, challenges his convictions of two counts of first degree sexual assault, see Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1989), and three counts of sexual assault of a child, see Neb. Rev. Stat. 28-320.01 (Reissue 1995). Case challenges the district court's orders denying Case's request for bill of particulars and Case's motion to suppress statements and the district court's order granting the State's motion in limine. Because we find no error, we affirm.

II. BACKGROUND

Appellant, Robert Case, resided with his wife and 16-year-old son in Oakland, Nebraska. At the time of the filing of the information in this case, Case was 46 years old and was employed by the Oakland-Craig Public Schools as a janitor. On or about July 28, 1994, the son made allegations that Case had been sexually assaulting him over a period of several years.

The son accused Case of subjecting him to fondling beginning when the son was approximately 6 years old. He alleged that Case subjected him to repeated incidents of fondling and mutual masturbation over a period of approximately 10 years. The son further alleged that the fondling escalated to episodes of oral sex beginning when he was in sixth or seventh grade. He alleged that the fondling episodes occurred in several locations, including the family home, Case's pickup truck, the Oakland City Auditorium, and Case's mother's home. The son testified that the episodes of oral sex occurred exclusively in the family home.

On July 29, Case drove himself to the Nebraska State Patrol offices in Norfolk, Nebraska, to take a polygraph examination. At that time, Sgt. Ronald Hilliges of the Nebraska State Patrol conducted a prepolygraph interview. Hilliges informed Case of his rights, and Case signed two different rights advisory forms. Hilliges repeatedly reminded Case that the entire procedure was voluntary and that Case could stop or refuse to take the test at any time. During the prepolygraph interview, Case made several incriminating statements to Hilliges. As a result of the incriminating statements, the polygraph test was never administered.

An information was filed on October 4, charging Case with seven counts of sexual misconduct. Specifically, the information alleged as follows:

COUNT I

That Robert Case, on or about September 1, 1989, through May 31, 1990, in the County of Burt and State of Nebraska, then and there being a person of more than nineteen years of age, did then and there subject [the son], a person of less than sixteen years of age, to sexual penetration;

COUNT II

That Robert Case, on or about September 1, 1989, through May 31, 1990, in the County of Burt and State of Nebraska, then and there being nineteen years of age or older, subjected [the son], a child 14 years of age or younger, to sexual contact;

COUNT III

And further, that Robert Case, on or about September 1, 1990, through May 31, 1991, in the County of Burt and State of Nebraska, then and there being a person of more than nineteen years of age, did then and there subject [the son], a person of less than sixteen years of age, to sexual penetration;

COUNT IV

That Robert Case, on or about September 1, 1990, through May 31, 1991, in the County of Burt and State of Nebraska, then and there being nineteen years of age or older, subjected [the son], a child 14 years of age or younger, to sexual contact;

COUNT V

That Robert Case, on or about September 1, 1991, through May 31, 1992, in the County of Burt and State of Nebraska, then and there being a person of more than nineteen years of age, did then and there subject [the son], a person of less than sixteen years of age, to sexual penetration;

COUNT VI

That Robert Case, on or about September 1, 1991, through May 31, 1992, in the County of Burt and State of Nebraska, then and there being nineteen years of age or older, subjected [the son], a child 14 years of age or younger, to sexual contact;

COUNT VII

That Robert Case, on or about September 1, 1992, through December 31, 1992, in the County of Burt and State of Nebraska, then and there being a person of more than nineteen years of age, did then and there subject [the son], a person of less than sixteen years of age, to sexual penetration.

Case was arraigned on October 11, 1994. Case waived the reading of the information, pled not guilty to all seven counts, was advised of his rights, and requested a jury trial.

On October 26, Case filed a motion in limine regarding any discussion of the polygraph examination at trial. On the same date, Case also filed a motion requesting a psychiatric examination of the son.

On December 9, Case filed a motion for bill of particulars, requesting the State to inform him of the exact location, date, time, and precise manner of commission of the criminal acts contained in the information. On December 20, the State filed objections to the motion for psychiatric examination of the son and the motion for bill of particulars.

On December 21, the court conducted a hearing on Case's motion in limine, motion for psychiatric examination of the son, and motion for bill of particulars. At that hearing, Case withdrew the motion in limine. The court received evidence and heard argument on the remaining motions and took the matters under advisement. On January 30, 1995, the court entered an order overruling Case's motion for psychiatric examination of the son and motion for bill of particulars.

On March 23, the State filed numerous motions in limine, including a motion in limine to prevent Case from calling a witness purported to be an expert in the field of coercive interview tactics. Case proposed to call Dr. Ralph Underwager to testify that the interview tactics employed by Sergeant

Hilliges during the prepolygraph interview were coercive and led Case to make involuntary statements.

On March 27, Case filed a motion in limine regarding the polygraph examination and a motion to suppress statements made during the prepolygraph interview. Case alleged that any statements he made were coerced.

The State's motions in limine and Case's motion in limine and motion to suppress were scheduled for hearing on April 4. On that date, Case filed a motion for continuance, seeking a continuance of the hearing and the trial because of health problems experienced by Dr. Underwager. The court granted a continuance of the trial to May 22. The court also granted a continuance of the hearing concerning the State's motion in limine regarding Dr. Underwager's testimony. The court allowed the State to present evidence regarding Case's motion to suppress and continued the hearing until May 17 regarding presentation of evidence by Case.

On May 17, the court conducted a hearing on the State's motion in limine regarding Dr. Underwager's testimony and Case's motion to suppress. On that date, Dr. Underwager was again unavailable. Case presented no evidence regarding his motion to suppress. Case also presented no evidence regarding the State's motion in limine. The court granted the State's motion in limine and ruled that no testimony would be allowed at trial from Dr. Underwager. The court also overruled Case's motion to suppress statements made during the prepolygraph interview.

On May 22, the State moved to dismiss counts I and VII of the information. As a result, Case was tried for two counts of first degree sexual assault and three counts of sexual assault of a child. Trial was conducted on May 22 through 26. The jury returned a verdict of guilty on all five counts. On June 5, Case filed a motion for new trial. On August 1, the court overruled Case's motion for new trial and sentenced Case to 10 to 20 years' imprisonment on each of the two counts of first degree sexual assault and 2 to 4 years' imprisonment on each of the three counts of sexual assault of a child. All of the imposed sentences were to be served concurrently. This appeal timely followed.

III. ASSIGNMENTS OF ERROR

On appeal, Case assigns three errors. First, Case alleges the district court erred in overruling Case's motion for bill of particulars. Second, Case alleges the district court erred in overruling Case's motion to suppress statements made during the prepolygraph interview. Third, Case alleges the district court erred in granting the State's motion in limine regarding the testimony of Dr. Underwager.

IV. STANDARD OF REVIEW

An appellate court has an obligation to reach a conclusion independent of that of the trial court on questions of law. *State v. Roche, Inc.*, 246 Neb. 568, 520 N.W.2d 539 (1994); *State v. Martinez, ante* p. 192, 541 N.W.2d 406 (1995).

In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the decision of the trial court unless the court's findings of fact are clearly erroneous. *State v. Ray*, 241 Neb. 551, 489 N.W.2d 558 (1992). An appellate court recognizes the trial court as the trier of fact and takes into consideration that the trial court observed the witnesses. *Id.* In reviewing the trial court's ruling on a motion to suppress, an appellate court considers all the evidence, at trial as well as at the hearing on the motion. *State v. Huffman*, 181 Neb. 356, 148 N.W.2d 321 (1967).

A trial court's factual finding concerning a determination of whether a witness qualifies as an expert 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). The determination whether an expert's testimony will assist the trier of fact involves the discretion of the court, whose ruling on admissibility of an expert's testimony will be upheld on appeal in the absence of an abuse of discretion. *Id.*

V. ANALYSIS

1. Bill of Particulars

Case assigns as error the district court's ruling denying his motion for bill of particulars. Case asserts that the district court erred with respect to this ruling for two reasons. First, Case asserts that he "has a constitutional right to be adequately informed of the charges against him." Second, Case asserts that a bill of particulars was necessary to adequately protect his rights against double jeopardy in the event a future prosecution is commenced against him for similar acts during the time periods charged in the information in the present case.

(a) Adequacy of Information

[1,2] An information must apprise a defendant with reasonable certainty of the charges against him so that he may prepare a defense to the prosecution and be able to plead a judgment of conviction as a bar to a later prosecution for the same offense. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Wehrle*, 223 Neb. 928, 395 N.W.2d 142 (1986); *State v. Martinez, ante* p. 192, 541 N.W.2d 406 (1995) (*Martinez I*). See *State v. Martinez*, 250 Neb. 597, 550 N.W.2d 655 (1996) (*Martinez II*). An information which alleges the commission of a crime using the language of the statute which defines the crime is generally sufficient. *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993); *State v. Wehrle, supra*; *Martinez I*.

[3] To the extent that Case's motion for bill of particulars was an effort to correct alleged inadequacies in the information for purposes of preparing an adequate defense, we note the following principle of law: When a defendant wishes to challenge the certainty and particularity of the information for the preparation of his defense, a motion to quash is the proper method of attack. *State v. Bocian*, 226 Neb. 613, 413 N.W.2d 893 (1987).

[4] Case failed to avail himself of this procedure and pled not guilty to all the charges at arraignment. He did not move to quash the information as provided for in Neb. Rev. Stat. 29-1808 (Reissue 1995), nor did he otherwise attack the sufficiency of the information prior to his arraignment. In Nebraska, the rule is that all defects which may be excepted to by a motion to quash are considered waived by a defendant who pleads the general issue. Neb. Rev. Stat. 29-1812 (Reissue 1995); *State v. Bocian, supra*; *State v. Owen*, 1 Neb. App. 1060, 510 N.W.2d 503 (1993).

To the extent that Case is arguing that he may have been hindered in his ability to prepare his defense because of the language of the information, he waived the right to challenge the language by pleading not guilty at arraignment.

(b) Double Jeopardy

[5] This court recently noted in *Martinez I*, that the sufficiency of the information for *double jeopardy purposes* is not waived by pleading at arraignment and proceeding to trial without challenging the information. Case's argument on appeal is devoted almost entirely to a claim that the language of the information prevents him from being able to plead the judgment in the present case as a bar to future prosecution for the same offense.

Case argues that because of the broad language of the information filed against him, "no one will be able to determine which of several acts during a particular time frame [Case] has been found guilty of committing." Brief for appellant at 13. Case argues that he was therefore entitled to a bill of particulars which could be used to support a plea of former adjudication in any future prosecution for the same offense.

Case relies primarily on this court's decision in *State v. Quick*, 1 Neb. App. 756, 511 N.W.2d 168 (1993), in support of his argument that a bill of particulars was necessary to protect his double jeopardy rights. In *Quick*, the defendant was charged with one count of sexual assault during a 2-week timeframe. At trial, the State was allowed to amend the information to expand the time period to nearly 1 year. During trial, the State produced evidence that the victim was sexually assaulted four times during that year. Based on that evidence, Quick was convicted of one sexual assault. On appeal, the court found that the conviction could not stand, because even by reference to the record, one could not determine which of the four assaults had resulted in the conviction. The court held: "When a conviction could be based on any of two or more occasions of indistinguishable criminal conduct alleged at trial, the record must clearly indicate which occasion of criminal conduct supports the conviction in order for the judgment to serve as a bar to future prosecution." 1 Neb. App. at 765, 511 N.W.2d at 172.

In *Martinez I*, this court recently reevaluated the holding in *Quick*. In *Martinez II*, the Nebraska Supreme Court affirmed the holding of *Martinez I* and expressly disapproved of the holding in *Quick*.

In *Martinez I*, the court noted that the court in *Quick* rejected the solution of a "blanket bar" to future prosecution for defendants who are charged with one sexual assault during a particular timeframe when the evidence at trial reveals the possibility of two or more assaults during the charged time period. The *Martinez I* court, however, rejected the prohibition against a "blanket bar" and extended the protection of such a "blanket bar" to defendants in sexual assault cases. The court quoted with approval the reasoning of the Wisconsin Court of Appeals in *State v. Fawcett*, 145 Wis. 2d 244, 426 N.W.2d 91 (Wis. App. 1988), which held:

> "If the state is to enjoy a more flexible due process analysis in a child victim/witness case [in pleading the charge in the information], it should also endure a rigid double jeopardy analysis if a later prosecution based upon the same transaction during the same time frame is charged. . . ."

Ante p. 206, 541 N.W.2d at 415 (quoting *State v. Fawcett, supra*).

The *Martinez I* court also adopted the reasoning of a Connecticut Court of Appeals case, recognizing that in cases involving sexual abuse of very young children, the child's capacity to recall specifics is very limited. See *Martinez I* (citing *State v. Saraceno*, 15 Conn. App. 222, 545 A.2d 1116 (1988)). The Connecticut court held that to impose a requirement of certitude in the information as to date, time, and place would render prosecutions of those who sexually abuse young children impossible and would, by judicial fiat, establish a class of crimes committable with impunity. See *State v. Saraceno, supra*

As the court in *Martinez I* noted, without the application of a "blanket bar," convictions in cases of multiple offenses against children would be very difficult to sustain in the face of double jeopardy challenges when there exist multiple assaults over a lengthy timeframe upon a young and possibly frightened child. Further, when there are multiple instances of assault, the inability to define a specific date often becomes even more pronounced. *Martinez I*. Balancing those difficulties against the defendant's constitutional right to be free from double jeopardy as a result of future prosecutions, a "blanket bar" will allow the crimes to be effectively prosecuted while still protecting the defendant's double jeopardy rights. See *Martinez II*. "It is preferable to allow the State to conduct one vigorous prosecution to protect a child rather than to bar any prosecution at all . . . ." 250 Neb. at 601, 550 N.W.2d at 658.

[6] Our analysis here is concerned only with whether this conviction must be reversed because Case was denied a bill of particulars and the charging information was not particular enough to enable Case to use these convictions as a bar to future prosecution. In the event a future prosecution against Case for sexually assaulting the son is undertaken by the State, Case will be able to plead that further prosecution based on a sexual assault of the son during any of the time periods set out in the five counts of the amended information is barred by the Double Jeopardy Clause of the U.S. Constitution because of the "blanket bar." See *Martinez II*. This assigned error is without merit.

2. Motion to Suppress

Case sought to suppress statements which he made to Sergeant Hilliges during the prepolygraph interview on the grounds that the statements were not "freely and voluntarily given" because Case was "coerced" into making them. Case's motion to suppress was originally scheduled for hearing on April 4, 1995. On April 4, the court heard argument and received evidence on other motions and allowed the State to present its evidence on Case's motion to suppress. Because of the unavailability of Case's chief witness on the issue of coercion, Case requested and received a continuance of the hearing to May 17. On May 17, Case's witness was again unavailable, Case presented no evidence in support of his motion, and the court overruled it.

(a) The Interview

The prepolygraph interview conducted by Sergeant Hilliges was videotaped, and the videotape was played for the jury during trial. During the interview, Hilliges explained Case's rights, including the right to remain silent, the right to have counsel, and the right to stop the interview or polygraph examination at any time. Case signed two different rights advisement forms. Case was reminded several times during the interview that the entire process was voluntary and that he could stop at any time, if he so chose.

Hilliges explained to Case that the purpose of the prepolygraph interview was for Case to become familiar with the process and how the polygraph machine worked and that Hilliges and Case would go over all questions that would be asked during the polygraph examination during the prepolygraph interview so that Case would not be surprised by any of the questions.

During the course of the interview, Hilliges attempted to elicit Case's version of the events or what might have happened to generate the accusations. Hilliges related to Case a prior interview, in which Hilliges interviewed a man who had been falsely accused of sexual assault, to illustrate that in some instances there may be reasonable explanations for actions that lead to an accusation of sexual assault.

At trial, Hilliges admitted that during prepolygraph interviews he may attempt to "minimize" the charges being brought against an accused or may attempt to be "friendly" toward the accused by saying things that Hilliges does not necessarily believe are true. In the present case, Hilliges admitted that he was "friendly" toward Case, but denied attempting to "befriend" him. Hilliges also acknowledged that at some point during the interview, he decided that he was going to attempt to elicit an admission from Case.

During the interview, Hilliges suggested that the son was exaggerating the extent of what happened. Hilliges asked Case if it was possible that he might have "touched [the son's] penis" in the act of demonstrating masturbation in an effort to teach the son about sex. Case admitted that it was possible. Later during the interview, Case related an incident of touching the son's penis in the shower and stated that he probably stroked the son's penis "6 or 8 strokes."

Hilliges also confronted Case about the allegations of oral sex. Hilliges told Case that the son was alleging the oral sex had occurred on 30 to 40 occasions, and Hilliges told Case that the number seemed like an unbelievable number of times. Hilliges told Case that if there was any possibility that he had *ever* placed his penis in the son's mouth, or vice versa, and Case denied it during the polygraph examination, Case would fail the polygraph. Case told Hilliges that he was sure it did not happen 40 or 50 times and that it would have happened "[o]nce or twice, if it happened at all." Hilliges then asked Case if there was oral sexual contact between Case and the son. Case answered "Yes." Hilliges then asked Case how often it occurred, and Case answered, "I'm still sticking with one or mabye [sic] two times."

(b) The Law

[7,8] "The especially damning nature of a confession requires the State to prove that the statement was voluntary before it is admissible." *State v. Walker*, 242 Neb. 99, 102–03, 493 N.W.2d 329, 333 (1992). At a suppression hearing, the State has the burden to establish voluntariness by a preponderance of the evidence. *State v. Brewer*, 241 Neb. 24, 486 N.W.2d 477 (1992). The Supreme Court has stated that the test for voluntariness of a statement is as follows:

> "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. . . ."

State v. Walker, 242 Neb. at 103, 493 N.W.2d at 333 (quoting *State v. Melton*, 239 Neb. 790, 478 N.W.2d 341 (1992)).

Sergeant Hilliges admitted to acting "friendly" toward Case and also admitted that he sometimes says things which he does not necessarily believe to be true as part of his interview techniques. An interrogation tactic in which the police appear to befriend the defendant does not, by itself, render a statement or confession involuntary. *State v. Walker, supra*. Further, deception alone will not render a statement involuntary. *Id*. A defendant's statement is rendered inadmissible by interrogation tactics only if the totality of the circumstances shows that the police offered the defendant some type of benefit in exchange for the statement or otherwise overbore the will of the defendant and produced a false or untrustworthy confession. See *id*.

[9] Whether a defendant's statements are the result of an officer's promise is a question of fact. *State v. Ray*, 241 Neb. 551, 489 N.W.2d 558 (1992). A determination by the trial court that a statement was made voluntarily will not be disturbed on appeal unless the court's determination was clearly wrong. *Id*. See, also, *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991). The trial court's ruling on a motion to suppress statements will be disturbed only if the court's findings of fact are clearly erroneous. *State v. Walker, supra*. In making this determination, we do not reweigh the evidence or resolve conflicts in the evidence, but do recognize that the trial court is the finder of fact and has observed the witnesses. *Id*. Thus, the inquiry in the present case is whether the trial court was clearly erroneous in not finding that the police conduct, in the context of the totality of the circumstances, overbore Case's will and rendered his statements involuntary.

Case never made any claim that Sergeant Hilliges promised him anything or offered him anything in exchange for his statements. Case merely testified that he felt Hilliges was on his side and that Hilliges made Case realize there was a "seed of doubt" about whether anything happened. Case testified that he understood the advisement forms read to him and that he knew he could stop at any time.

As noted above, Case offered no evidence in support of his motion to suppress. In reviewing a trial court's ruling on a motion to suppress evidence, we may consider all the evidence, at trial as well as at the hearing on the motion. *State v.*

Huffman, 181 Neb. 356, 148 N.W.2d 321 (1967). The record reflects that even if we consider Case's testimony at trial on the issue of voluntariness, the trial court's ruling was not clearly erroneous.

The record is devoid of any instances where the conduct of Sergeant Hilliges was coercive as has been discussed above. Case presents no instances where Hilliges promised him anything, threatened him in any way, or otherwise overbore his free will. Case's testimony overwhelmingly demonstrates that he was fully aware of his rights and chose to make voluntary statements to Hilliges during the prepolygraph interview. This assigned error is without merit.

3. Motion in Limine

(a) Procedural History

During pretrial discovery, Case disclosed that he intended to call Dr. Underwager as an expert witness. Dr. Underwager is a licensed psychologist who has testified in court on numerous prior occasions. Dr. Underwager has done work in the field of coerced confessions, including polygraph examinations and prepolygraph interviews.

The State filed a motion in limine to prevent Dr. Underwager from testifying in the present case. The State alleged that Dr. Underwager held himself out as an expert able to detect false allegations of child abuse by using methods alleged to detect " 'false memory syndrome' " or " 'learned memories.' " The State argued that Dr. Underwager's testimony would amount to an improper comment upon the credibility of the other witnesses. It appears from the record that Case offered no evidence in response to the State's motion. On May 17, 1995, the court sustained the motion and ruled that Dr. Underwager's testimony was inadmissible at trial.

Case made an offer of proof at trial which consisted of a short direct examination of Dr. Underwager, outside of the presence of the jury. Dr. Underwager testified that he had reviewed the videotape of the prepolygraph interview, as well as Case's medical records. Dr. Underwager also interviewed Case and administered several commonly used psychological tests. Dr. Underwager testified that the field of coerced confessions has been around for many years and that the primary focus has been on "psychological-type" coercion. Dr. Underwager testified that he found several instances of "coercion" during the prepolygraph interview, including the setting, Sergeant Hilliges' statement that the machine is infallible, Hilliges' minimization of the charges and befriending of Case, and the interview process itself. Finally, Dr. Underwager testified that Case is very susceptible to these interview techniques.

In response to Case's offer, the State made an offer of proof outside of the presence of the jury. The State argued that Dr. Underwager had no scientific means of testing the voluntariness of Case's statements and that Dr. Underwager was using the psychological tests in a novel fashion. At the conclusion of the offers of proof, the court stated that its previous ruling on the motion in limine would stand.

(b) Expert Testimony

The State's motion in limine requested the exclusion of expert testimony. Several of the Nebraska Evidence Rules are applicable in determining the admissibility of expert testimony, including Neb. Evid. R. 702: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise"; Neb. Evid. R. 401: "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. 402, in part: "Evidence which is not relevant is not admissible"; and Neb. Evid. R. 403: "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." See *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990).

[10] For admissibility of an expert's testimony pursuant to rule 702, the witness must be qualified as an expert whose

proffered testimony will assist the trier of fact to understand the evidence or determine a factual issue. *State v. Reynolds, supra.* Therefore, the trial court must first determine whether the witness is qualified to provide an expert opinion pursuant to the qualifications of rule 702. *State v. Reynolds, supra.* The determination of whether a witness qualifies as an expert under rule 702 is a preliminary question of admissibility for the trial court under Neb. Evid. R. 104(1) and depends upon the factual basis or reality behind the witness' title or claim to expertise. *State v. Reynolds, supra.* The trial court's determination about whether a witness qualifies as an expert under rule 702 will be upheld on appeal unless the court's finding is clearly erroneous. *State v. Reynolds, supra.*

The Nebraska Supreme Court has adopted the "*Frye* test" for determining the admissibility of scientific evidence. See *State v. Reynolds, supra.* The court has recognized the appropriate test is the following: " '[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.' " 235 Neb. at 681, 457 N.W.2d at 417–18 (quoting *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923)). Under the *Frye* standard, the reliability necessary for admissibility of an expert's testimony, including an expert opinion, which is based on a scientific principle or a technique or process which utilizes a scientific principle, depends on the general acceptance of the principle, technique, or process in the applicable scientific community. *State v. Reynolds, supra.* See, also, *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923); *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994) (reaffirming use of *Frye* test in Nebraska despite U.S. Supreme Court's modification of test in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)).

[11] If the trial court determines that a witness is qualified to provide an expert opinion pursuant to rule 702, the court must next determine whether the expert's opinion will assist the trier of fact. See *State v. Reynolds, supra.* This determination

initially requires a determination of relevance. "It appears axiomatic that irrelevant evidence will not 'assist the trier of fact.' " 235 Neb. at 682, 457 N.W.2d at 418.

[12] The Nebraska Supreme Court has recognized that most trial court rulings excluding expert testimony can be explained as findings by the court that the issue is inappropriate for expert resolution, either because the expert is not needed for the jury to resolve the issue or because the expert is incapable of rendering meaningful assistance. *State v. Reynolds, supra*. The trial court's determination of whether an expert's opinion testimony will be helpful to the jury or assist the trier of fact in accordance with rule 702 is a determination involving the discretion of the trial court, whose ruling on the admissibility of an expert's testimony or opinion will be upheld on appeal unless the trial court abused its discretion. *State v. Reynolds, supra*. See, also, *State v. Welch*, 241 Neb. 699, 490 N.W.2d 216 (1992); *State v. White*, 2 Neb. App. 106, 507 N.W.2d 654 (1993); *State v. Maggard*, 1 Neb. App. 529, 502 N.W.2d 493 (1993).

The "abuse of discretion" standard of review is applicable in reviewing this determination because

> "[T]he trial judge has a hands-on familiarity with the nuances of the case—nuances which may not survive transplantation into a cold appellate record. Thus, the [trial] court's assessment of what will or will not assist the jury is entitled to considerable deference in the Rule 702 milieu."

State v. Reynolds, 235 Neb. at 684, 457 N.W.2d at 419 (quoting *U.S. v. Hoffman*, 832 F.2d 1299 (1st Cir. 1987)).

The Supreme Court has further held that a trial court may exclude an expert's opinion which is nothing more than an expression of how the trier of fact should decide the case or what result should be reached on an issue to be resolved by the trier of fact. *State v. Reynolds, supra*. See, also, *State v. Maggard, supra*. Therefore, when an expert's opinion on a disputed issue is merely a conclusion which may be deduced equally well by the trier of fact with sufficient evidence on the issue, the expert's opinion is superfluous and does not assist the trier of fact in determining the factual issue or understanding the evidence. *State v. Reynolds, supra*.

(c) Application to Case

On the record before us, it is unclear on what grounds the trial court decided to grant the State's motion in limine. We are unable to discern whether the trial court initially determined that Dr. Underwager was not qualified to provide an expert opinion or whether the trial court determined that Dr. Underwager's testimony would not assist the trier of fact. On either possible ground, the conclusion would not merit reversal.

The State argued that Dr. Underwager was not qualified to offer an expert opinion on whether or not Case's statements to Sergeant Hilliges were voluntary. At the hearing on the motion in limine, Case presented no evidence in support of Dr. Underwager's qualifications as an expert. Even if we consider the court's allowance and ruling on Case's offer of proof at trial as a reconsideration of the motion in limine, there remains no indication that Dr. Underwager had any knowledge or training in determining the "voluntariness" of Case's statements as that term is used in a legal sense. Dr. Underwager testified that his focus was on "psychological-type" coercion, but he did not testify in any manner concerning whether any of Hilliges' actions overbore Case's free will, as is required for a determination that the statement was coerced in a legal sense and therefore involuntary.

The evidence was not adequate to demonstrate that Dr. Underwager's techniques may be used to determine whether a person's previous statements were coerced or involuntary. Accordingly, if the trial court determined that Dr. Underwager was not qualified to provide an expert opinion under the requirements of rule 702, we cannot say that finding was clearly erroneous.

Additionally, if the trial court's decision to exclude Dr. Underwager's testimony was based on a finding that the testimony would not assist the trier of fact, we cannot say that the court abused its discretion. Case sought to have Dr. Underwager testify that legal standards of voluntariness concerning statements made to police officers had not been met.

Case failed to establish, however, that Dr. Underwager was in any better position than the jury to make that determination. See *State v. Reynolds, supra*. Case presented no evidence at the hearing on the motion in limine, and Dr. Underwager's testimony, as evidenced by Case's offer of proof at trial, would have been nothing more than an expression of how the trier of fact should resolve the issue of voluntariness. See *id.* Accordingly, the trial court did not abuse its discretion in excluding Dr. Underwager's testimony.

VI. CONCLUSION

Because we find that the trial court did not err in denying Case's request for bill of particulars, in denying Case's motion to suppress, or in granting the State's motion in limine, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM M. MALONE, JR., APPELLANT.

552 N.W.2d 775

Filed August 6, 1996. No. A-95-1352.

1. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
2. **Lesser-Included Offenses: Jury Instructions: Evidence.** A trial court must instruct the jury on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
3. **Lesser-Included Offenses.** When the statutory elements of two offenses are compared, if it is impossible to commit the greater offense without simultaneously committing the lesser offense, then the lesser offense is, in fact, a lesser-included offense of the crime charged.

4. **Lesser-Included Offenses: Jury Instructions.** The second step of the test in *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993), requires a court to examine the evidence in the case, rather than merely comparing the statutory elements, to determine whether the evidence in the case produces a rational basis for concluding that a jury could acquit the defendant of the greater offense but still convict him of the lesser offense.
5. **Controlled Substances.** Weight is not an element of the substantive offense of possession of marijuana, and the weight or amount of marijuana only determines the grade of the offense and relates to the punishment which may be imposed on conviction for the offense of simple possession.
6. **Lesser-Included Offenses: Controlled Substances.** Possession of marijuana is a lesser-included offense of possession of marijuana with intent to distribute.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded for a new trial.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

Don Stenberg, Attorney General, and James A. Elworth for appellee.

IRWIN, SIEVERS, and INBODY, Judges.

IRWIN, Judge.

I. INTRODUCTION

William M. Malone, Jr., appeals his conviction for possession of marijuana with intent to distribute. See Neb. Rev. Stat. § 28-416 (Cum. Supp. 1994). Malone received a sentence of 18 months' probation and $25 restitution. Malone appeals, alleging error in the jury instructions given by the district court. Because we find that a lesser-included offense instruction should have been given, we reverse, and remand for a new trial.

II. BACKGROUND

This case arises from an incident occurring on November 23, 1994, in Lincoln, Nebraska. On November 23, Officer Dan Doggett of the Nebraska State Patrol went to an apartment in Lincoln to complete a purchase of crack cocaine in furtherance of a pending drug investigation. The apartment was maintained by the State Patrol as part of the investigation. A cooperating individual named "Tina" was residing in the apartment while she assisted the State Patrol.

On November 23, Officer Doggett met an individual named "Monte Scott" at the apartment and purchased cocaine from him. After the transaction, Scott left the apartment to retrieve more cocaine for Officer Doggett. As Officer Doggett waited for Scott's return, he answered a telephone call from an individual that Doggett knew only as "Baybay." Baybay informed Officer Doggett that he had a person with him who was "looking to unload a two-five." Officer Doggett interpreted the comments to mean that someone was offering to sell drugs, and he asked Baybay to bring the individual to the apartment. According to the evidence, Baybay was not a cooperating individual and was not aware that Officer Doggett was a police officer.

Shortly after the phone conversation, Baybay arrived at the apartment accompanied by an individual named "Mickey." At trial, Officer Doggett identified Malone as the individual named "Mickey." Officer Doggett, Tina, Baybay, and Malone engaged in conversation, during which Malone inquired about the possibility of purchasing some crack cocaine. Officer Doggett told Malone no and testified that he could not sell any drugs to Malone, but that he could purchase drugs from Malone.

Officer Doggett inquired if Malone had the "two-five" to sell, at which time Malone produced one-eighth of an ounce of marijuana. After negotiating the price, Officer Doggett purchased the marijuana from Malone for $25 plus one cigar. During the course of this entire transaction with Malone, Officer Doggett was wearing an electronic monitoring device which transmitted the conversation to a nearby recorder. The entire transaction was thus tape-recorded.

At trial, the State provided testimony from Officer Doggett, from the officer who actually recorded Officer Doggett's conversation with Malone, and from a forensic drug chemist who performed an analysis on the substance purchased from Malone. Malone testified on his own behalf.

At the conclusion of the evidence, a jury instruction conference was held. During the conference, Malone requested an instruction on simple possession of marijuana as a lesser-included offense of possession with intent to distribute and also requested an instruction on the defense of entrapment.

The court declined to give either instruction. The court did, however, instruct the jury on the defense of intoxication at the request of Malone and over the objection of the State.

During deliberations, the jury sent the district judge a note inquiring whether it was to consider the defense of entrapment. The court conducted a hearing with the parties present, during which the parties were allowed to provide argument concerning the appropriate response to be given to the jury. Malone's attorney requested that the court simply tell the jury to follow the instructions as already given to it. The State requested that the court specifically inform the jury not to consider entrapment as a defense in this case. The court then sent the jury a written response that it was not to consider the defense of entrapment in this case and that it was to decide the case on the instructions previously given to it. Malone promptly moved for a mistrial based on the court's response to the inquiry, and the court overruled Malone's motion.

The jury returned a verdict of guilty of possession of marijuana with intent to distribute. The court sentenced Malone to 18 months' probation and ordered Malone to pay $25 restitution and costs of the action. Malone timely filed this appeal.

III. ASSIGNMENTS OF ERROR

On appeal, Malone has assigned numerous errors in the proceedings in the district court. Among his assigned errors, Malone asserts that the district court erred in failing to instruct the jury on simple possession of marijuana as a lesser-included offense of possession with intent to distribute. Because our decision regarding this error is dispositive, we will not address the remaining assigned errors. See, *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994); *State v. Lewchuk, ante* p. 165, 539 N.W.2d 847 (1995). We also note that Malone has not assigned as error that there was insufficient evidence to support his conviction. See *State v. Noll*, 3 Neb. App. 410, 527 N.W.2d 644 (1995).

IV. STANDARD OF REVIEW

[1] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that

(1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996). If the jury instructions, when read together and taken as a whole, 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 reversal. *Id.*

V. ANALYSIS

Malone asserts that the district court erred in refusing to give an instruction on simple possession of marijuana as a lesser-included offense of possession of marijuana with intent to distribute. The district court ruled that "under the evidence in this case the defendant is either guilty of delivery of the controlled substance or he's not guilty" and therefore ruled that it was not appropriate to instruct on the lesser-included offense. We initially note that the trial court had a duty to instruct the jury on the proper law of the case whether requested to do so or not. *State v. Woods*, 249 Neb. 138, 542 N.W.2d 410 (1996) (Fahrnbruch, J., concurring in part, and in part dissenting).

1. The Test

The test for determining whether a lesser-included offense instruction should be given is provided in *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). In *State v. Williams*, the Nebraska Supreme Court returned Nebraska to the strict statutory elements approach for determining whether one crime is a lesser-included offense of another crime. The court further established a two-part test for determining whether or not a lesser-included offense instruction should be given in a particular case.

[2] In *State v. Williams*, the Nebraska Supreme Court held that a trial court must instruct the jury on a lesser-included offense if

> (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational

> basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.

243 Neb. at 965, 503 N.W.2d at 566.

[3] The first step of the *Williams* test requires the court to determine whether the lesser offense for which an instruction is requested is, in fact, a lesser-included offense of the crime charged. This initial determination is made by looking only to the statutory elements of the two criminal offenses. *State v. Williams, supra*. When the statutory elements of the two offenses are compared, if it is impossible to commit the greater offense without simultaneously committing the lesser offense, then the lesser offense is, in fact, a lesser-included offense of the crime charged. In other words, a lesser-included offense is one which has statutory elements that are entirely embraced within the elements of the greater offense. See *id.*

[4] The second step of the *Williams* test requires a court to determine whether the evidence in the case produces a rational basis for concluding that a jury could acquit the defendant of the greater offense but still convict him of the lesser offense. If the answer to this inquiry is in the affirmative, then the lesser-included offense instruction should be given. The second step of the *Williams* test requires a court to examine the evidence in the case, rather than merely comparing the statutory elements. See *id.*

2. Step One

In the present case, Malone was charged with delivery or possession of marijuana with intent to distribute. The statutory elements of possession with intent to distribute are (1) to knowingly or intentionally (2) distribute, deliver, dispense, or possess with intent to distribute, deliver, or dispense (3) a controlled substance. § 28-416(1). Malone sought a lesser-included offense instruction on simple possession. The statutory elements of simple possession are a bit more problematic.

Section 28-416 provides:

> (9) Any person knowingly or intentionally possessing marijuana weighing more than one ounce but not more than one pound shall be guilty of a Class IIIA misdemeanor.

> (10) Any person knowingly or intentionally possessing marijuana weighing more than one pound shall be guilty of a Class IV felony.
>
> (11) Any person knowingly or intentionally possessing marijuana weighing one ounce or less shall:
>
> (a) For the first offense, be guilty of an infraction . . .
>
> (b) For the second offense, be guilty of a Class IV misdemeanor . . .
>
> (c) For the third and all subsequent offenses, be guilty of a Class IIIA misdemeanor . . . .

The State argues that the weight or amount of marijuana involved is also an element of simple possession, but not an element of possession with intent to distribute. The State argues that simple possession, therefore, is not a lesser-included offense of possession with intent to distribute. Given recent Nebraska Supreme Court case law, we are unable to agree.

The State argues that the Nebraska Supreme Court has specifically held that the weight of marijuana is an element of simple possession in *State v. Coca*, 216 Neb. 76, 341 N.W.2d 606 (1983). We do not find *State v. Coca* to be dispositive in the present case, however. In *State v. Coca*, the Nebraska Supreme Court was presented with an evidentiary question and thus set out the elements of possession for assistance in determining whether other similar crimes evidence would have been relevant to the charge of possession brought against the defendant. The issue in *State v. Coca* did not concern the elements of simple possession in terms of a lesser-included offense analysis. With regard to the weight of marijuana possessed, the Supreme Court's decision in *State v. Coca* merely recognizes that there needs to be some evidence of weight presented in a possession case, and for that reason weight may be a factor in determining the relevancy of other similar crimes evidence. The Nebraska Supreme Court's guidance, specifically in the area of lesser-included offenses and statutory grading of offenses, directs our analysis in this case.

[5] Although we recognize that the statutory provisions which prohibit simple possession of marijuana grade the offense depending upon the weight or amount of marijuana, we do not

believe that the weight or amount is a statutory element of the offense. Weight is not an element of the substantive offense of possession, because a person is guilty of possession *regardless* of the weight or amount possessed. The weight or amount of marijuana only determines the grade of the offense and relates to the punishment which may be imposed on conviction for the offense of simple possession.

The statutory provisions prohibiting possession of marijuana are not unlike the statutory provisions prohibiting theft and criminal mischief. See Neb. Rev. Stat. §§ 28-518 and 28-519 (Reissue 1995). The statutory provisions prohibiting theft and criminal mischief also grade the offenses depending on the value of the property stolen or the pecuniary loss suffered from the criminal mischief. §§ 28-518 and 28-519. The Nebraska Supreme Court has specifically held in both the theft and the criminal mischief arenas, however, that the value of the property stolen and the pecuniary loss suffered are not statutory elements of the substantive offenses, but, rather, are factors solely for determining the punishments to be imposed for the offenses. *State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989) (holding that value of property stolen is not element of crime of theft and is important only in determining penalty); *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989) (holding that pecuniary loss is not element of offense of criminal mischief and only determines grade of offense for punishment purposes). But see § 28-518(8) (legislative requirement that value be element of theft).

We further note that the Nebraska Supreme Court has specifically held that possession of a controlled substance is a lesser-included offense of possession of a controlled substance with intent to distribute. *State v. Bernth*, 196 Neb. 813, 246 N.W.2d 600 (1976). Although we note that *State v. Bernth* was not decided under the modern strict statutory elements approach, in that case, the Nebraska Supreme Court held that possession includes the identical elements contained in a charge of possession with intent to distribute except for the element of intent. At the time *State v. Bernth* was decided, the Nebraska statutes prohibiting possession of marijuana included language grading the offense dependent upon the weight or amount of marijuana possessed. See Neb. Rev. Stat. § 28-4,125(4) and (5) (Reissue 1975). This is the same law we must presently apply.

[6] Despite the fact that possession was graded to provide different punishments for different weights, while possession with intent to distribute was not similarly graded, the Supreme Court held in *State v. Bernth* that the *only* element which was different between the two crimes was the element of intent. We are persuaded that this remains true under the present statutory scheme. As a result, possession of marijuana is a lesser-included offense of possession of marijuana with intent to distribute.

3. Step Two

Our inquiry is not ended by a determination that possession is, in fact, a lesser-included offense of possession with intent to distribute. The second part of the test in *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993), requires us to determine whether the evidence in this case would provide a rational basis for a jury to acquit Malone of the greater offense of possession with intent to distribute, but convict Malone of the lesser offense of possession of marijuana. On the evidence in the present case, we conclude that such a rational basis exists.

The evidence in the present case reflects that Malone admitted in testimony to having possessed one-eighth of an ounce of marijuana. Malone's defense in the case was that he did not intend to deliver the substance to Officer Doggett. Malone attempted to present this defense both through an entrapment defense and through an intoxication defense. Malone's own testimony primarily was in support of his intoxication defense. Malone testified that he purchased the marijuana for his own use and went to the apartment "to party," but not to sell the marijuana to Officer Doggett. He testified that he was too intoxicated to remember the actual sale and delivery.

Although we recognize that voluntary intoxication is ordinarily not a justification or excuse for crime, the Nebraska Supreme Court has held that excessive intoxication as the result of which a person is wholly deprived of reason may prevent one from having the requisite intent for the crime charged. *State v.*

Reynolds, 235 Neb. 662, 457 N.W.2d 405 (1990). If the jury had chosen to believe Malone's testimony concerning his state of intoxication, then it could have concluded that although he did possess the marijuana, he did not knowingly or intentionally possess marijuana *with the intent to distribute* it to Officer Doggett. The jury thus could have rationally acquitted Malone of the greater offense of possession with intent to distribute and possibly convicted him of the lesser-included offense of possession of marijuana, because he did not dispute having possessed the marijuana.

4. Resolution

In the present case, Malone requested an instruction on the lesser-included offense of possession. Because possession is a lesser-included offense of possession with intent to distribute, and because the evidence in this case provides a rational basis for the jury to have acquitted Malone of the greater offense of possession with intent to distribute but to have convicted Malone of the lesser offense of possession, the district court erred in failing to give a lesser-included offense instruction. For this reason, the conviction must be reversed and the case remanded to the district court for a new trial.

VI. CONCLUSION

Because possession of marijuana is a lesser-included offense of possession of marijuana with intent to distribute, and because the evidence in this case provides a rational basis upon which a jury could have acquitted Malone of the greater offense but convicted him of the lesser offense, the conviction is reversed, and the case is remanded for a new trial.

Reversed and remanded for a new trial.

DEBRA A. DEAN, APPELLEE, V. JERRY A. DEAN, APPELLANT.

552 N.W.2d 310

Filed August 13, 1996. No. A-95-259.

1. **Modification of Decree: Appeal and Error.** The determination as to modification of a dissolution decree is a matter of discretion for the trial court, and its decision will be reviewed on appeal de novo on the record and will be reversed upon an abuse of discretion.
2. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Modification of Decree: Child Support.** The general rule in Nebraska is to allow a modification of a child support order prospectively from the time of the modification order itself.
4. ____: ____. Under certain circumstances, modification of a child support order retroactive to the filing date of the application for modification may be proper.
5. ____: ____. The retroactive modification of child support is limited to the date of the filing of the application for modification.

Appeal from the District Court for Hamilton County: BRYCE BARTU, Judge. Affirmed as modified.

John R. Brogan, of Brogan & Brogan, for appellant.

Michael H. Powell for appellee.

MILLER-LERMAN, Chief Judge, and MUES and INBODY, Judges.

MUES, Judge.

INTRODUCTION

Jerry A. Dean appeals from an order of the district court ordering the retroactive modification of Jerry's child support obligation to a date prior to the filing of the application for modification.

STATEMENT OF CASE

Jerry and Debra A. Dean were divorced by decree on September 30, 1992. Debra was awarded custody of three of the parties' four minor children, Michelle, Marcena, and Jeremy, and Jerry was ordered to pay child support in the amount of $133.33 per child, or a total of $400 per month. The decree further awarded custody of the parties' remaining minor child, Jason, to Jerry. Michelle reached the age of majority on June 5, 1993, at which time Jerry began paying support for only two children.

Jason began living with Debra in late August or September 1993. Debra filed an application for modification on October 28, 1994, seeking a change in custody regarding Jason and child support on his behalf. By order dated January 24, 1995, the court approved the parties' stipulation changing custody of Jason to Debra and further ordered Jerry, beginning September 1, 1993, to pay child support in the amount of $439 for his three minor children then in Debra's care. Jerry's motion for a new trial was overruled on February 8, 1995.

Evidence adduced at the January 5, 1995, hearing established that Jerry had paid no support for Jason since Jason began living with Debra in late August or September 1993.

ASSIGNMENTS OF ERROR

Jerry asserts that the trial court erred in (1) modifying his child support obligation retroactively to a date prior to the filing of Debra's application for modification and (2) modifying his child support obligation for the two children who had always been in Debra's custody and for whom child support had already been paid in accordance with the amounts specified in the original decree.

STANDARD OF REVIEW

[1,2] The determination as to modification of a dissolution decree is a matter of discretion for the trial court, and its decision will be reviewed on appeal de novo on the record and will be reversed upon an abuse of discretion. *Adrian v. Adrian*, 249 Neb. 53, 541 N.W.2d 388 (1995). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995).

ANALYSIS

[3,4] This case presents the issue of whether a child support modification may be ordered retroactive to a date prior to the filing of the application to modify. The general rule in Nebraska is to allow a modification of a child support order prospectively from the time of the modification order itself. *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991). This general rule recognizes that support payments, ordered pursuant to a divorce decree and contingent only upon a subsequent order of the court, become vested in the payee as they accrue. *Id.* However, the Nebraska Supreme Court in *Maddux*, although rejecting retroactive modification in that case where the father entered court with "unclean hands," recognized that under certain circumstances, modification of a child support order retroactive to the filing date of the application for modification may be proper. (Citing *Goodman v. Goodman*, 173 Neb. 330, 113 N.W.2d 202 (1962) (accrued child support payments after date of filing canceled where mother deliberately removed children from state for purpose of keeping them away from father).) The *Maddux* court also recognized other circumstances in which a retroactive modification had been allowed. See, also, *Berg v. Berg*, 238 Neb. 527, 471 N.W.2d 435 (1991) (credit allowed for amounts due for support of child for period of time in which child resided with noncustodial parent); *Williams v. Williams*, 206 Neb. 630, 294 N.W.2d 357 (1980) (doctrine of equitable estoppel applied to defeat claim for accrued child support payments where natural father reasonably believed that child had been adopted). While the aforementioned cases deal with the retroactive *decrease* of child support, the Supreme Court has also allowed the retroactive *increase* of child support to the date of the filing of the petition for modification.

In *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993), the Supreme Court affirmed a trial court's order requiring the father to pay support retroactive to the date the mother filed her petition for modification. In *Wulff*, a 1988 divorce decree awarded custody of the parties' two minor children to the mother. This decree was modified in April 1990, at which time the father's child support obligation was terminated after the court awarded him custody of the younger child and found that the elder child had become emancipated because she was living independently. The modification order further required the mother to begin paying child support for the younger child. The mother sought another modification in August 1990, asserting that the elder child had moved back into her home. In a March 1991 order, the father was ordered to pay support for the elder child from September 1 through December 1, 1990, the month in which the elder child reached the age of majority. The Supreme Court affirmed this retroactive order of support. Thus, Nebraska has recognized that under certain circumstances, a parent may be ordered to pay support from the date of the filing of the application for modification, where he or she previously was not ordered to do so.

In the case now before this court, however, the trial court went beyond the authority provided by *Wulff, supra*, and ordered Jerry to pay support commencing September 1, 1993, a date prior to the filing of Debra's application for modification. The record shows that the dissolution decree of September 1992 awarded custody of Jason to Jerry. In late August or September 1993, however, Jason moved out of his father's home and into his mother's. Debra did not file her application for modification until October 1994. Based on the fact that Jason had resided with his mother since September 1993, the trial court ordered Jerry's child support obligation retroactive to September 1, 1993. In so deciding, the trial court relied upon authority allowing for the retroactive order of child support from the date of the child's birth in paternity cases. Debra cites similar authority in support of her argument that child support retroactive to September 1, 1993, was proper in this case. We disagree.

Debra's reliance upon *State on behalf of Matchett v. Dunkle*, 244 Neb. 639, 508 N.W.2d 580 (1993), is misplaced. In *State on behalf of Matchett*, a petition to establish paternity was filed on February 21, 1990, on behalf of a minor child born on March 9, 1988. Following a hearing on October 30, 1991, the trial court specifically declined to order retroactive support and ordered support commencing only from November 1, 1991. The Supreme Court disagreed, stating:

> The plain words of [Neb. Rev. Stat.] § 43-1402 [(Reissue 1988)] require that an out-of-wedlock child be supported by its father "to the same extent and in the same manner" as a child born in wedlock. A parent is required to provide his or her child with the basic necessities of life. [Citation omitted.] It is obvious that such a requirement must begin at the time of the child's birth, for it is at that time that a child is most helpless and most dependent upon its parents for the child's very survival. This is true for any child, not just for a child born in wedlock.
>
> When paternity is legally established, there is no rational basis to distinguish the support obligations of a father to a child born out-of-wedlock from the support obligations of a father to a child born in wedlock, and an out-of-wedlock child should be entitled to support from its father from the time of birth under the provisions of § 43-1402. We can perceive of no other way in which an out-of-wedlock child whose paternity is legally established could be supported by its father "to the same extent and in the same manner" as a child born in wedlock.

Id. at 643-44, 508 N.W.2d at 583.

In *State on behalf of Matchett*, the Supreme Court held that the statute required an award of retroactive child support. In that case, the mother sought, and the Supreme Court awarded, such support only from the date she had begun supporting the child, a point some time after birth, but before the petition was filed. The court's language, however, strongly intimates that the statute authorized support retroactive to the date of birth.

In reliance upon the foregoing, Debra asserts in her brief that "had Jason A. Dean been born on September 1, 1993, [Jerry] would be required to pay retroactive child support from and after September 1, 1993." Brief for appellee at 3. Debra also contends that if retroactive support is denied in this case, children in paternity actions would be treated differently from children in dissolution actions. Debra, however, overlooks a key distinction between a paternity action and an action seeking the modification of a dissolution decree. Whereas the former involves no prior order of the court, the latter, by necessity, involves a previous order of the court in which the issues of child custody and support have already been addressed, or, at least, were capable of being addressed.

In the majority of modification cases, the parent whose support obligation is being modified is already obligated under a prior support order for the child. While the fact that Jerry was not previously ordered to pay support for Jason adds a new twist, we believe *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993), indicates that the Supreme Court would view the present case as a modification of child support, rather than an initial child support order. See, also, *In re Marriage of Eilers*, 526 N.W.2d 566 (Iowa App. 1994). As a consequence, the parties were acting under a previous court order which had already determined the custody and support of Jason. The parties were entitled to rely upon the provisions of this order until either an order of modification was entered or an application for modification was filed. This case is distinguishable from paternity actions in which there is no previous order of the court deciding the issue of support. Debra does not cite us to, nor does our research disclose, any child support *modification* cases in which a court has allowed child support retroactive to a date prior to the date of the filing of the application.

To the contrary, our research discloses that a court is without authority to issue such an order in a child support modification action. *Hoover v. Hoover*, 2 Neb. App. 239, 508 N.W.2d 316 (1993), involved a modification action in which the trial court ordered a father to pay 35 percent of all unreimbursed expenses incurred by the mother as a result of the minor child's medical problems. On appeal, the father argued that the trial court was without authority to enter a retroactive judgment requiring him to pay expenses incurred prior to the date of filing the application for modification. Noting the general rule, as espoused by the court in *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991), that modification orders are generally prospective, unless circumstances warrant a modification retroactive to the date of the filing of the petition, this court found that the same rules should apply to an order to pay *expenses* incurred prior to the filing of the application for modification. *Hoover, supra*. Thus, this court held that the trial court abused its discretion by ordering the father to pay a percentage of expenses incurred prior to the filing of the application. This court limited the order to apply to expenses incurred since the date of the filing. Similarly, *Rood v. Rood, ante* p. 455, 545 N.W.2d 138 (1996), involved a modification action brought by a father to decrease the amount of arrearage owed by him for past-due child support. In *Rood*, at the time the modification action was brought, the minor children were above the age of 19 years. This court affirmed the trial court's decision denying retroactive modification, noting that where the father's support obligation had terminated over 1 year before he sought modification, *any* retroactive modification would have been prohibited.

[5] In sum, the retroactive modification of child support in Nebraska has been limited to the date of the filing of the application for modification. See, *Wulff, supra*; *Maddux, supra*; *Rood, supra*. We find no authority to impose a child support obligation retroactive to a date prior to the filing of the application to modify. Therefore, in this case, the district court was prohibited from ordering Jerry to pay child support retroactive to a date prior to the filing of the application to modify.

In reaching this result, we are also guided by Part D, the Child Support Enforcement Act (Act), of Title IV of the Social Security Act, codified at 42 U.S.C. § 651 et seq. (1994). This Act establishes a federal-state scheme for the establishment and enforcement of child support. If a state wishes to receive federal funds in providing child support enforcement services, it must develop and implement a program which complies with the requirements of federal law. In particular, the state must have in effect laws requiring the use of all procedures for the improvement of child support enforcement effectiveness described in 42 U.S.C. § 666. See 42 U.S.C. § 654(20)(A). The Act requires states to enact legislation to prohibit the retroactive modification of child support orders to maintain a conforming child support enforcement program. Specifically, states must enact a procedure which provides that child support orders are not subject to retroactive modification, "except that such procedures may permit modification with respect to any period during which there is pending a petition for modification, but only from the date that notice of such petition has been given . . . ." 42 U.S.C. § 666(a)(9)(C).

While other states have enacted legislation substantially similar to that outlined in 42 U.S.C. § 666(a)(9)(C), we find no similar provision in the Nebraska statutes or the Nebraska Child Support Guidelines. We need not and do not determine, for purposes of this appeal, the applicability of this Act. We simply note that, thus far, Nebraska case law has been consistent with the Act and that the Act supports the conclusion we reach here.

Other state courts have reached similar conclusions. For example, the Supreme Court of North Dakota, explaining the rule that modification orders may be made effective from the date of the filing of the petition or any date thereafter, stated: " 'Once a petition to modify a support order has been filed, the respondent is on notice that circumstances relevant to the determination of child support have changed and that the terms of the support obligation will change upon a judicial determination that the changed circumstances are material.' " *Mahoney v. Mahoney*, 538 N.W.2d 189, 196 (N.D. 1995) (quoting *Olson v. Garbe*, 483 N.W.2d 775 (N.D. 1992)). The applicable statute in North Dakota provides in relevant part: " 'Any order directing any payment or installment of money for the support of a child is, on and after the date it is due and unpaid . . . [n]ot subject to retroactive modification.' " *Id.* Although silent with regard to the time period during which a petition is pending, the court in *Mahoney*, citing 42 U.S.C. § 666(a)(9) (1988), reiterated the rule established by that state's case law that modification is permitted retroactive to the date the motion to modify has been filed and served.

The importance of notice to the noncustodial parent was likewise emphasized in *Meyer v. Meyer*, 17 Ohio St. 3d 222, 478 N.E.2d 806 (1985). In *Meyer*, the parties were divorced in 1975 and custody of the three minor children was granted to the father. Custody of the eldest child was subsequently changed to the mother by agreement, and the father was ordered to pay child support. Custody of the remaining two children was also subsequently changed to the mother pursuant to court orders; however, no support was ordered for either. Subsequently, the mother filed a motion requesting reimbursement from the father for the reasonable amount of support for the period of time since the change of custody was granted. Describing such an order of reimbursement as "manifestly unfair to the noncustodial parent," the court in *Meyer* stated:

> It is true that we have in the past ruled that child support orders are subject to modification. [Citations omitted.] However, these rulings apply to the support orders in *prospective* fashion only, and solely to *existing* support orders. In such cases, the supporting spouse has ample notice on which to prepare his or her finances. This would not be true in the case of a *retroactive* order that *establishes* a support obligation.

Id. at 223-24, 478 N.E.2d at 808.

Thus, whether based upon the theory that support "vests," thereby warranting the denial of a retroactive decrease in child support, see *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991), or the "notice" theory employed by the *Meyer* court to decline the retroactive *imposition* or *increase* of child support, the retroactive modification of child support obligations is limited to the filing date of the application to modify.

The trial court's order requiring Jerry to pay support in the amount of $439 commencing on September 1, 1993, was an abuse of discretion. Under the circumstances of this case, however, we believe that an order retroactive to November 1, 1994, the first month after the application to modify was filed, is proper. Jason was living with Debra as of this date, and Jerry was thereafter put on notice that he might be subject to an increased child support obligation. As neither party challenges the amount of child support ordered by the trial court, we therefore order Jerry to pay $439 for the support of Jason, Marcena, and Jeremy, commencing on November 1, 1994, with this amount decreasing to $350 for the support of two minor children, and $226 when only one minor child is remaining.

Jerry argues in his second assigned error that by computing his obligation in accordance with the child support guidelines and making his obligation retroactive, his support obligation to Marcena and Jeremy, upon which he was fully paid as of the date of trial, was also retroactively increased. To the extent that the order of modification affected Marcena's and Jeremy's support retroactively to a point before the application was filed, that error has been noted and corrected earlier in this opinion. The balance of Jerry's argument is without merit.

The original dissolution decree of September 1992 provided for a payment of child support by Jerry "for the benefit of said minor children at the rate of $133.33 per month, per child, or a total of $400 per month." This method, which merely takes a set amount and divides it by the number of children to be supported, is directly contrary to the child support guidelines in effect today, as well as those in effect in September 1992.

Jason's change of custody necessarily required recomputing the child support award for all the children in Debra's custody because a proper application of the guidelines requires the order to specifically set forth the amount of child support which will be due as the obligation to support each child terminates, with the amount for each possibility calculated separately in accordance with table 1 of the guidelines. Therefore, Jerry's contention that the court modified support for Marcena and Jeremy, without Debra's seeking it, is without merit. That the court's initial decree erroneously awarded separate, equal amounts for each child does not change this result.

Jerry's assertion that the support modification effectively increased his obligation to Marcena and Jeremy, despite his having already paid his obligation "in full" as required by the original decree, also ignores the child support guidelines. When split custody is awarded, worksheet 2 of the guidelines must be applied. It anticipates that the total amounts owed by each parent for the support of the child or children in the other's custody be offset, with the party owing the greater amount ordered to pay the difference to the other parent. The record before us does not establish what, if any, calculation was used as the basis for the trial court's initial support order. If we assume that support was ordered in compliance with the split custody calculation worksheet, Jerry's obligation to Marcena and Jeremy was reduced in that calculation by the amount owed him from Debra for the support of Jason. Yet, in fact, he provided no support for Jason since August or September 1993. Certainly as of the date of the filing of the application, Jerry was no longer entitled to this offset.

We conclude that Jerry's support obligation for the three minor children should commence on November 1, 1994, in the amount of $439 per month, with credit given him for those amounts due and paid under the prior order on or after that date for the support of Marcena and Jeremy. Jerry's child support obligation for two children is $350 per month and for one minor child, $226.

CONCLUSION

The trial court abused its discretion by modifying child support retroactively to a date prior to the filing of the application to modify. However, ordering support retroactive to the filing date of the application is proper here, where the child for whom support is sought was living with the parent seeking the modification at said time and was receiving no support from the other parent.

AFFIRMED AS MODIFIED.

PAT J. KUSEK, APPELLEE, V. BURLINGTON NORTHERN RAILROAD COMPANY, A CORPORATION, APPELLANT.

552 N.W.2d 772

Filed August 20, 1996. No. A-95-730.

1. **Federal Acts: Railroads: Claims: Courts.** In disposing of a claim controlled by the Federal Employers' Liability Act, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under the Federal Employers' Liability Act are determined by the provisions of the act and interpretative decisions of the federal courts construing the Federal Employers' Liability Act.

2. **Jurors.** Retention or rejection of a venireperson as a juror is a matter of discretion with the trial court.
3. **Judgments: Appeal and Error.** An appellate court reaches an independent conclusion on questions of law.
4. **Juror Qualifications.** It shall be ground for challenge for cause that any proposed juror lacks any of the qualifications provided by law.
5. **Employer and Employee: Jurors: Parties.** An employee of a party, including a corporate party, is ineligible to serve on a jury involving its employer, and the challenge to such potential jurors may be made by either party to the litigation.
6. **Employer and Employee: Jurors: Proof.** When a challenge to a potential juror or venire is made on the basis of employment of a potential juror by a party to the litigation, it is not necessary that the challenging party show that the potential juror is biased or cannot be impartial.
7. **Employer and Employee: Juries.** To premise prejudicial error on the presence of a party's employees on a jury, the complaining party must have exhausted all of its peremptory challenges.

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Reversed and remanded for a new trial.

Terry C. Dougherty and Samantha B. Trimble, of Knudsen, Berkheimer, Richardson & Endacott, for appellant.

Robert P. Chaloupka, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellee.

IRWIN, SIEVERS, and INBODY, Judges.

SIEVERS, Judge.

Burlington Northern Railroad Company appeals to this court in this Federal Employers' Liability Act (FELA) case filed in state court by its employee, Pat J. Kusek, who claims that he injured his back while changing a cab seat in a locomotive. Kusek alleges in his petition that Burlington was negligent in failing to provide him with a reasonably safe place to work. After a jury trial, Kusek was awarded $155,000 in damages. Burlington alleges that the jury selection process was flawed because the trial court allowed Burlington employees to be in the jury pool. Because employees of a party to a lawsuit are disqualified for cause and thus ineligible to serve on a jury in a case involving their employer, there was error in the jury selection process which requires reversal of the verdict.

JURY SELECTION

On October 23, 1991, Kusek was employed by Burlington Northern as a cab carpenter. On that date, Kusek and Beonville Bullock, a carman for Burlington, were required to change a cab seat in a locomotive. Kusek and Bullock parked a pickup truck next to the locomotive in the railyard. Kusek then stood on the bed of the pickup truck and lifted the cab seat to Bullock, who leaned out the window of the cab to take the seat from Kusek. While lifting the seat up to Bullock, Kusek allegedly suffered an injury to a disk in his lumbar spine.

Before trial in Alliance, Nebraska, Burlington moved to exclude from the jury pool all employees of Burlington and their spouses. Kusek's attorney responded that every problem counsel for Burlington was concerned about could be taken care of by a challenge for cause or by a peremptory strike. The trial court overruled the motion to exclude Burlington employees and their spouses from the jury panel. However, the trial court did rule that "site specific" employees, i.e., carmen (the same craft as Kusek), would not be allowed to serve. Jury selection then proceeded. We note that when venireperson Keith Gardiner was called to the jury box after a challenge for cause to another venireperson was sustained, he was immediately excused by the court upon the disclosure that he was a carman. This action appears to be a result of the trial court's ruling prohibiting "site specific" employees from serving on the jury.

Although Burlington's counsel asserted at oral argument that he renewed the challenge for cause to all Burlington employees before exercising Burlington's peremptory strikes, the record is slightly different. The bill of exceptions shows that after questioning of the venire was completed, Burlington's counsel asked to approach the bench, where an "[o]ff-the-record discussion was had in low tones," after which the parties proceeded to exercise their peremptory strikes. This was followed by another unrecorded bench conference. There was then a renewed motion on the record by Burlington that all Burlington employees and their spouses be excluded from the jury. But, at no time did Burlington's counsel ever "pass the panel for cause."

Burlington argues on appeal that employees of a party are automatically subject to challenge for cause or, alternatively, are ineligible to serve by virtue of their employee status. Burlington further argues that because employees of Burlington were not struck from the jury pool, it was forced to use its five peremptory strikes (the trial court provided five strikes per side) against four Burlington employees and against a woman whose brother-in-law was a Burlington employee and whose husband was an injured employee of a railroad, albeit not Burlington. We summarize what the record reveals about the five people stricken from the jury by Burlington with peremptory strikes.

The first, Lois White, worked in the diesel shop as a laborer and had a claim against Burlington for a work-related injury, but had not yet filed a petition. White stated, "We've just talked a couple of times, nothing has gone that far yet." White stated that she did not think there was anything about the circumstances of her injury which would lead her to be unfair or biased in her judgment as a juror. The second, Eldie Cline, Sr., was a retiring machinist for Burlington who knew Kusek. Cline stated he was retiring because of a back injury. Cline stated that he did not think there was anything in particular about his condition which would affect his ability to be fair. The third, Richard Hatterman, was a sheet metal worker who had worked with Kusek. Hatterman stated that he was familiar with the task of changing cab seats. He had had a fusion between L5 and L6 in his spine as a result of a disk injury while working for a different employer, for which he received workers' compensation benefits. When asked whether he could be fair, given his job proximity to Kusek and his back injury, and knowing Kusek, Hatterman stated, "It could be a little difficult but I think I could hold pretty steady on it." The fourth, Shari Burney, had a brother-in-law working for Burlington who had been a carman. Her husband had been a car inspector for Transcisco Rail and had sustained a work-related injury to his back while employed by Transcisco. Burney stated that her husband was probably going to sue. When asked whether she could be fair, she stated, "I would try to." The fifth venireperson, Robert Blumanthal, had been an engineer for Burlington for 20 years, his father had been a carman, and he had numerous uncles and cousins employed at Burlington. He was told at voir dire that his cousin had filed a claim against Burlington for his uncle's death, which occurred while the uncle was working for Burlington, but he did not think the lawsuit would affect his decision because "[w]e were never really that close anyway. I don't know him that well." Blumanthal stated that as an engineer he had had experience with cab seats and had developed some opinions regarding cab seats. He stated he had had trouble with his cab seat and had asked to have it changed. Of these five venirepersons, Burlington moved to strike only Blumanthal for cause, which was denied.

Burlington argues that because it had exercised its peremptory challenges on the five venirepersons discussed above, it had to leave three people on the jury panel whom Burlington would have otherwise peremptorily struck. The first was Jerry Beagle, who had lower back problems which he described as "just like Pat is going through." Beagle used the same chiropractor as Kusek, including a visit on the morning of jury selection. The second was Jean Vancil, whose husband, a conductor for Burlington, had filed an injury claim against Burlington. The claim had been "resolved," and Vancil stated that she felt fine about the settlement. Vancil's husband had returned to work at Burlington and intended to continue working for Burlington. The third person Burlington would have peremptorily struck was Carter Hoover, who worked at the post office with Kusek's wife. He stated he did not think there was anything about the relationship he had with Kusek's wife which would interfere with his ability to be fair and impartial.

Because we have concluded that the assignments of error concerning the composition of the venire are dispositive, we dispense with further detailed recitation of the evidence. Suffice it to say that extensive evidence was introduced about whether Kusek was injured, the extent of any such injury, whether Burlington was negligent in some way with respect to its procedure for the changing of cab seats, and whether Kusek was contributorily negligent. The jury found damages of $310,000, but reduced the award to Kusek to $155,000 due to Kusek's negligence.

STANDARD OF REVIEW

[1] In disposing of a claim controlled by FELA, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under FELA are determined by the provisions of the act and interpretative decisions of the federal courts construing FELA. *Chapman v. Union Pacific Railroad*, 237 Neb. 617, 467 N.W.2d 388 (1991).

[2,3] Retention or rejection of a venireperson as a juror is a matter of discretion with the trial court. *Auer v. Burlington Northern RR. Co.*, 229 Neb. 504, 428 N.W.2d 152 (1988). An appellate court reaches an independent conclusion on questions of law. *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994).

ASSIGNMENTS OF ERROR

In addition to the jury selection issues, Burlington assigns other errors, mainly centering on evidence of subsequent remedial measures and injuries to other Burlington employees while changing cab seats.

ANALYSIS

[4] Burlington alleges that the court erred when it did not automatically remove from the venire for cause all Burlington employees because they are ineligible to sit in judgment on cases in which Burlington is a party. Neb. Rev. Stat. § 25-1636 (Reissue 1995) provides in part: "It shall be ground for challenge for cause that any proposed juror lacks any of the qualifications provided by law." In support, Burlington cites *Burnett v. B. & M. R. R. Co.*, 16 Neb. 332, 20 N.W. 280 (1884). In that case, the plaintiff complained that an employee of the railroad should have been struck for cause. The voir dire of the venireperson revealed that he was employed by the defendant railroad, but did not have knowledge of the facts in the case, and did not have a bias or prejudice in favor of or against either party. The plaintiff's challenge for cause of this venireperson was overruled. The plaintiff then peremptorily challenged the venireperson, who was excused. The court in *Burnett* held:

> At common law it is good cause for challenge that a juror is next of kin to either party . . . ; that he has an

> interest in the cause; that there is an action depending between him and the party; . . . that he is the party's master, servant, counselor, or attorney. 3 Black. Comm., 363. And the common law in that regard is in force in this state. *Ensign v. Harney*, 15 Neb., 330. Jurors must be indifferent between the parties and have neither motive nor inducement to favor either. The fact that the defendant is a corporation does not change the rule nor render an employe eligible to sit on a jury in an action where the corporation is a party.

16 Neb. at 334, 20 N.W. at 281. The *Burnett* court held that the trial court erred in overruling the challenge for cause of the railroad employee. "But as it appears that the juror was challenged peremptorily and excluded from the jury, and the record fails to show that the plaintiff exhausted his peremptory challenges, it was error without prejudice." *Id.*

While some other courts have rejected this common-law rule, see *Savant v. Lincoln Engineering*, 899 S.W.2d 120 (Mo. App. 1995), and *CSX Transp., Inc. v. Dansby*, 659 So. 2d 35 (Ala. 1995), other jurisdictions which have visited this issue have reached a conclusion similar to that of the Nebraska Supreme Court in *Burnett*, see *Ottis v. Stevenson-Carson Sch. Dist.*, 61 Wash. App. 747, 812 P.2d 133 (1991); *Dean v. Nunez*, 534 So. 2d 1282 (La. App. 1988), *rev'd on other grounds* 536 So. 2d 1203 (La. 1989); and *Cocora v GMC*, 161 Mich. App. 92, 409 N.W.2d 736 (1987).

The common-law rule has been explained as flowing from the presumption of loyalty of employees to their employer. See, *CSX Transp., Inc., supra* (employer cannot strike its employees for cause unless employer makes showing of actual bias; however, party opposing employer may automatically strike employees for cause); *Henslee v. State*, 251 Ark. 125, 471 S.W.2d 352 (1971) (defendant who was accused of committing arson upon corporation's land could strike for cause employees of corporation as there is presumption of loyalty to corporation).

The rationale of the *Burnett* court is simply that jurors must be indifferent between the parties. The precedent of *Burnett* still stands and still makes perfect sense. However, we do not see the basis for the rationale in today's society as being so narrow as "employees may be loyal to employers." It is possible, and sometimes probable, that employees are disloyal, antagonistic, hostile, spiteful, or all of these things toward their employer. And, in some situations, the bond of loyalty between coemployees (including between fellow union members) is far stronger than any loyalty to the employer. While we cannot say for certain that Burlington employees are loyal or disloyal, it seems apparent that the potential is manifest that jurors who are Burlington's employees and Kusek's coemployees are unlikely to hear the case with a "clean slate" and an open mind. If the employee can automatically strike his or her coemployees as jurors, without any showing of partiality, as was held in *CSX Transp., Inc., supra*, the employer should not be required to have its case decided by its employees. In short, the rule ought to run both ways.

[5] Kusek argues that he is entitled to a trial by a jury of his "peers." We do not disagree with this broad general statement, although it is of little help in the instant case. The goal of any jury trial is a decision by a fair and impartial jury. Over a century ago, the Nebraska Supreme Court said that employment by a party, including a corporate party, renders that employee ineligible to sit on a jury when his or her employer is a party. The *Burnett* court, despite the assertion of Kusek's counsel, did not make the rule for use by employees only; rather, *Burnett* makes employees ineligible—no matter whether employee or employer asserts the rule. In modern society, the rule is more compelling than at the time *Burnett* was decided. A venire which includes Burlington conductors, engineers, machinists, electricians, and sheet metal workers in an FELA case might, by Kusek's definition, be a jury of his peers, but the suspicion of partiality would hang heavy in the courtroom. The trial court recognized this, at least in part, by its ruling that "site specific" workers, i.e., carmen, could not serve. Moreover, a management-level Burlington employee recognized the problem of his own accord when he told Kusek's counsel in voir dire that he did not think he could be impartial.

We simply hold that all employees of a party are ineligible to serve on a jury in a case involving their employer. The exclusion from the jury pool of those employed by Burlington, regardless of their position or rank, does nothing except allow Kusek's case to be decided by those citizens of Box Butte County who are not intimately connected with one of the parties to that case. Such a jury of citizens is still composed of Kusek's peers—they just do not have the same employer as he does. In this way, the impartiality of the jury panel is not subject to obvious suspicion.

[6] In the case at hand, Burlington made a motion, consistent with *Burnett*, that the jury panel not include any Burlington employees. That motion was overruled, and jury selection proceeded. During jury selection, Burlington made only one specific challenge for cause, to venireperson Blumanthal, which was overruled. Thus, one could suggest that by not specifically challenging the other Burlington employees besides Blumanthal, Burlington waived its *Burnett* challenge. However, *Burnett* makes Burlington employees ineligible from the outset, and thus what such employees say during voir dire about their knowledge of a plaintiff, the particular work being done at the time of the alleged injury, or their ability to serve impartially is simply not determinative, or even relevant. We have recited what the five venirepersons said during voir dire, not because it is essential to our holding, but, rather, to demonstrate that suspicion about their partiality is not illusory. We read *Burnett* as imposing a ban on employees serving on a jury involving their employers, irrespective of what they might say or know about the particular case or the parties, or how impartial they say they can be. *Burnett* holds that employees of a party are ineligible to sit as jurors in a case involving their employer. No showing of partiality is required, and we read *Burnett* as leaving no discretion in the matter to the trial court.

The doctrine that employees are ineligible to serve on a jury in a case involving their employer is said to be a challenge for "implied bias." See *McMahon v. Carlisle-Pennell Lum. Co.*, 135 Wash. 27, 236 P. 797 (1925). *McMahon* also holds that if a litigant is forced to use a peremptory challenge to remove a venireperson who should have been excused for implied bias, the litigant has, in effect, lost the "right of [the] three peremptory challenges provided by statute." *Id.* at 31, 236 P. at 798. Perhaps it is better stated that the litigant has lost the *benefit* of his or her peremptory strikes where the litigant is forced, by a wrongfully overruled challenge for cause, to use peremptory strikes for venirepersons who should have been removed by the court as ineligible to serve.

Having made the motion at the outset, and renewed it thereafter, Burlington was not obligated to specifically challenge for cause each Burlington employee during voir dire. The court had already ruled adversely to Burlington on the issue. Moreover, unlike the situation in *Burnett*, Burlington used all of its peremptory challenges. In addition to the general challenge to Burlington employees, Burlington made a specific challenge for cause to its employee Blumanthal during voir dire. Thus, the factor that saved the trial in *Burnett* and prevented a reversal, i.e., that the employee was stricken and the complaining party still did not use all of its peremptory challenges, is not present here. Burlington used all of its peremptory challenges, including one on Blumanthal. Additionally, Burlington still had three people it asserts it would have peremptorily struck: (1) Vancil, whose husband had settled his back-injury case against Burlington and continued to work there; (2) Beagle, who had the same back problem and the same chiropractor as Kusek; and (3) Hoover, who worked with Kusek's wife. These three people probably are the sort of venirepersons, despite their affirmations of impartiality, for whom peremptory strikes would obviously be considered. However, the presence of others, after all peremptory strikes are exhausted, against whom peremptory strikes might logically be lodged is not necessary to a finding of prejudicial error when the trial court refuses to strike an ineligible venireperson. See *McMahon*, 135 Wash. at 31, 236 P. at 798 ("[i]f no reason need be given [for the exercise of a peremptory strike], we should not require the injured party [whose valid implied bias challenge was overruled] to affirmatively show by the record that there were reasons for excusing some other juror that sat on the panel"). See, also, *Bishop v Interlake, Inc*, 121 Mich. App. 397, 402, 328 N.W.2d 643, 646 (1982), holding:

> However, we do not construe the requirement of "prejudice" to apply to situations where an improper denial of a challenge for cause compels the challenging

party to exercise a peremptory challenge to the juror desired to be excused. In these situations, an erroneous cause ruling compels a party to prematurely exhaust his limited number of peremptory challenges and to forego the opportunity to excuse another juror by use of a peremptory challenge.

[7] The holding in *Bishop* was explained as being grounded in the notion that peremptory challenges are for personal, unarticulable, and unarticulated reasons, which obviously now are limited with respect to race and gender by *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994). *Batson* was extended to civil cases in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991). As a consequence, a litigant is denied an opportunity to act on his or her intuitions and subjective feelings about venirepersons by having to prematurely exhaust his or her peremptory challenges to rid the panel of those who should have been struck as ineligible for implied bias. *Burnett* may impose a more stringent standard because the challenging party must exhaust all peremptory strikes before prejudicial error can be found from the failure to sustain an implied bias challenge. In the instant case, Burlington used all of its peremptory strikes, and thus the standard of *Burnett* for prejudicial error is satisfied.

CONCLUSION

The trial court erred in not sustaining the motion to exclude Burlington employees from the venire. Because Burlington used all of its peremptory strikes, there was prejudicial error and the verdict cannot stand. Because we remand the matter for a new trial and are uncertain whether the same evidentiary issues and difficulties concerning subsequent remedial measures and other injured employees will arise in that new trial, we decline to embark on the perhaps fruitless exercise of determining issues, in an advisory capacity, which may never be presented again. See *Crowder v. Aurora Co-op. Elev. Co.*, 223 Neb. 704, 393 N.W.2d 250 (1986).

REVERSED AND REMANDED FOR A NEW TRIAL.

DAVID M. MEHNE, APPELLEE, v. DEANA HESS, APPELLANT.

553 N.W.2d 482

Filed September 3, 1996. No. A-95-660.

1. **Child Support: Paternity: Appeal and Error.** The trial court's award of child support after a determination of paternity will not be disturbed on appeal absent an abuse of discretion.
2. **Child Support.** With certain exceptions, income for child support purposes includes income derived from all sources.
3. ____. The paramount concern and question in determining child support is the best interests of the children.
4. ____. When a settlement is intended to replace income which would have been earned absent injury, it will generally be treated as income for child support purposes.
5. ____. The appropriate treatment of settlement awards for child support purposes depends upon the circumstances of each case, with the best interests of the children as the paramount focus.

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Affirmed as modified.

Leo P. Dobrovolny, Jr., for appellant.

A. James Moravek, of Curtiss, Moravek & Curtiss, P.C., for appellee.

HANNON, SIEVERS, and MUES, Judges.

MUES, Judge.

INTRODUCTION

Deana Hess appeals from a trial court's decision decreasing the child support obligation owed by David M. Mehne for the parties' twin boys. Hess asserts on appeal that a personal injury lump-sum settlement award received by Mehne should be considered income for the purpose of calculating child support.

BACKGROUND

The parties' twin boys, Ethan and Evan, were born on June 30, 1990. A paternity action was filed, and pursuant to an agreement between the parties, temporary child support was set in October 1992 at $674. A settlement agreement, in which Mehne admitted paternity, was approved by the court by order dated March 11, 1993. This agreement further awarded custody of the minor children to Hess, subject to reasonable visitation, and required Mehne to pay $500 in child support, with this amount subject to review and retroactive adjustment upon settlement of Mehne's pending lawsuit against Burlington Northern Railroad. The record fails to disclose how the $500 figure was arrived at. The agreement, and the order approving it, provided: "If Petitioner is awarded compensation for lost wages and future loss of earnings, the Court shall adjust the support due . . . ."

Mehne filed a "Showing" on November 17, 1994, acknowledging that he had received a settlement amount from Burlington Northern shortly after May 10, 1994. A hearing to determine child support was held on January 9, 1995. By a journal entry filed May 19, 1995, the court found a material change in circumstances and reduced Mehne's child support to $231 for two children and $148 for one child. In reaching these amounts, the court attributed $737 gross monthly income to Hess ($4.25 x 40 hours) and $775 gross monthly income to Mehne. The income figure attributed to Mehne was reached by applying a 4.43-percent interest rate to $209,820 of his settlement. No portion of the settlement's principal amount was treated as income.

EVIDENCE ADDUCED AT TRIAL

In March 1991, Mehne injured his back while working as a brakeman and conductor for Burlington Northern. Because of his injury, Mehne was unable to return to that position. In May 1994, as the result of a claim under the Federal Employer's Liability Act, Mehne negotiated a gross settlement award of $375,000. In addition to this amount, all of Mehne's medical expenses were paid. Mehne testified that he did not expect further surgeries resulting from his injury. Burlington Northern deducted from the gross settlement amount slightly over $36,000 for loans to Mehne following his injury, making Mehne's check from Burlington Northern approximately $339,000. Further deductions for attorney fees, legal expenses, and a $25,000 "sustenance loan" were also made. It is unclear from the record whether the net settlement amount received by Mehne was $209,401 or $209,820. From the net amount received, Mehne paid off additional unspecified bills, leaving

$189,401.79. Mehne then purchased a house for $82,000 and a used truck for $10,000. At the time of the hearing in January 1995, Mehne had remaining from the settlement proceeds $3,000 to $4,000 in a checking account and approximately $65,000 in various interest-bearing funds and deposits.

Mehne is currently a full-time student, having started a 4-year course of study in the fall of 1994. He expects to graduate in May 1998 with a bachelor of science degree in nursing. Mehne estimated that he would be able to earn between $30,000 and $40,000 with this degree. Mehne is currently unemployed. He stated that it would be difficult for him to find a job at the current time due to his back injury, but that he would be "very employable" with a nursing degree. At the time of trial, Mehne testified that he had no other form of income and that he relied upon the remaining settlement proceeds to pay living expenses. Mehne is currently married and resides with his wife and her two children from a previous relationship.

Hess currently lives in Denver, Colorado, with her "common law" husband, their newborn child, and her twin sons. Hess is also currently unemployed due to her recent pregnancy and a preexisting back injury aggravated by her pregnancy. Hess testified that she had had four back surgeries in the past and might require a fifth.

Hess is a licensed practical nurse. Prior to moving to Denver, she was employed for approximately 6 months as a nurse, earning $7 an hour. Since moving to Denver, Hess has been employed at several nursing agencies. At her last position, she earned approximately $14.50 an hour, averaging 30 hours a week. At the time of trial, Hess had been unemployed for 11 months. Hess plans to go back to school to get her registered nurse's degree, which she estimated would take less than 6 months. Due to her back injury and newborn child, Hess estimated she would be able to return to school within another year or so. Hess estimated her monthly expenses to be approximately $1,000 a month.

ASSIGNMENT OF ERROR

In sum, Hess' sole assignment of error is that the trial court erred in considering as income for child support purposes only the interest produced by Mehne's lump-sum settlement, rather than the entire amount.

STANDARD OF REVIEW

[1] The trial court's award of child support after a determination of paternity will not be disturbed on appeal absent an abuse of discretion. *State v. Smith*, 231 Neb. 740, 437 N.W.2d 803 (1989); *Hanson v. Rockwell*, 206 Neb. 299, 292 N.W.2d 786 (1980).

ANALYSIS

This case presents the issue of whether and how a personal injury settlement award should be considered for purposes of calculating child support. The trial court found that only the income generated by applying a hypothetical interest factor to a "net" settlement amount should be considered.

Should Net Settlement Amounts Be Considered?

[2] Paragraph D of the Nebraska Child Support Guidelines defines total monthly income as the "income of both parties derived from all sources, except all means-tested public assistance benefits and payments received for children of prior marriages." Although not in effect at the time of this hearing, Paragraph D was amended effective January 1, 1996, to provide, in addition to that stated above: "If applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities. Earning capacity is not limited to wage-earning capacity, but includes moneys available from all sources." This amendment formalizes existing legislative direction and prevailing court decisions that earning capacity as well as the guidelines shall be considered in determining child support. See, Neb. Rev. Stat. § 42-364(6) (Cum. Supp. 1994); *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994). Both versions of the guidelines define "income" broadly, specifying only what is to be excluded from total income, rather than what is to be included. With certain exceptions, income includes "income . . . derived from *all* sources." (Emphasis supplied.)

Other jurisdictions, interpreting similar definitions of income, have included settlement proceeds in a parent's income figures. In *In re Marriage of Fain*, 794 P.2d 1086 (Colo. App. 1990), the court determined that payments received pursuant to a structured settlement of a personal injury claim constituted gross income when determining the parent's child support obligation. The *In re Marriage of Fain* court reasoned:

> Section 14-10-115(7)(a)(I)(A), C.R.S. (1987 Repl.Vol. 6B) provides that "gross income" includes "income from any source and includes, but is not limited to . . ." the items specifically enumerated therein. Therefore, although social security benefits and disability benefits are expressly included as "gross income," § 14-10-115(7)(a)(I), by its plain language, also includes all payments from a financial resource, whatever the source thereof. . . .
>
> While the General Assembly expressly excluded certain benefits from the definition of "gross income," . . . the statute does not provide an exclusion for personal injury benefits.

794 P.2d at 1087. Thus, in *In re Marriage of Fain*, the parent's personal injury payments were deemed a financial resource constituting "gross income" under Colorado child support guidelines.

A similar result was reached by the Superior Court of New Jersey in *Cleveland v. Cleveland*, 249 N.J. Super. 96, 592 A.2d 20 (1991). That court included the proceeds from a parent's personal injury settlement as income on the basis that absent a statement to the contrary, the legislature's clear intent was to base child support upon total family resources.

The Minnesota Court of Appeals, applying a similar analysis, reached a similar result. "Income" for the purpose of establishing child support is defined in Minnesota as " 'any form of periodic payment to an individual including, but not limited to, wages, salaries, payments to an independent contractor, workers' compensation, unemployment compensation, annuity, military and naval retirement, pension and disability payments.' " *Sherburne County Social Serv. v. Riedle*, 481 N.W.2d 111, 112 (Minn. App. 1992). In *Riedle*, a father, suing a third party for sexual abuse that occurred when he was a child, accepted a settlement to be paid through an annuity over a period of years. The settlement provided for monthly payments, as well as lump-sum payments every 3 years. Referring to the aforementioned definition of "income," the court in *Riedle* stated: "This definition of income is broad and explicitly includes payments from an annuity. In the absence of any legislative intent to limit the definition, this court must conclude the legislature intended to include any periodic payments from an annuity, regardless of the annuity's source." *Id.* Thus, in *Riedle*, both the monthly and lump-sum payments were considered income for the purpose of child support. The court further stated: "This holding is consistent with the trial court's responsibility to consider the standard of living the child would have enjoyed had his parents been married." (Citation omitted.) *Id.*

The Minnesota Court of Appeals repeated this holding in *Mower County Human Services v. Hueman*, 543 N.W.2d 682 (Minn. App. 1996), in which it found two annuity contracts received by a father in conjunction with a settlement resulting from a personal injury he received when he was a child constituted income for the purpose of establishing child support.

[3] Mehne, however, argues that since Nebraska has viewed personal injury settlements as *property* in dissolution cases, *Maricle v. Maricle*, 221 Neb. 552, 378 N.W.2d 855 (1985), and *John v. John*, 1 Neb. App. 947, 511 N.W.2d 544 (1993), it is improper to view them as *income* in child support cases. Thus, he asserts that only the interest derived from his personal injury settlement is properly considered as income. A similar argument was raised and rejected in *In re Marriage of Fain*, 794 P.2d 1086 (Colo. App. 1990). In that case, the father argued that his personal injury settlement award constituted property and, therefore, was not income for child support purposes. Like Mehne, the father in *In re Marriage of Fain* cited dissolution cases in support of this contention. The *In re Marriage of Fain* court rejected this argument, noting simply that unlike dissolution cases in which the issue is whether a settlement constitutes marital property for property division purposes, the issue in child support cases is whether settlement proceeds are

a financial resource that may be considered in setting child support. We agree with the rationale of the *In re Marriage of Fain* court. The paramount concern and question in determining child support is the best interests of the children. *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994). Moreover, while Mehne now contends the settlement is property and not income, his stipulation below belies such position. As stated above, in the March 11, 1993, order, Mehne stipulated that his child support obligation would be "subject to review and retroactive adjustment" if he was awarded compensation for "lost wages and future loss of earnings" as a result of his claim against Burlington Northern. To argue now that only interest income produced from such compensation should be considered is contrary to that stipulation.

Contrary to Mehne's argument, child support is also different from spousal support. Accordingly, Mehne's reliance upon *Ainslie v. Ainslie, ante* p. 70, 538 N.W.2d 175 (1995), *aff'd* 249 Neb. 656, 545 N.W.2d 90 (1996), is misplaced. In that case, treating an inheritance of one spouse as her separate property, we considered only the income derived therefrom when awarding alimony. Again, the issue in *Ainslie* involved the obligations between spouses, not the obligation of support owed by a parent to his or her child. See, also, *Cleveland v. Cleveland*, 249 N.J. Super. 96, 592 A.2d 20 (1991).

Mehne also contends that Nebraska has already determined that only interest income derived from personal injury settlements should be considered when awarding child support, citing *Maricle, supra*, and *Lainson v. Lainson*, 219 Neb. 170, 362 N.W.2d 53 (1985). We disagree. The relevant issue addressed in those two cases was whether a totally disabled parent had an earning capacity for child support purposes. We do not read either case to stand for the proposition that *only* the interest income from settlement awards may be considered for child support purposes. Indeed, we believe *Lainson* compels consideration of the settlement proceeds in this case in determining child support. In *Lainson*, the father was a totally disabled quadriplegic who was incapable of earning a wage. Nevertheless, he received Social Security benefits and significant investment income from capital assets of over

$200,000, primarily stocks and bonds. He had received an undisclosed sum of money because of the injuries which resulted in his condition. The *Lainson* court found the father to have an earning capacity within the meaning of § 42-364(3) (Reissue 1984), which contained language similar to present day § 42-364(6) (Cum. Supp. 1994). In so concluding, the Supreme Court found:

> It has been the law of this state for many years that, as stated in *Brus v. Brus*, 203 Neb. 161, 164-65, 277 N.W.2d 683, 686 (1979), "[i]n determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. The financial position of the husband as well as the estimated costs of support of the children must be taken into account . . . ." . . . "Earning capacity" as used in § 42-364(3) means the overall capability of a parent to make child support payments based on the overall situation of the parent making such payments. That overall situation includes moneys available to the parent from all sources, including investment income.

Lainson, 219 Neb. at 174-75, 362 N.W.2d at 56.

Finally, we are not persuaded by Mehne's argument that personal injury settlements should be ignored as an income source in determining child support because they are not considered as gross income by Internal Revenue Service laws. The taxability of moneys received provides no logical basis to necessarily include or exclude them from the category of resources available to pay child support. Such a general proposition would exclude such settlements, when in fact many represent compensation for lost wages or diminished earning capacity, which are pivotal considerations in setting child support under Nebraska law. See, § 42-364(6); *Sabatka, supra.*

Based on the clear language of § 42-364(6), the broad definition of "income" in the guidelines, the *Lainson* holdings, and the cited decisions of other states, we conclude the district court abused its discretion in considering only interest income available from Mehne's settlement proceeds in determining Mehne's child support obligation. Having so found, we must make a de novo determination of what portion of Mehne's personal injury settlement should be considered and how it should be factored in. Such a determination, by necessity, must depend upon the facts of each case, including what the settlement was intended as compensation for.

What Portion of Settlement Proceeds Should Be Excluded?

No attempt was made by either party to allocate the gross settlement proceeds to any specific element or item of damage. We realize that particularly in a general personal injury settlement context, such allocation is difficult, if not impossible, and subject to some abuse by those who attempt to make an allocation to meet the exigencies of the issues in dispute. Allocation becomes most important when there is a genuine dispute over whether a portion of the proceeds should be excluded because, inter alia, they are (1) compensation for the recipient's medical care and related expenses, *Gallegos v. Gallegos*, 174 Ariz. 18, 846 P.2d 831 (Ariz. App. 1992), and *In re Marriage of Durbin*, 251 Mont. 51, 823 P.2d 243 (1991) (portion of settlement compensating for medical and related expenses not includable), and (2) attributable to damages that are "capital" in nature, like pain, suffering, and disability, *Whitaker v. Colbert*, 18 Va. App. 202, 442 S.E.2d 429 (1994) (holding that portion of settlement intending to compensate for damages "capital" in nature should be excluded). Contra, *Cleveland v. Cleveland*, 249 N.J. Super. 96, 592 A.2d 20 (1991) (rejecting father's argument that only portion of personal injury settlement intended to compensate for lost wages should be used in calculating child support); *Mower County Human Services v. Hueman*, 543 N.W.2d 682 (Minn. App. 1996).

Of course, Mehne does not argue for any such partial exclusion, but, rather, insists that *none* of the proceeds should be included. Moreover, the evidence shows that none of the settlement was for past medical costs and that it is reasonably certain that significant medical expenses will not occur in the future from the injury. Based on the economist's report which was used in settlement negotiations, Mehne's lost wages and future wage loss alone from the disabling back injury were projected at approximately $716,000. The report was a pivotal tool in his attorney's April 4, 1994, $625,000 settlement demand. The $375,000 settlement was consummated on April 29, 1994. We believe a fair inference is that the settlement, in large measure, was intended to compensate Mehne for the significant lost wages and future wage loss which he sustained.

[4] We do not suggest that the settlement served no other purpose. To be sure, two back surgeries culminating in a fusion of vertebrae at the L5–S1 level involved pain, suffering, and significant permanent bodily impairment and overall disability. Such damages are, by nature, incapable of precise definition, but nonetheless very real. While it may be reasonable to assume that some undefined portion of the settlement was attributable to such factors, without any guidance evidentially in that regard, what portion was is purely speculative. What is certain from the evidence is that Mehne's lost wages and future earnings were significant in triggering the settlement. When a settlement is intended to replace income which would have been earned absent injury, it is generally treated as income for child support purposes. See *In re Marriage of Swan*, 526 N.W.2d 320 (Iowa 1995) (father's workers' compensation lump-sum settlement treated as income for child support purposes based on reasoning that it was intended to replace income he could have earned absent the injury).

Hess contends that the entire net settlement amount received by Mehne should be considered in the child support equation. Given the conflict in the evidence, we conclude that this amount is $209,401. Using this amount not only allows Mehne a deduction for the fees and expenses in generating the settlement, but also includes a deduction for approximately $61,000 to repay moneys loaned to Mehne following his injury. Although Mehne has only approximately $69,000 remaining from his settlement, he purchased a house and a vehicle out of the proceeds, and also paid off other significant debts. As a result, a reasonable inference is that he is not now shouldering mortgage, auto loan, or general debt-servicing burdens. We therefore conclude that under the circumstances here, the figure of $209,400 is an equitable sum to factor into our de novo determination of Mehne's child support obligation. We note, however, that there are several other ways, figures, and methods which may be used to reach a fair result in such cases. The facts and circumstances of each case necessarily dictate the outcome where such settlements are to be considered in determining child support.

How to Consider Proceeds.

We move, finally, to the question of *how* to factor the settlement proceeds into the determination of Mehne's child support calculation. Again, as Mehne is insistent that none of it should be considered, he provides no solution in this regard. Hess argues that the entire net amount should be allocated over a period of 4 years to correspond with Mehne's completion of schooling before returning to the work force. According to Hess, using the child support guidelines, such allocation results in Mehne's monthly support obligation of $811 for the twins.

[5] Our research discloses that other courts facing this issue have used a variety of methods to calculate support when faced with a lump-sum settlement amount determined to be includable in the recipient's income for child support purposes. Some view the lump-sum settlement amount as income only in the year in which it was received. See *In re Marriage of Sullivan*, 258 Mont. 531, 853 P.2d 1194 (1993). One court reversed a lower court's decision to treat a mother's receipt of a lump-sum workers' compensation payment as income only in the year in which it was received. See *Lenz v. Wergin*, 408 N.W.2d 873 (Minn. App. 1987). On appeal, the *Lenz* court allocated the lump-sum payment over the years between the date of the injury and the time the mother's obligation to support her child ceased. Still another court allocated a father's lump-sum payment over 126 weeks, the time period for which the payment was intended to compensate. *In re Marriage of Swan, supra*. In *In re Marriage of Swan*, the father's workers' compensation disability benefits were periodic and were scheduled to cease in the same month that the father would be completing his schooling. We come away from our review of such cases in general agreement with the court in *In re Marriage of Swan* that it would be unwise to define one rule to be applied in all cases in which a settlement award is at issue in this context. The appropriate treatment of such awards depends upon the circumstances of each case, with the best

interests of the children as the paramount focus. *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994).

The facts of this case indicate that Mehne is currently unable to engage in work involving strenuous physical labor, the type of work which has represented his livelihood for the 15-year period prior to his injury. He is currently a full-time student, and his current source of income is what remains from his settlement award, some $69,000. He plans to graduate in May 1998 after completing a 4-year program to attain his bachelor of science degree in nursing. He estimates his earning capacity will be between $30,000 and $40,000 gross per annum after graduation. We realize that much of the remaining proceeds may be necessary for basic living expenses of Mehne's current household during his schooling, absent his obtaining part-time employment to supplement these amounts. At the same time, we cannot ignore that a substantial portion of his settlement proceeds were used to purchase assets and pay debts, which has reduced his necessary monthly living expenses and thus benefits his overall financial condition and standard of living, a standard which would have been shared with his twins if they lived in his household.

In our de novo review, we conclude that the settlement proceeds of $209,400 should be allocated over the period of time from Mehne's receiving it (May 1994) until the twins reach age 19 (2009), or for 15 years. By using this method, the children benefit from an increase in support from Mehne over the entire time they are entitled to receive it and Mehne is not attributed income which results in a child support obligation totaling nearly $40,000 over a 4-year period—the amount of the award were we to accept Hess' position. In reaching this decision, we are aware that a reasonable inference is that the settlement proceeds were intended to compensate Mehne for his entire working life. However, spreading the settlement proceeds over a period of 34 years would lead to an untenable result in this case and would not be in the children's best interests.

By applying the above method, Mehne's current child support obligation must be calculated using a monthly net income figure of $1,163. The trial court attributed an earning capacity to Hess based upon a 40-hour week at $4.25 per hour and used a net monthly income figure for her of $619. Neither party challenges this figure on appeal. Using that same amount in our de novo determination, Mehne owes $353 per month for child support for the two children and $227 for one child, commencing on June 1, 1995, and continuing thereafter as allowed by law or until further order of the court. No income tax deduction was calculated in determining Mehne's monthly income figure as, according to Mehne, no income tax is payable on the award. The $1,163 monthly income figure which we have attributed to Mehne must continue to be attributed to him, in addition to his actual earnings, in any future child support determinations.

CONCLUSION

The district court was correct in modifying Mehne's child support obligation. However, the district court abused its discretion by considering Mehne's settlement proceeds only to the extent of the interest income which they could generate. Instead, under the circumstances of this case, portions of the settlement proceeds should have been considered in determining child support, either as income or as a factor affecting Mehne's overall financial condition and thus bearing on his earning capacity. We modify the district court's order by increasing Mehne's child support obligation effective June 1, 1995, for two children to the sum of $353 per month and $227 per month if only one child remains to be supported, subject to the directions in this opinion regarding any future child support determinations.

AFFIRMED AS MODIFIED.

HEADNOTES

Contained in this Volume